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347	Ravupalli Ramamurthy, *In re* ...	A I R 1941 Mad. 290; (1940) M W N 163; 42 Cr. L J 407; 13 R M 667.
353	Muhammad Shalak Koyi Sahib v. Burra Venkata Komaraju ...	A I R 1940 Mad. 810; (1940) M W N 717; (1940) 2 M L J 433; 52 L W 463; 13 R M 656.
354	Abdul Aziz v. Nawab Khan ...	1941 O W N 355; 13 R O 452; 1941 O L R 277.
356	Yarlagadda Venkatasubbayya v. Gajjala Satyanaryanamurthy ...	A I R 1940 Mad. 489; (1940) M W N 187 (2); (1940) 1 M L J 465; 51 L W 644 (2); 13 R M 657.

358	S. E. Naylor v. Emperor ...	A I R 1941 Sind 30; 42 Cr. L J 422; 13 R S 224; (1941) Kar. 184.
360	Bhagwan Dass Ramprosad v Secretary of State ...	A I R 1941 Pat. 157; 21 P L T 776; 7 B R 598; 13 R P 584.
363	Swami Dayal v. Ram Bahadur Singh ..	1941 O W N 471; 13 R O 454; 1941 O L R 279.
365	Dost Muhammad Qutab Din v Municipal Committee, Haripur Hazara	A I R 1941 Pesh. 9; 42 Cr. L J 420; 13 R Pesh. 60.
366	Pandela Pundarikakshudu v. Sontineni Kondayya ...	A I R 1940 Mad. 669; (1940) M W N 230; 51 L W 481; (1940) 1 M L J 801; 13 R M 659.
368	Nand Lal v. Emperor ...	A I R 1941 Lah. 65; I L R (1940) Lah. 648; 13 R L 455 S. B.
371	Nirsu Raut v. Somar Nonia ...	21 P L T 852; 7 B R 601; 42 Cr. L J 413; 13 R P 592.
372	Ah Twe v. Ma Mai Sein ...	A I R 1941 Rang. 97; 1941 Rang. 7; 13 R Rang. 248 F B.
375	Balam Pateyya, *In re* ...	A I R 1941 Mad 339; (1940) M W N 97; 42 Cr. L J 414; 13 R M 687
381	Hanuman Singh v. Gaya Singh ...	A I R 1941 Pat 145; 21 P L T 826; 7 B R 602; 13 R P 582; 20 Pat. 177.
382	John Baptist D'Souza v. Lizzie Jane Lobo ...	A I R 1940 Mad 584; (1940) 1 M L J 651; 51 L W 523; (1940) M W N 427; 13 R M 652
384	Amir Singh v. National Bank of India, Delhi ...	A I R 1941 Lah. 87; 42 P L R 794; 13 R L 453
385	S. Azimullah Jan v. Abdul Hakim ...	A I R 1941 Pesh. 14; 13 R Pesh. 55.
387	Ujagar Singh v. Likha Singh ..	A I R 1941 All. 28; 13 R A 405.
390	Annapurna Dasi v. Bazley Karim Faz ey Moula ...	A I R 1941 Cal. 85; 72 C L J 129; 13 R C 389.
394	J. C. Eno Ltd v. Vishnu Chemical Co ...	A I R 1941 Bom. 3, 42 Bom L R 921; 13 R B 308
399	Puliyath Govinda Nair v. Parekalathil Achuthan Nair ...	A I R 1940 Mad. 678; 51 L W 520; (1940) 1 M L J 682; (1940) M W N 443; 13 R M 661.
401	Gajadhar Prasad v. Udaichand ...	A I R 1940 Nag. 354; 1940 N L J 445; 13 R N 324.
404	Sanata v. Sahib Bibi ...	A I R 1941 Lah. 94; 43 P L R 7; 13 R L 458.
406	Amad Koya v. Appu ...	A I R 1941 Mad 201; 52 L W 849; (1940) 2 M L J 935; (1941) M W N 33; 13 R M 664.
407	Ram Daur Rai v. Lachhmi Prasad ..	A I R 1941 All. 51; (1941) A L J 7, 13 R A 403; I L R 1941) All. 27.
411	Gansu Ram v Parvati Kuer ...	A I R 1941 Pat 130; 21 P L T 973; 7 B R 604; 13 R P 587.
413	Damodar Vishnu Juvekar v. Shriram Lakshman Juvekar ..	A I R 1941 Bom. 56; 42 Bom. L R 1086; 13 R B 315.
416	Muthu Goundan v. Periya Goundan ...	A I R 1941 Mad. 353; (1940) 2 M L J 937; 52 L W 887; (1941) M W N 38, 13 R M 663, I L R (1941) Mad. 78.
417	Maung Shwe Thin v. Maung Tha Ok ...	A I R 1941 Rang. 78; 1940 Rang 764, 13 R Rang. 250.
419	Janaki Nath Roy v. Jyotish Chandra Acharya Chowdhury ...	A I R 1941 Cal. 41; 72 C L J 208; 45 C W N 141; 13 R C 396; I L R (1941) 1 Cal 234.
436	Subhani v. Nawab ...	A I R 1941 P C 21; 1941 O L R 343, 7 B R 665; 13 R P C 151; I L R (1941) Lah. 154; 43 Bom. L R 432; 43 P L R 318 P C.
449	Chitnis and Kanga v. Wamanrao S. Mantri ...	A I R 1941 Bom 99; 43 Bom. L R 76; 13 R B 322.
451	Tamizali v. Nasarali Bhuiya ...	A I R 1941 Cal. 58; I L R (1940) 2 Cal. 334; 72 C L J 66, 13 R C 439.
454	Mansharam Gianchand v. Emperor ...	A I R 1941 Sind 36, 42 Cr L J 460; 13 R S 231.
457	Corporation of Calcutta v. Province of Bengal ...	A I R 1941 Cal 60; 44 C W N 1128; 13 R C 436.
460	D. D. Italia v. Official Assignee of Madras ...	A I R 1941 Mad. 183; 52 L W 894; (1940) 2 M L J 979; (1940) M W N 1251; 13 R M 701.
463	Bulaki Mahton v. Dulia ...	7 B R 567; 13 R P 611.
464	Achraj Singh v. Hardwar Nath ...	A I R 1941 All 131; (1941) A L J 85; 1941 O W N 350; 13 R A 433; 1941 R D 173 F B.
465	Pingampilli Yerranna, *In re* ...	A I R 1941 Mad. 306; 52 L W 898; (1940) M W N 1238; 42 Cr. L J 424. 13 R M 694.
468	Gokal Chand v. Said Ali ...	A I R 1941 Pesh. 24; 42 Cr. L J 423; 13 R Pesh. 59.
469	Ghulam Rasul v. Kafail Ahmad Shah ...	A I R 1941 Lah. 30; 43 P L R 91; 13 R L 460.
470	N. Krishnuswamy Iyer v. Nagalinga Mudaliar ...	A I R 1940 Mad. 836; (1940) 2 M L J 174; (1940) M W N 722; 52 L W 140; 13 R M 676.

471	Muradali Muhammad Ibrahim v. Emperor ...	A I R 941 Sind 31; 42 Cr. L J 427, 13 R S 223; (1941) Kar. 164
473	Onkarsa v. Municipal Committee of Nadura ...	A I R 1940 Nag. 293; I L R (1940) Nag. 416; 1940 N L J 685; 13 R N 327
480	Amir Fahim v. Ajun Iasa ...	A I R 1941 Pesh 15. 13 R Pesh. 57.
481	Raghunandan Tewari v. Sheoraji ...	A I R 1941 Oudh 210; 13 R O 456; 1941 O L R 280; 1941 O W N 361 F. B.
490	Chidambaram Chettiar. *In re* ...	A I R 1940 Mad. 383; 51 L W 228; (1940) M W N 268; I L R (1940) Mad. 618; (1940) 2 M L J 42; 13 R M 677.
491	Goni Mahton v. Emperor ...	A I R 1941 Pat 159, 7 B R 606; 42 Cr L J 434; 13 R P 614.
495	Kalyan Das v. Brij Keshore ...	A I R 1941 All. 9, (1940) A L J 762; 13 R A 412
501	Rampal Singh v Mansukh Rai Khemka ...	22 P L T 02; 7 B R 603; 13 R P 593.
507	Ma Kyin Sen v. Maung Kyin Htaik ...	A I R 1941 Rang 87; 1940 Rang 783; 13 R Rang. 250.
516	Shib Sharma (Shiva Sharma) v. Emperor ...	1941 O W N 480; 42 Cr L J 429; 13 R O 479; 1941 O L R 290.
521	Mattapalli Appa Rao v. Ramamurthi ...	A I R 1940 Mad. 675; (1940) 1 M L J 334; 51 L W 333; (1940) M W N 284; 13 R M 675.
522	Bir Bhan v. Jagan Nath ...	A I R 1941 Lah. 25; 13 R L 462.
524	Belahri Co-operative Society v. Puttu Lal ...	1941 O W N 404; 13 R O 436; 1941 O L R 297.
530	Gobardhan Bar v. Gunadhar Bar ...	A I R 1941 Cal. 78, I L R (1940) 2 Cal. 270; 44 C W N 802; 13 R C 433
533	Gulab Chand Prasad v. Ram Kumar ...	A I R 1941 Pat. 236; 22 P L T 230; 7 B R 554; 13 R P 601.
536	V. S. A. R M. Annamalai Chettiar v. Vellayan Chettiar ...	A I R 1940 Mad. 826; (1940) 2 M L J 23; (1940) M W N 699; 52 L W 191; 13 R M 673.
538	Besar Kuar v. Ramhit Singh ...	A I R 1941 Pat. 167; 21 P L T 1063; 7 B R 557; 13 R P 599.
540	Mahammad Ali v. Dinesh Chandra Roy Choudhury ...	A I R 1940 Cal. 417; I L R (1940) 2 Cal. 189; 71 C L J 432; 44 C W N 718; 13 R C 413.
546	Jiwachh Mahtha v. Banwari Sah Ramlagan Ram ...	A I R 1941 Pat 285; 13 R P 604; 7 B R 559.
547	Rajoo v. Palaniyappa Chettiar ...	A I R 1941 Mad. 289; (1940) M W N 1156; (1940) 2 M L J 817; 52 L W 731; 13 R M 680.
548	Muhammad Yar v. Ali Muhammad ...	A I R 1941 Lah. 92; 42 P L R 743; 42 Cr. L J 439; 13 R L 463.
551	Abdul Kareem Sahib v. Commissioner Corporation of Madras ...	A I R 1941 Mad. 19; (1940) 2 M L J 597; (1940) M W N 1059; 52 L W 621; 13 R M 683.
553	East Bengal Bank, Ltd. v. Jogesh Chandra Banerjee ...	A I R 1941 Cal. 127; I L R (1940) 2 Cal. 237; 44 C W N 828; 13 R C 419.
555	Govada Balabharathi Co-operative Credit Society, Govada v. Alapati Venkatakrishnayya ...	A I R 1940 Mad. 932; (1940) 2 M L J 388; (1940) M W N 993; 52 L W 451; 13 R M 681.
557	Imamdino v Emperor ...	A I R 1941 Sind 39; 42 Cr. L J 437; 13 R S 226
559	Vemuri Ramjee Rao v. Municipal Council, Masulipatam ...	A I R 1940 Mad 956; 52 L W 437; (1940) 2 M L J 469; (1940) M W N 956; 13 R M 686.
560	Jabib Gul Jan Gul v. Gopi Chand Singh Jawahar Mal ...	A I R 1941 Pesh. 16; 13 R Pesh. 64.
561	Jagatmaya Kumri v. Ram Bahadur Prasad ...	22 P L T 293; 7 B R 561; 13 R P 607.
564	Ghulam Sadid-ud-din v. Emperor ...	A I R 1941 Lah 71; I L R (1940) Lah. 577; 42 Cr. L J 448; 13 R L 480.
566	Noorul Hoda v. Rai Nohar Prasad Varma ...	7 B R 565; 13 R P 608.
567	Dasaradharama Reddy v. Rahimtulla Hussani ...	A I R 1940 Mad. 492. 51 L W 137; (1940) 1 M L J 270; (1940) M W N 137 (1); I L R (1940) Mad. 856; 13 R M 700.
568	Inderdawan Singh v. Jairaj Singh ...	1941 O W N 487; 13 R O 473; 1941 O L R 293.
569	Juba Singh v. Emperor ...	A I R 1941 Pat. 165; 7 B R 553; 42 Cr. L J 446; 13 R P 612.
571	Lachhmi Prasad v. Bahraich Ram ...	A I R 1941 All. 31; 13 R A 422.
578	Midnapore Zamindary Co. Ltd., v. Bijoy Singh Dudhuria ...	A I R 1941 Cal. 1; 73 C L J 14; 13 R C 420.
591	Ranganatha Aiyar v. Jayavelu Mudaliar ...	A I R 1940 Mad 637; (1940) M W N 318; 51 L W 449; (1940) 1 M L J 685; 13 R M 697.
593	Jugal Prasad Missir v. Jadubans Narayan Missir ...	22 P L T 236; 7 B R 568; 13 R P 610.

593	Municipal Committee, Peshawar v Abdullah Jan Mian Agha Jan ..	A I R 1941 Pesh. 20, 13 R Pesh. 62.
594	Emperor v. Ashraf-ud-din ..	A I R 1941 Lah 45; 42 Cr. L J 450; 13 R L 478
597	Midde Sampatirayudu v Sonti Venkataratnam	A I R 1940 Mad. 878 (1940) 2 M L J 278; 52 L W 247; 1940 M W N 811; 13 R M 691.
598	Rao Bhimsingh v. Gangaram ...	A I R 1940 Nag. 278; 1940 N L J 275; 13 R N 334.
603	Goaldas Daga v. Manicklal Maity ...	A I R 1941 Cal. 125; I L R (1940) 2 Cal 385, 13 R C 442.
606	Ganeshilal Chhappan Lal v. Commissioner of Income-tax ...	A I R 1941 All. 24; (1941) A L J 79; I L R (1940) All 805; 13 R A 429.
609	Champalal v. Village Panchayat, Semri Harchand ...	A I R 1941 Nag 128; 1941 N L J 42; 13 R N 340; I L R (1940) Nag 161.
611	Chhedi Singh v. Ram Singh ...	1941 O W N 412; 1941 O L R 306; 13 R O 174.
616	Sanoo Manaji v. Emperor ...	A I R 1941 Sind 33; 42 Cr. L J 454; 13 R S 234.
619	Ma Kalema v Ma Kyaing ..	A I R 1941 Rang. 103; 1940 Rang 772, 13 R Rang. 262.
620	H. L. Batliwalla Sons & Co. Ltd. v. Emperor ...	A I R 1941 Bom. 97; 43 Bom. L R 105; 42 Cr. L J 452; 13 R B 335.
623	Sheoshanker Sahai v. Surajmal ...	A I R 1940 Nag. 367; I L R (1940) Nag. 689; 1940 N L J 325; 13 R N 311
627	Padam Singh v. King-Emperor ...	1941 O W N 357; 42 Cr. L J 457; 13 R O 492; 1941 O L R 203.
630	Pattu Achi v. V. Rajagopala Pillai ...	A I R 1940 Mad. 923; (1940) M W N 81; 13 R M 703.
631	Jasodan Devi v. Jai Gopal ...	A I R 1941 Pesh. 17; 13 R Pesh. 63.
633	Bansi Lal v. Chairman, Town Area Committee, Saidpur ..	A I R 1941 All. 144; (1940) A L J 869; 13 R A 434.
634	Munusami Chetti v. Chenchu Naidu ...	A I R 1940 Mad. 849; (1940) M W N 731; (1940) 2 M L J 216; 52 L W 335, 13 R M 706.
635	Atul Krishna Bose v. Zahed Mondal ...	A I R 1941 Cal. 102; 72 C L J 132; 45 C W N 129; 13 R C 415.
637	Ratnasabapathi Pillai v. Gopala Iyer ...	A I R 1940 Mad. 876, (1940) M W N 876, (1940) 2 M L J 349; 52 L W 357; 13 R M 705
639	Sudaman Prasad v. Mohamed Abdul Alim ...	1941 O W N 562; 13 R O 496; 1941 O L R 311.
641	Zeb-ul-nisa v. Din Mohammad ...	A I R 1941 Lah 97; 43 P L R 106; 13 R L 465 F B.
654	Prithi Nath v. M. H Nowroji ...	1941 O W N 555; 13 R O 484; 1941 O L R 313.
655	Udho Dass v. Girdhari Lal ...	A I R 1941 Lah. 96; 43 P L R 6; 13 R L 491.
657	Ramanathan Chettiar Viswanathan Chettiar ...	A I R 1941 P C 43, 1941 O L R 331; 7 B R 694; 13 R P C 177 P. C.
658	District Council, Amraoti v. Vithal Vinayak Bapat ...	A I R 1941 Nag. 125; 1941 N L J 98; 13 R N 350
661	Madho Prasad Singh v Mukutdhari Singh ...	22 P L T 317; 7 B R 641; 13 R P 637.
666	Emperor v. Ramji Lal Budha ...	A I R 1941 Lah. 117; I L R (1940) Lah. 554; 42 Cr. L J 475; 13 R L 494.
670	Dharukdhari Singh v. Ramratan Singh ...	A I R 1941 Pat. 1; 19 Pat 862; 21 P L T 1057; 7 B R 646; 13 R P 6, 2.
673	Ghulam Qadir v. Emperor ...	A I R 1941 Lah. 114; I L R (1940) Lah. 678; 42 Cr. L J 481; 13 R L 498.
675	Sheorajfuddin a Prasad ...	1941 O W N 618; 1941 R D 328; 13 R O 502; 1941 O L R 361.
679	Chinni Venkatachalam Chetti v. Athivarapu Venkatrami Reddi ...	A I R 1940 Mad. 929; (1940) 2 M L J 456; 52 L W 465; (1940) M W N 978; I L R (1941) Mad. 114; 13 R M 725.
681	Khemana v. Dularey ...	1941 O W N 510, 42 Cr. L J 478; 1941 O L R 364; 13 R O 510.
684	Mohammad Ikhtiar v. Himtu Ram ...	A I R 1941 P C 34; 1941 O L R 332; 7 B R 697; 13 R P C 179 P. C.
686	Jwala Prasad v. Lakshmi Narain ..	1941 O W N 61; 13 R O 499; 1941 O L R 356.
689	Mohammad Raza v. Ahmad Abbas ..	1941 O W N 522; 1941 R D 274; 13 R O 489; 1941 O L R 315.
692	Pulin Krishna Mukherjee v. Adya Nath Mukherjee ...	A I R 1941 Cal. 98; 72 C L J 77, 45 C W N 85; 13 R C 447.

696	Muniratna Gulukkal, *In re* ...	A I R 1941 Mad. 312; (1940) 1 M L J 93; 13 R M 709.
697	Dharam Narain v. Suraj Narain ...	A I R 1941 All 1; (1940) A L J 705; I L R (1940) All 815; 13 R A 435.
705	Sait Sogmull Lachiram Firm v. Vallabhaneni Parandhamayya ...	A I R 1940 Mad. 716; 51 L W 697; (1940) M W N 566, (1940) 2 M L J 17; I L R (1941) Mad. 13; 13 R M 707.
707	K. C. Majumdar v. Surajsingh ...	13 R N 345, A I R 1941 Nag 205.
710	Parmanand v. Emperor ...	A I R 1941 All. 156 (1941) A L J 26; 42 Cr. L J 463, 13 R A 413.
711	R M. P. L. S. Chettiar Firm v. Koormiah ...	A I R 1941 Rang. 95; 1940 Rang. 767; 13 R Rang 264.
712	Sohan Lal Gulab Rai v. Muhammad Din Muhammad Yanis, Firm ...	A I R 1941 Pesh. 18; 13 R Pesh. 65.
714	Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan v. Indian Life Assurance Co, Ltd, Karachi ...	A I R 1941 Sind 17; 13 R S 228; (1941) Kar. 191.
718	Krishnadas Govardhandas Madivale v. Ratanbai Gokuldas Laxmandas ...	A I R 1941 Bom 41; 42 Bom. L R 1044; 13 R B 38; I L R (1941) Bom. 42.
725	Kanhaiya Lal Goenka v. Commissioner of Income-tax, U. P. ...	A I R 1941 All. 129; (1940) A L J 855; I L R (1940) All. 785; 13 R A 445.
727	Sanwaley Rai v. Sant Rai ...	1941 O W N 474; 13 R O 495; 1941 O L R 319
731	Bahari Lal Bhargava v. Commissioner of Income-tax, C. P. and U. P. ...	A I R 1941 All. 135; (1940) A L J 860; 13 R A 447; I L R (1941) All 54.
737	Equitable Coal Co., Ltd. v. Amrita Nath Mitter ...	22 P L T 304; 7 B R 633, 13 R P 620.
740	Rayachand Jivaji v. Basappa Virappa Bellary ...	A I R 1941 Bom. 71; 42 Bom. L R 1113; 13 R B 337; I L R (1941) Bom. 136.
746	A. C. Mojumdar v. Emperor ...	A I R 1941 Cal. 87; I L R (1940) 2 Cal. 571, 42 Cr. L J 472; 13 R C 472.
747	Chhakauri Singh v. Sri Krishna Pande ...	A I R 1941 All. 134; (1940) A L J 904; I L R (1940) All. 793; 1941 O W N 238; 13 R A 453
748	Shyama Kant Lal v. Ram Lal ...	22 P L T 267; 7 B R 636, 13 R P 617.
751	Sanam Narayanamurthi v. Manapalli Nageswara Rao ...	A I R 1941 Mad. 103; (1940) M W N 756; 52 L W 251; 13 R M 710.
752	Girish Chandra Ghose v. Sudhir Chandra Roy Ghoudhuri ...	A I R 1941 Cal. 133; I L R (1940) 2 Cal. 212; 45 C W N 186; 13 R C 450.
756	Tara Prasad Baliasey v. Baijnath Prasad Baliasey...	A I R 1941 Pat. 155; 19 Pat 927; 7 B R 615; 13 R P 628.
758	Venkataramasastri v. Venkatasubramania Dikshitar ...	A I R 1940 Mad. 674; (1940) 1 M L J 478 (2); 51 L W 431 (2); (1940) M W N 348; 13 R M 712.
760	Kusum Kamini Debya v. Jagdish Chandra Deo Dhabal Deb ...	A I R 1941 Pat. 13; 20 Pat. 96; 7 B R 618; 13 R P 623.
764	M. Do Carmo Lobo v. Official Assignee ...	A I R 1941 Rang. 127; 13 R Rang. 265.
766	Emperor v. Abdul Qayyum ...	A I R 1941 Lah. 113; I L R (1940) Lah. 616; 42 Cr. L J 465; 13 R L 497.
767	Commissioner of Income tax, Bihar and Orissa v. Dhaneshwardhai Misra ...	A I R 1941 Pat. 27; 7 B R 623; 13 R P 630.
768	Rukmansa Rajansa Hosmani v. Shankargouda Basangouda Lakhyal ...	A I R 1941 Bom 83; 42 Bom. L R 1111; 13 R B 318.
770	Waris Khan v. Emperor ...	A I R 1940 Oudh 209; 15 Luck 423; 1940 O W N 177; 1941 O L R 333; 42 Cr. L J 483; 13 R O 513.
772	Nathi Lal v. Sri Mal ...	A I R 1940 All. 30; (1940) A L J 179; I L R (1940) All. 256; 13 R A 410
773	Sharafuddin Ahmad v. Shamsul Huq ..	A I R 1941 Cal. 147; I L R (1940) 2 Cal. 373; 13 R C 469.
776	Hasan Abbas Ali Khan v Abdul Rahman ...	1941 O W N 587; 1941 O L R 341; 13 R O 505
779	Sukhanandan Ramdhin v. Maiklal Kanhialal, Firm ...	A I R 1941 Bom. 82; 42 Bom. L R 113; 13 R B 350.
780	Ramgobind Sahu v. Moso Dhobi ...	7 B R 639; 13 R P 647.
781	Ata Mohammad v. Lachhman Das ...	A I R 1941 Lah. 116; 42 P L R 749; 13 R L 492.

782	Udai Chand Lal v. Pannalal Champalal, Firm ...	A I R 1941 Pat. 174; 21 P L T 1019; 7 B R 640; 13 R P 646.
783	Sobhomal Thaoomal v Dulahdinomal Tilusing ...	A I R 1941 Sind 49; (1941) Kar 139; 13 R S 241.
785	Badri Lonia v. Dwarka Prasad Ram Shukla ...	A I R 1940 All. 240; (1940) A L J 229; 1940 R D 131; 13 R A 454.
786	Islamuddin Jumma Din v. Firm Jiwa Shah Ram Chand ...	A I R 1941 Pesh. 30; 13 R Pesh. 67.
787	Mayandi Venkatesa Mudali v. Konne Desappa Mudali ...	A I R 1941 Mad. 99 (1); 52 L W 479 (2); (1940) 2 M L J 555, 13 R M 713.
788	Govindram Jiwanram v. Harasaya Ganasaya Marwadi ...	A I R 1941 Nag. 154; 13 R N 347.
789	Om Parkash v. Mukhtar Ahmad ...	A I R 1940 Lah. 486; 42 P L R 630; 13 R L 482
795	Shripadgouda Venkangouda Aparanji v. Govindgouda Narayangouda Aparanji ...	A I R 1941 Bom. 77; 42 Bom. L R 1185; 13 R B 343.
801	V. G. Manicka Mudaliar v. Andalammal ...	A I R 1940 Mad 573; (1940) 1 M L J 356; (1940) M W N 343, 51 L W 687; I L R (1940) Mad. 636; 13 R M 714.
805	Abdul Aziz v. Amir ...	A I R 1941 Nag. 130; 13 R N 348; 1941 N L J 115.
807	Secertary of State v. Sadek Reza ...	A I R 1941 Cal. 167; I L R (1940) 2 Cal. 312; 44 C W N 901; 13 R C 453.
814	Abdul Basha Sahib, *In re* ...	A I R 1941 Mad. 316; (1940) M W N 784; 52 L W 284; I L R (1940) Mad. 1028; 13 R M 732; 42 Cr. L J 466.
817	Ram Dihal v. Badri ...	A I R 1941 All. 143; (1941) A L J 53; 1941 O W N 237; 42 Cr. L J 469; 13 R A 462.
818	R. C. Bhide v. Travancore National and Quilon Bank, Ltd. ...	A I R 1941 Mad 18; (1940) M W N 1077; (1940) 2 M L J 697; 52 L W 635; 13 R M 718.
819	Rameshri v. Vaishno Ditti ...	A I R 1941 Pesh. 25; 13 R Pesh. 68.
821	Managing Director Nayar Modern Bank, Ltd. v. Official Liquidators of the Travancore National and Quilon Bank, Ltd. ...	A I R 1941 Mad. 48; (1940) 2 M L J 559; 52 L W 512; (1940) M W N 1036; I L R (1941) Mad. 125; 13 R M 720.
822	Badrunnissa v. Municipal Board, Agra ...	A I R 1941 All. 153, (1941) A L J 21; 1941 O W N 159; 13 R A 455.
823	Meyappa Chettiar v. Ramaswami Chettiar ...	A I R 1941 Mad. 96; (1940) 2 M L J 494; 52 L W 508; (1940) M W N 982; 13 R M 719.
824	Ramai Chaubey v. Ram Datta Sonar ...	A I R 1940 All. 314; (1940) A L J 267; 1940 R D 210; 13 R A 457.
825	Reddi Krishnan Naidu v. Chintala Somi Naidu ...	A I R 1940 Mad. 544; 51 L W 315; (1940) 1 M L J 363; (1940) M W N 327; I L R (1940) Mad. 815; 13 R M 723.
826	Ahmad Sayeed v. Kanizak Zohra ...	A I R 1941 All. 157, (1941) A L J 117; 1941 O W N 52; 13 R A 456.
827	Narasimhulu Naidu v. Pemmati Naga Reddi ...	A I R 1941 Mad. 64; (1940) M W N 958; 52 L W 530; (1940) 2 M L J 691; 13 R M 721.
829	Qaisar Jahan Begam v. Deputy Commissioner, Delhi Province ...	A I R 1941 Lah. 88; 13 R L 489.
832	Raju Mudali v. Chinnaraju Naidu ...	A I R 1941 Mad 51; 53 L W 476; (1940) M W N 1005; (1940) 2 M L J 562; 13 R M 724.
833	Mohamad Hossain v. Md. Rafique ...	A I R 1941 Cal. 130; I L R (1940) 2 Cal. 230; 13 R C 466.
836	Tha Mya v Ma Kin Pu ...	A I R 1941 Rang. 81; 1940 Rang. 807; 13 R Rang. 266.
842	Rajendra Kishore Basu Roy v Promotha Nath Roy	A I R 1941 Cal. 80, 72 C L J 49; 13 R C 461.
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OUDH CHIEF COURT

Full Bench

Miscellaneous Appeal No. 20 of 1937

January 30, 1941

THOMAS, C. J. BENNETT AND GHULAM HASAN, JJ.

GHULAM ABBAS AND OTHERS—APPLICANTS —APPELLANTS

versus

PRINCE SAFDAR JAH ZAHID ALI MIRZA AND OTHERS—OPPOSITE PARTY —RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII r. 4—One of respondents dying—His legal representatives not brought on record in time — Test whether appeal abates as whole, stated — Application under s. 4, U. P. Encumbered Estates Act (XXV of 1934)—Some of creditors opposing—Application dismissed—Appeal—One of creditors respondents dying—Legal representatives not brought on record — Appeal, held abated as whole.

The question whether an appeal has or has not abated as a whole on the failure of the appellant to bring on record the legal representatives of one of the deceased respondents depends upon the nature and circumstances of each case. The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter. [p. 4, col. 2.]

An application under s 4, U. P. Encum. Estates Act was opposed by some of the creditors on the ground that the applicants were not "landlords" within the meaning of the Encum. Estates Act. The Special Judge upheld this objection and dismissed the application. During the pendency of the appeal one of the creditors who opposed the application and who was one of the respondents died and his legal representatives were not brought on record within limitation :

Held, that the interests of the creditors in defeating the application of the appellants were joint and indivisible and the interests of the deceased creditor could not be separated from those of the rest and the heirs of the deceased creditor were necessary parties. The appeal therefore abated as a whole as otherwise it would lead to conflicting and inconsistent decisions with regard to the same subject-matter. 165 Ind. Cas. 45 (2) and 114 Ind. Cas. 417 (5), referred to. [p. 5, col. 2; p. 6, col. 1.]

Misc. A. against the order of the Special Judge, 1st Grade, Lucknow, dated September 30, 1936.

Mr. *Mahabir Prasad Srivastava*, for the Appellants.

Messrs. *L. S. Misra* and *S. N. Srivastava*, for Respondents Nos. 6 to 9.

Mr. *Raj Kumar Srivastava*, for Respondents Nos. 10 and 11.

Order of Reference

Zia-ul-Hasan, J.—(*July* 19, 1940).—In this appeal we have dismissed the appellants' application for setting aside the abatement of the appeal against *Pandit* Brahma Dutt, respondent No. 5, and the question now is whether the appeal should proceed against the remaining respondents or should be deemed to have abated in its entirety, as is contended on behalf of the respondents.

The appeal is against an order of a learned Special Judge under the U. P. Encum. Estates Act holding that the present appellants have no *locus standi* to apply under the U. P. Encum. Estates Act and rejecting their application as not maintainable. The respondents are the various creditors of the appellants. We have heard the learned Counsel for the parties on the question whether or not the appeal has abated as a whole and I am clearly of opinion that it has not abated as against respondents other than *Pandit* Brahma Dutt deceased. It is argued by the learned Counsel for the respondents that in case the appeal is allowed by this Court there will be two conflicting decisions one of the Special Judge between the appellants and the heirs of *Pandit* Brahma Dutt that the appellants are not entitled to apply under the U. P. Encum. Estates Act and the other of this Court's decision between the appellants and the other respondents that they are so entitled, and reliance is placed on the cases of *Fazal Mohammad Khan* v.

Ali Mohammad Khan, (1934 O. W. N. 1487) (1), *Ram Jas Tewari* v. *Ram Lal Tewari*, (1935 O. W. N. 297) (2) and *Mohammad Faruq* v. *Azizul Hasan*, (1935 O. W. N. 401) (3). There is, however, nothing in these cases in my view which can reasonably be construed as supporting the view that the appeal in the present case has wholly abated. The law appears to me to have laid down clearly in *Ram Jas Tewari's case* (2), in which it was held that the question, whether an appeal can or cannot proceed in the absence of the legal representatives of a deceased respondent, must depend upon the nature of each case, and it is impossible to lay down a general rule applicable to all such cases. It was further said that each case must depend upon its own circumstance and that if in such a case the decree under appeal is a joint decree in favour of all the respondents the appeal abates as a whole, for if the whole appeal is allowed not to abate, the decision may result in two conflicting decisions with regard to the same subject-matter. In the present case not only is there no joint decree in favour of the respondents but the debt due to each of them or each set of them is quite separate from that due to any other creditor or set of creditors. Moreover, as far as I think the rule against the possibility of conflicting decisions coming into existence contemplates those cases in which conflicting decrees capable of execution may be passed and it may subsequently be found difficult or even impossible to execute those decrees, This can best be illustrated by an example. Supposing a suit is brought for possession of a house against four persons, who are jointly in possession of it, the suit is dismissed by the trial Court and the plaintiff brings an appeal against the dismissal. The appeal must of necessity be against all the four defendants. Now supposing one of the defendants dies and his heirs are not brought on the record within the time allowed by law, the result will be that the appeal will abate so far as the deceased defendant and his heirs are concerned, and if it is allowed to proceed against the other defendants it may possibly be decreed against them. In such a case it will be impossible to execute the Appellate Court's decree as the decree of the trial Court dismissing the entire suit of the plaintiff will have become final so far as the deceased defendant's heirs are concerned, and they can successfully resist an attempt on the part of the plaintiff to get possession of the houses. Nothing of the kind can, however, happen in the present case. All that the order of the trial Court amounts to is that the appellants are not entitled to proceed under the U. P. Encum. Estates Act and if this Court reverses this finding of the trial Court the case will go back to that Court and will proceed against the other creditors without any difficulty or any prejudice to anybody.

(1) 1934 O W N 1487; 153 Ind. Cas. 54; 7 R O 284; A I R 1935 Oudh 36.

(2) 1935 O W N 297; 165 Ind. Cas. 45; A I R 1936 Oudh 209; 1936 O L R 564.

(3) 1935 O W N 401; 154 Ind. Cas. 897; 7 R O 515; A I R 1935 Oudh 329.

It is contended that the heirs of *Pandit* Brahma Dutt will have no remedy and will not be able to realise their debt from the appellants as under s. 13 of the U. P. Encum. Estates Act a creditor who does not put up a claim in the proceeding under the Encum. Estates Act loses his right to recover the debt. I cannot accept this contention. When proceedings are opened in the Court of the Special Judge, the heirs of *Pandit* Brahma Dutt can apply to be made parties to those proceedings and they will have to be made parties to those proceedings by the learned Judge. Of course this will mean that the abatement of the appeal against the heirs of *Pandit* Brahma Dutt will have no effect upon the appellants' rights under the Encum. Estates Act against them, but it is not necessary that it should have. In any case, the principle of the cases relied on by the respondents does not, in my opinion, apply at all to the present case, and I would, therefore, hold that the appeal has not abated against respondents other than *Pandit* Brahma Dutt.

Yorke, J.—(*July* 26, 1940).—I have given this matter my anxious consideration but I regret that I am unable to agree with my learned brother. So far as I am able to see the point of view which appeals to him is that although something like a contradictory position might arise from the not improbable decision of this appeal in favour of the appellants in the absence of the heirs of *Pandit* Brahma Dutt, it should not be held that this appeal has abated as a whole because that contradictory position is curable by the future act of the heirs of *Pandit* Brahma Datt. I am not satisfied in my mind that this is a decisive consideration.

Another Bench of this Court, of which I was a member had to consider the same point in Miscellaneous Appeal No. 69 of 1937 decided on May 8, 1940; (*Udai*

Pratap Singh v. *Dwarka Prasad*) (4). In that case also the Special Judge had dismissed the whole application on the view that the original application made to the Collector did not comply with the provisions of s. 4 of the Act. In the present case the decision is of an analogous nature that the applicants had no *locus standi* to apply under the Encum. Estates Act and their application was, therefore, not maintainable. We took the view that the appeal must abate as a whole on the ground that if the appeal were to be allowed as things now stand the result would be that the application would have to proceed *ab initio* as against some and not as against other creditors, a procedure which would be in contravention of the whole intention of the Act.

It seems to me that in a case under the Encum. Estates Act it may well be said that the applicants landlords, that is the debtors, are ranged on one side as against the whole body of creditors on the other, and that the interests of the creditors are joint and cannot be considered to be joint and several. In case it is decided that the application as a whole does not lie, as has been decided in this case and was decided in the case which came before us in Miscellaneous Appeal No. 69 of 1937, (*Udai Pratap Singh* v. *Dwarka Prasad*) (4) I am inclined to regard the interests of the creditors in the result of the appeal as joint and think that they cannot be regarded as joint and several.

The point may be looked at in another way. I think that in order to be able to say that an appeal does not abate as a whole when it has abated against one or more of the respondents it is necessary to be able to say that that the appeal would have been properly filed even if those same respondents had not been impleaded in the appeal as respondents. I do not think it would be possible to argue in a case like the present one that the appeal of the landlord debtors would have been properly filed and could have been allowed to go forward if the landlord debtors had failed to implead as respondents in the appeal any of the creditors who were parties to the original decision. If those respondents were necessary parties to an appeal of this kind, I conceive that their representatives are necessary parties to the continuation of the appeal and as the appeal has abated against those representatives, the appeal must be taken to have abated as a whole.

In this connection, I may refer to the notes in Chitaley's Civil P. C. Vol. II (Second Edition), p. 2123 where he says, quoting of course from decisions of certain High Courts,

> "In short, therefore, the test to see whether the suit or appeal abates as a whole or only in part is to find out if the suit (appeal) could, in the first instance, have been instituted and prosecuted with the deceased defendant (respondent) left out. In other words, if separate suits (appeals) are maintainable against defendants (respondents) severally, then the abatement will be only in part in spite of the other defendants (respondents) having been impleaded in the same suit (appeal)."

Accepting this as a sound statement of the law I do not feel that it is possible to depart from the view which was expressed by the Bench in Miscellaneous Appeal No. 69 of 1937 (4), and I would hold that this appeal must abate as a whole.

Zia-ul Hasan and Yorke, JJ.—(*July* 30, 1940).—As we differ on the question whether or not this appeal has abated as a whole, we refer this question for decision to a Full Bench.

Jugdment of the Full Bench

Thomas, C. J., Bennett and Ghulam Hasan, JJ.—(*January* 15, 1940).—The three applicants-appellants filed an application under ss. 4 and 49 of the Encum. Estates Act in respect of debts due from the ancestor of the applicants, Prince Humayun Qadar Bahadur.

There were nine creditors. Creditors Nos. 5 to 9 obtained a preliminary decree on the basis of a mortgage-deed executed on January 18, 1916, by the late Prince Humayun Qadar Bahadur, which was made final on August 18, 1928. The said creditors opposed the application on the ground that the applicants were not "landlords" within the meaning of the Encum. Estates Act.

The learned Special Judge, first grade, Lucknow, decided the preliminary point against the applicants holding that they were not "landlords" as defined in the Encum. Estates Act and thus had no *locus standi* to apply under the Encum. Estates Act and dismissed the application.

The applicants then appealed to this Court against the said decision. During the pendency of the appeal one of the creditors, (*Pandit* Brahma Dat, No. 5 in the application), died, and no application was made for substitution of his legal

(4) 189 Ind. Cas. 292; 1940 O L R 421; 13 R O 56; 1940 O W N 622; 1940 R D 310; A I R 1940 Oudh 365.

representatives within the period of 90 days provided by law.

On September, 28, 1939, the appellants applied for setting aside the abatement, but their application was dismissed by a Bench of this Court on July 16, 1940, the question whether the whole appeal abated was left open to be decided at the hearing of the appeal.

The appeal came up for hearing before a Bench of this Court consisting of Justice Zia-ul Hasan and Justice Yorke, and a preliminary objection was taken that the whole appeal had abated. Justice Zia-ul Hasan was of opinion that the whole appeal had not abated, while Justice Yorke took the view that the whole appeal had abated, and as there was a difference of opinion, they referred the following question for decision to the Full Bench:

"Whether or not this appeal has abated as a whole."

The contention of the learned Counsel for the appellants is that there are distinct creditors and their interests are separate and as such it cannot be said that the whole appeal has abated. In support of his contention the learned Counsel has relied on the following two decisions:

Ram Jas Tewari v. *Ram Lal Tewari*, (1935 O. W. N. 297) (2), and

Sant Singh v. *Gulab Singh*, (I. L. R. 10 Lahore 7), (5),

In the case reported in 1935 O. W. N. 297 (2), it was held that

"the question, whether an appeal can or cannot proceed in the absence of the legal representatives of a deceased respondent, must depend upon the nature of each case, and it is impossible to lay down a general rule applicable to all such cases. Each case must depend upon its own circumstances. If in such a case the decree under appeal is a joint decree in favour of all the respondents the appeal abates as a whole, for if the whole appeal is allowed not to abate the decision may result in two conflicting decisions with regard to the same subject-matter."

In the case reported in I. L. R. 10 Lahore 7 (5), which is a Full Bench decision, it was held that

"as the interest of the deceased respondent in the subject-matter of the appeal was separate from those of the surviving respondents, and it could not, therefore, be said that the decree of the Appellate Court, if in favour of the appellant, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal *qua* the deceased, the appeal did not abate in its entirety but could proceed against the surviving respondents."

We do not doubt the correctness of either of the two decisions. In our opinion, they lay down the correct law and we reiterate what has been said in the case reported in 1935 O. W. N. 297 (2), that whether an appeal has or has not abated must depend upon the nature and circumstances of each case.

The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter.

It is a matter of common sense that the Court should not be called upon to pass two inconsistent decrees about the same property, but if on the other hand the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

The Encum. Estates Act lays down a special scheme for liquidation of debts. Section 7 of the Act lays down the consequences of acceptance of an application by the Collector and under cl. (1) (*b*) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any Civil or Revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order.

Section 8 provides for filing of written statements.

Section 9 provides for calling of claims and under s. 13 if the claim is not duly notified it shall be deemed to be discharged.

Section 14 provides for examination and determination of claims and amounts.

Section 19 provides for transmission of the decree by the Special Judge to the Collector.

In short the intention of the Act is to secure the entire property of the landlord under the control of the Court, compel all his creditors to prove their claims against him, and to disencumber his property of all debts under a special scheme laid down in the Act.

Coming to the merits of the case, it is clear that all the creditors were interested in defeating the appellants' application on the ground that they were not "landlords". It is true that only creditors Nos. 5 to 9

(5) 10 L 7; 114 Ind. Cas. 417; A I R 1928 Lah. 572 30 P L R 453; Ind. Rul. (1929) Lah. 257 (F B).

specifically raised the plea, but there can be no doubt that it was for the benefit of all the creditors.

There is no doubt that the appeal so far as the deceased creditor is concerned has abated and the order of the Special Judge that the appellants are not "landlords" has become final, and if the appeal of the appellants in this Court is allowed on the ground that they are "landlords" within the meaning of the Encum. Estates Act, the result will be two contradictory decrees. It is further clear that the heirs of the deceased cannot now in this Court contest the appeal, while the appellants may get a reversal of the order of the Special Judge behind their back. If the whole appeal does not abate it is to the advantage of the landlords and to the disadvantage of the heirs of the deceased creditor and the effect would be that the creditor against whom the appeal has abated would be debarred from all remedy by the provisions of the Act itself. He would be faced with the difficulty arising out of s. 13 of the Act, namely that the claim not duly notified would be deemed to have been discharged whereas the effect of dismissing the appeal as having abated as a whole be that the proceedings under the Encum. Estates Act will come to an end and those creditors would not be debarred by s. 7 of the Act from pursuing further remedies still open to them against the applicants-debtors. It has been suggested that in the event of the appeal being allowed it would be open to the heirs of the deceased creditor to present a written statement of their claims and s. 13 of the Act will not stand in their way. We do not see any reason why the heirs of the deceased creditor in whose favour a decision had been passed by reason of abatement which had become final, should be forced to resubmit their claims as if nothing had happened. This suggestion destroys the effect of finality which the law gives to the decrees of Courts.

Abatement of suits and appeals as contemplated by the Civil P. C. is based on the principle of forfeiture of rights. The law imposes a penalty upon parties guilty of laches or negligence in the shape of abatement if they fail to take prompt steps to implead the legal representatives of deceased parties on the record so as to effectually continue the proceedings. It is true that so far as the Statute is concerned, the appeal abates only *qua* the deceased respondent, but the question whether the partial abatement thus caused leads to an abatement of the appeal in its entirety depends upon general principles. All the creditors were jointly interested in defeating the application of the landlords and the order passed by the Special Judge on the objection of some of them was in favour of all of them, and unless the whole appeal abates, the result will be two inconsistent and contradictory orders.

Under s. 50 of the Act if a landlord with regard to whom a notice has been published under s. 9 dies before a declaration has been made in respect of him under s. 44 under cl. (*a*) the proceedings under this Act shall be continued as nearly as may be possible in all respects as if the landlord were still living. The Act contains no similar provision that upon the death of any of the creditors the proceedings will not abate. The learned Counsel for the appellants drew our attention to a passage at p. 25* of I. L. R. 10 Lahore (5), in which it was said that "there can be no legal objection to the so-called contradictory decrees or findings in such cases."

These observations were made with regard to an illustration which was as follows:—

"For instance, supposing there had been four sale-deeds each with regard to a one-fourth share in the property in suit and four different suits had been instituted by the plaintiff in the trial Court. it was open to the trial Court in some of them to come to the conclusion that the property was ancestral and In the others to hold that the property was not ancestral because each case had to be decided on the evidence produced therein, and it is conceivable that some of the vendees were able to produce convincing evidence as to the nature of the property and the rest were not equally fortunate."

The observations made by the learned Judge under these circumstances were perfectly justified, but we fail to see how they help the appellants. We are of opinion that in the case before us no contradictory decrees are possible and a contrary view will lead to grave injustice to the heirs of the deceased creditor.

We have carefully considered the case reported in I. L. R. 10 Lahore, 7 (5), and as far as the facts of that case are concerned it lays down good law, but it does not help the appellants as the facts are clearly distinguishable. There was no prejudice in that case to the successful party, but in the case before us, as we have shown, if the appeal is allowed, the successful party will be greatly prejudiced and he will be precluded from obtaining any remedy in regard to the debts which stand in his favour.

We are, therefore, of opinion that the interest of the creditors in defeating the application of the appellants were joint and

indivisible and the interests of the deceased creditor cannot be separated from those of the rest and that the heirs of the deceased creditor were necessary parties. We are, therefore, constrained to hold that the appeal has abated as a whole otherwise it would lead to conflicting and inconsistent decisions with regard to the same subject-matter.

Our reply, therefore, to the question referred is that the appeal has abated as a whole.

Final Order of Division Bench

Yorke and Ghulam Hasan, JJ.—(*January* 30, 1941).—The decision of the Full Bench on the question referred to it, is that the appeal has abated as a whole. As it has not been proved on the record that the appellant was prevented by any sufficient cause from continuing the suit, there is no ground for setting aside the abatement, and it follows that the appeal having abated as a whole, it is, therefore, dismissed upon that ground. As the respondents have had to incur costs in connection with the hearing of the appeal on the question of abatement we order that one set of costs be paid by the appellant to the contesting respondents.

S. *Order accordingly.*

NAGPUR HIGH COURT

Criminal Appeal No. 201 of 1940
August 21, 1940
GRILLE AND GRUBB, JJ.
BHAROSA—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Evidence Act** (I of 1872), **s. 27**—**Amendment of s. 162, Criminal Procedure Code** (Act V of 1898), **whether affects s. 27**—**Accused after committing murder lodging report to Police**—**First Information Report containing confessional matter** — **Conclusion of**—**Such matter if can be admitted under s. 27** — **Such accused, if in custody of Police within the meaning of s. 47** (1), **Criminal Procedure Code** (Act V of 1898)—**Criminal trial**—**Investigation**—**Sub-Inspector getting information from accused and acting on it** — **Whether can make him repeat that information before witnesses**—**Penal Code** (Act XLV of 1860), **s. 302**—**Provocation**—**Woman of low caste importuniting accused to instal her as his permanent mistress** — **Whether provocation, justifying awarding lesser sentence.

The provisions of s. 27 of the Evi. Act, are still valid and are not affected by their Lordships' judgment in *Pakala Narayana Swami* v. *Emperor* (4). Consequently the amendment of s. 162, Criminal P. C., in 1923 does not affect s. 27, Evi. Act. 168 Ind. Cas. 562 (2) and 188 Ind. Cas. 498 (3), not followed. 181 Ind. Cas. 1001 (5), 185 Ind. Cas. 310 (6) and 114 Ind. Cas. 273 (7), Cr. App. No. 121 of 1940, relied on. [p. 8, col. 2.]

Where the accused after committing murder goes to the Police Station and lodges the first information of the crime, and the report contains statements in the nature of confessions and statements having no connection with the actual narrative of the crime, the statements in the nature of confession cannot be admitted but they are not excluded for the purposes of s. 27, Evi. Act.

[Case-law discussed.]

A person who makes a statement to a responsible Police Officer, voluntarily confessing that he has committed an act which the I. P. C., regards as an offence, is submitting himself to custody within the meaning of s. 46 (1) of the Criminal P. C., and is then in the custody of a Police Officer within the meaning of s. 27 of the Evi. Act. 138 Ind. Cas. 116 (9), distinguished.

[Case-law discussed.]

In principle it is of course objectionable for a Sub-Inspector who has received information from the accused and is proceeding to act on that information to get him to repeat that information in the presence of witnesses. A Police Officer ought to expect to be believed when he gives evidence on oath. 180 Ind. Cas. 590 (12), referred to. [p 10, cols. 1 & 2.]

It may of course also be possible that the Sub-Inspector was aware that there might be some doubt as to the admissibility of what the accused had stated at the Police Station as it was embodied in a confession made to a Police Officer, in which case, if he considered that the statement might be entirely inadmissible, he was justified in taking the statement again in circumstances where it certainly was admissible. [p. 10, col. 2.]

A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion amounting to importunity—that he should instal her as a permanent mistress, which would result in heavy caste penalties. Then if on her insistence he loses control and gives a *lathi* blow on her head causing her immediate death, the accused is entitled to a lesser penalty and not that of death. [p. 12, col. 1.]

Cr. A. from the order of the Court of the Sessions Judge, Wardha, dated July 16, 1940.

Messrs. *M. Adhikari* and *M. G. Ghate*, for the Appellant.

Mr. *W. R. Puranik*, Advocate General, for the Crown.

Judgment.—The appellant Bharosa has been convicted of the murder of one *Mst.* Gaji and has been sentenced to death. The facts, though unusual, are simple. The prosecution story is that Bharosa, who was a gardener, in the employment of one Dagaji, Malguzar of *Mauza* Waldhur, lived in a hut in his master's garden and had formed an illicit connection with *Mst.* Gaji, a widow, of a lower caste than his own, she being a Pardhan and he a Pardeshi of the United Provinces. On the night of April 3, the woman visited his hut and suggested that she should enter permanently into his keeping and live with him. He demurred as this would result in his being outcasted and he in a rage at her

importunity struck her over the head with *lathi* killing her practically instantaneously. The medical evidence is to the effect that several blows with a *lathi* must have been delivered. The murder was committed not in the hut but at a *nalla* some 150 yards away and the accused turned her out of the hut and accompanied her part of the way, when, presumably, the importunities being renewed, he lost his temper and killed her. Early on the following morning he left Waldur for Hinganghat, where his master lives, with the intention of telling his master exactly what had happened. The master was not present at his shop, but his agent Devidas (P. W. No. 1) was, and to him the accused confessed that a woman had come to his hut at night and refused to leave and that he had struck her and killed her. Devidas then suggested that the accused ought to go to the Police Station and report, and this with the concurrence of his master Dagaji who had then arrived, was done and a first information report was recorded by the Sub-Inspector Sheomangal, in the course of which a full story was detailed. As the result of statements made in the course of this narrative namely, where the instrument with which the crime had been commited lay and where the body was to be found, the Sub-Inspector went to the village. He reached there before the accused, who had been placed in the custody of a constable, arrived, and village elders were called at the *bada*. When the accused arrived he was asked to show the weapon and the corpse and he did so, accompanied by the Sub-Inspector and by witnesses. A blood-stained *lathi* was produced from under his bed in the hut, and the body was found in the *nalla* where he said it would be found. In the committing Magistrate's Court the accused in his examination admitted all these facts, but he retracted them in the Court of Session, denied that he had struck the woman or killed her, denied that he had made a confession to Devidas and even denied that he had been to the Police Station at all or made a report to the Sub-Inspector in charge. Finally, and equally incredibly, he denied that he had made the statement which was recorded in his examination in the committal Court. He called no evidence in defence, but it was contended on his behalf that he had been implicated by one Kalkaprasad, a fellow-servant of his. We may here note that Kalkaprasad was called as a witness for the prosecution and although in examination-in-chief he admitted that he knew *Mst.* Gaji who was a day-labourer under his control, he stated that he was unaware if she had any connection with the accused Bharosa, and he was not asked a single question in cross-examination which would tend to show that he himself had any immoral relations with *Mst.* Gaji although such immoral connection was hinted at in Counsel's argument both in this Court and in the Sessions Court Neither was any question put to him indicating any ill-feeling between himself and the accused. It is quite obvious that any imputation against Kalkaprasad was a despairing afterthought.

The grounds taken in appeal all relate to technical points of law. The Sessions Judge, following the law as laid down in *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1), did not allow the whole of the first information report to be proved, excluding from the proof by the Sub-Inspector, who recorded it, any such part as would include a confession. The earlier part of the report was allowed to be proved down to the words "used to come to do my master's work and I therefore knew her." We reproduce the first information report as taken down in full :

"I am a resident of Santara Mohalla, Allahabad. I do not know whether any of my relations in *desh* (=native country) are alive or not. I came to Pardesh (=another country) 25 years back. I served as a guard at the shop of Seth Narsinghdas for twenty years. From over 12 months from now I have been working as a gardener on Rs. 5 per month in the garden of Dagaji at Waldhur. I live in the tin hut in his garden at Waldhur. *Mst.* Gaji a widow by caste Pardhanin, who as the people said had two sons, used to come to do my master's work and I therefore knew her. That *Mst.* Gaji Pardhanin came to me in the master's garden last night at 12 or 12-30 o'clock and said that she had no husband and so I should take her into my keeping. I told her that I was a Pardeshi and she a Parihanin by caste and because of a caste diversity I could not take her as a keep and advised her to go to her own caste. Then your honour, I explained things to her at length. She did not agree and said, 'I have no husband and I shall live here only'. Then I got angry and raising my bamboo stick overhead with both hands I sturck with force. The *lathi* fell on the head of *Mst.* Gaji in front and she fell to the ground along with the stick. Fleshy material protruded out of her broken scalp and there had been bleeding. Immediately on falling down she died : it did not take half a minute (even). I then remained lying in my master's garden. I got up before 6 A. M. in the morning and took my way to the master's shop from the village. The master, Dagaji, had gone to the station and I related the fact of *Mst.* Gaji's murder to the senior Dewanji who was in the shop and who has accompanied me to the Police Station house. Then the master arrived and Dewanji told this incident to him. When I struck *Mst.* Gaji

(1) 49 C 167; 62 Ind. Cas 578; A I R 1922 Cal. 342; 22 Cr. L J 562; 25 C W N 788.

with the *lathi* she was standing close to me. The *lathi* is a bamboo stick of my *desh* and up to my ear in height. Only one *lathi* blow killed her. When *Mst.* Gaji approached my cot once I asked her to go away queitly. Accordingly she went a little distance outside the garden. I lay on my bed. In the meantime she came back again. Then again I said to her 'I advised you to go away and you have come again' and asked her to get out of the garden gate. She did not go. I took her out of the garden up to the *nullah* and told her to take her way across the *nullah*. She said she would not go. I then struck her. *Mst.* Gaji is lying dead in the *nullah* at the rear of my master's garden and the *lathi* is kept near the cot inside the hut in my master's garden. The hut is open. The report was read over to me: it has been taken down correctly.'

It is contended before us that not merely the confessional part of the first information report should have been excluded but the whole of it; It is also contended that as the first information report itself could not be admitted in evidence, no statement contained in it could be used under the provisions of s. 27 of the Evi. Act for the purpose of leading to the discovery of the blood-stained *lathi* or of the body. It is further urged that the whole of the accused's examination in the committing Magistrate's Court is inadmissible as the questions asked are based on the inadmissible first information report, and the examination itself is attacked intrinsically on the ground that multiple and improper questions were asked to which the accused could not give proper answers. In respect of statements made ny the accused in the *bada* in *Mauea* Waldhur after he had been taken there and met the Sub-Inspector, it is contended that the conduct of the Sub-Inspector was improper in asking him questions which he had asked him previously so as to obtain his statements in the presence of witnesses for the application of s. 27 of the Evi. Act. Finally it is urged that no statement under s. 27 of the Evi. Act is admissible since that section has been superseded by the amendment in 1923 of s. 162 of the Criminal P. C. In short the contention on behalf of the appellant is that there is no admissible evidence whatever to connect the accused with the crime.

Taking the last point of law first, namely, that s. 27 of the Evi. Act is now a dead letter since the amendment of s. 162 of the Criminal P. C. in 1923, reliance is placed on two recent decisions of the Allahabad High Court and the Lahore Court in *Baldeo* v. *Emperor* (2) and *Khuda Yar* v. *Emperor*(3),

(2) A I R 1940 All. 263; 188 Ind. Cas 562; 41 Cr. L J 627; (1940) A L J 241; I L R (1940) All. 396; 13 R A 48.

(3) A I R 1940 Lah 129; 188 Ind. Cas. 498; I L R (1940) Lah. 242; 41 Cr. L J 591; 13 R L 1.

to the effect that this is the correct interpretation of the ruling of their Lordships of the Privy Council in *Pakala Narayana Swami* v. *Emperor* (4). The Patna High Court, however, does not follow the interpretation which is given to this ruling by the Allahabad High Court: *vide Emperor* v. *Mayadhar Pothal* (5). The opinion of this Court has been expressed on similar lines to that of the Patna High Court: *vide* the Divisional Bench decision of Niyogi and Gruer, JJ. in *Motilal Puransao* v. *Emperor* (6). The view follows a decision of the Nagpur Judicial Commissioner's Court in *Gola* v. *Emperor* (7), which is anterior to the decision of their Lordships of the Privy Council, and the Divisional Bench has pointed out that their Lordships did not specifically decide the question but left it open. A similar decision was reached even more recently by a Divisionl Bench of this Court in *Sheoram* v. *King-Emperor*, (Cri. App. No. 121 of 1940, decided on May 23, 1940) where the question has been discussed. One of us was a party to the decision in *Motilal Puransao* v. *Emperor* (6) and the other to the decision in *Sheoram* v *King-Emperor*, (Cri. App. No. 121 of 1940). We are, therefore, satisfied that the provisions of s 27 of the Evi. Act are still valid and are not affected by their Lordships' judgment in *Pakala Narayana Swami* v. *Emperor* (4).

For the proposition that the whole of the first information report should have been excluded from admission, reliance is placed on *Emperor* v. *Harnam Kisha* (8), where the partial exclusion in *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1), was doubted. With the greatest respect we do not consider that the doubt there expressed was justified. The relevant words of Beaumont, C. J. are as follows:—

"But I doubt myself whether the principle on which the Calcutta High Court proceeded in that case can be justified. Section 25 of the Indian Evi. Act seem to be founded on the view of the Legislature that confessions made to a Police Officer are suspect, since

(4) 18 Pat. 234; 180 Ind. Cas 1; A I R 1939 P C 47; 40 Cr. L J 364; 66 I A 66; I L R (1939) Kar. 133; (1939) M W N 185; 11 R P C 166; 1939 O W N 282, 20 P L T 265; 49 L W 349; 43 C W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; (1939) 1 M L J 756 (P C).

(5) 18 Pat. 450; 181 Ind. Cas. 1001; A I R 1939 Pat. 577; 40 Cr. L J 625; 20 P L T 420, 5 B R 706; 11 R P 653.

(6) A I R 1940 Nag. 66; 185 Ind. Cas. 310; 41 Cr. L J 158; 12 R N 150; 1939 N L J 585.

(7) 24 N L R 158; 114 Ind. Cas. 273; A I R 1929 Nag. 17; 30 Cr. L J 258; Ind. Rul. (1929) Nag. 49.

(8) 59 B 120; 154 Ind. Cas. 631; A I R 1935 Bom. 26; 36 Bom. L R 1117; (1935) Cr. Cas. 27; 7 R B 353; 36 Cr. L J 569.

they may have been induced by improper pressure. If that be the true underlying principle of s. 25, it is, to my mind, very difficult to see how any part of the confessional statement can be admitted in evidence."

The confessions in those cases and in the one which we are considering were made in circumstances which preclude any possibility of improper pressure, as in each case the accused person went of his own accord to the Police Station before any suspicion had been aroused and stated that he had killed someone, and in *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1), that part of the confessional statement which was admitted had no connection with the actual narrative relating to the crime. Neither in the case before us can the part which has been admitted have any direct bearing on the fact of the fatal assault. So little bearing has it that it is really immaterial whether it is admitted or not, and the case against the accused would not lose any of its force by disallowing the whole of the first information report.

Of more serious consideration, however, is the contention that if the first information report is not admissible in evidence—and the argument of course applies to that part of it which comes within the confessional statement—then the statement cannot be used for the purpose of the discovery of the body or of the weapon under s. 27 of the Evi. Act. If this proposition is correct law, we arrive at the astonishing position that a man may kill another person in circumstances which he considers entirely justifiable and, moved either by remorse or honesty, make a report to the nearest Police Station stating the exact truth and the full circumstances of what he has done; the Police, however, would not be able to prove that such a statement was made or, if on investigation they found that the circumstances detailed were entirely true and made their discoveries as the result of what they had been told, and no other evidence was available to use it. This might result in glaring miscarriages of justice. Rankin, C. J. has pointed out the absurdity of the situation in *Durlav Namasudra* v. *Emperor* (9), and considers that the situation is the result of bad drafting of the Evi. Act and that the Act should be redrafted. The material criticism is as follows:—

"What was said in this case was said to the Police. It was, therefore, not allowed to go in evidence by s. 25 and the consequence of holding that s. 27 is not a mere exception to s. 26 is this: that in a case like the present where the confession was made to the Police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it. That is the present case. It cannot be admitted in evidence because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is admissible in evidence against him because he is not in custody. Yet this is the consequence of saying that s. 27 is more than a proviso to s. 26."

It was suggested to Beaumont, C. J. in *Emperor* v. *Harnam Kisha* (8), that "confession" in s. 25 of the Evi. Act refers only to a confession made to a Police Officer in the course of an inquiry into an offence and does not cover the first information which starts the inquiry. That would be, in our opinion, on obviously desirable interpretation were it possible, since it is evident, and we consider undisputed, that the purpose of s. 25 of the Evi. Act, in the words of Garth, C. J. in *Queen* v. *Hurribole Chunder Ghose* (10), is

"to prevent confessions obtained from accused persons through any undue influence being received as evidence against them,"

and in confessions made in the course of a first information report it is patent that there could have been no pressure by the Police. Unfortunately s. 25 is worded in such plain and simple language namely,

"No confession made to a Police Officer shall be proved as against a person accused of any offence,"

as to make the salutary proviso propounded in *Emperor* v. *Harnam Kisha* (8), impossible, and until this particular section is amended, as in our opinion it should be, such confession made in a first information report must be excluded from its operation. We are not, however, satisfied that statements made in the course of such an inadmissible confession are excluded for the purposes of s. 27 of the Evi. Act. The matter has been adumbrated in *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1), to which no reference was made in *Durlav Namasudra* v. *Emperor* (9), and the proposition that a person who makes a statement to a responsible Police Officer, voluntarily confessing that he has committed an act which the I. P. C. regards as an offence, is submitting himself to custody within the meaning of s. 46 (1) of the Criminal P. C. is, in our opinion, sound. In *Santoki Beldar* v. *Emperor* (11), a Full Bench of the Patna

(9) A I R 1932 Cal. 297; 138 Ind. Cas. 116; 33 Cr. L J 546; 59 C 1040; 36 C W N 373; Ind. Rul. (1932) Cal. 417.

(10) 1 C 207 (215); 25 W R 36 Cr.

(11) 12 Pat. 241; 142 Ind. Cas. 474; A I R 1933 Pat. 149; 34 Cr. L J 349; 14 P L T 82; Ind. Rul. (1933) Pat. 139; (1933) Cr. Cas. 404 (F B).

High Court stated :

"when a person states that he had done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a Police Officer, as such, he submits to the custody of the officer within the meaning of s. 46(1) of the Criminal P. C., and is then in the custody of a Police Officer within the meaning of s. 27 of the Evi. Act. This was also the opinion of Teunon and Ghosh, JJ. in *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1)."

In both these cases and in the case before us the person making the statement had no intention of not submitting himself to the Police. There is a voluntary statement without any pressure by the Police and indeed without any previous knowledge by them of what had been done; the arrest took place immediately after the statement, but we feel no doubt that at the time the statement was made there was a submission to custody which would bring the statement made within the ambit of s. 27 of the Evi. Act as a statement made by a person in the custody of a Police Officer. The facts in *Durlav Namasudra* v *Emperor* (9), were entirely different and the statements made were in the course of a Police investigation shortly before the arrest of the accused and in circumstances which certainly could not connote any submission to Police custody; and this we presume to be the reason why no reference was made in this case to *Legal Remembrancer* v. *Lalit Mohan Singh Roy* (1) since the facts in one case could have had no application to the facts in the other. We are, then, satisfied that the statements as the result of which the Police discovered the blood-stained *lathi* and the body are admissible,

Arising out of this is the conduct of the Sub-Inspector at the *bada* where the accused was asked to repeat his statements which he had already made to the Sub-Inspector at the Police Station. In re-examination the Sub-Inspector stated that the accused had told him in the first information report that the stick was lying in the hut, and that he repeated the question as he wanted the accused to make the statement before the Panches. This question was objected to by the defence Counsel as being inadmissible; nevertheless use is sought to be made of it here. In principle it is of course objectionable for a Sub-Inspector who has received information from the accused and is proceeding to act on that information to get him to repeat that information in the presence of witnesses. As stated by Burn and Lakshmana Rao, JJ. in *Public Prosecutor* v. *Subba Reddi* (12), a Police Officer ought to expect to be believed when he gives evidence on oath. But in the case before us the stricture is certainly not so well-deserved as it was in that case where the accused person was brought out of the lock-up and examined in the presence of witnesses and where the statement was embodied in a *panchnama*, and he was then apparently returned to the lock-up again, since it was quite clear that the Circle Inspector knew exactly what the accused was going to say. In the present case it may be safely presumed that the Sub-Inspector had no doubt that the accused was going to take him to the place indicated and that the people had been called so as to depose to the recovery of whatever there was to be recovered, a perfectly legitimate proceeding since a seizure memorandum has to be signed by witnesses. It may of course also be possible that the Sub-Inspector was aware that there might be some doubt as to the admissibility of what the accused had stated at the Police Station as it was embodied in a confession made to a Police Officer, in which case, if he considered that the statement might be entirely inadmissible, he was justified in taking the statement again in circumstances where it certainly was admissible.

It was also urged that the statement made to the Police Officer resulting in the discoveries made could not be used under s. 27 of the Evi. Act as the discovery of the body must already have been known to numerous people. It has not been proved that anybody else had seen the body or was aware where the stick had been placed until the spot was pointed out by the accused. No evidence was led on the point neither was this elicited in cross-examination from the prosecution witnesses. Even if other people had discovered the body or the blood-stained stick after the accused had left his village to make a report at Hinganghat, that would be entirely immaterial, and the argument could only have force if it were shown that by the time the second statement was made the Police were aware from other sources that the stick and the body were actually to be found in such places. There is no evidence whatever that anyone else informed the Police where these things were or that the Sub-Inspector who had certainly

(12) A I R 1939 Mad. 15 (17); 180 Ind. Cas. 590; 40 Cr. L J 433; (1938) M W N 1118; 48 L W 780; 11 R M 728.

arrived at Waldhur a short time before the accused, had been shown any object connected with the crime.

Turning now to the examination of the accused, the learned Sessions Judge, although he does not say so in so many words, appears to indicate that there might be some doubt as to the propriety of question No. 3 put to the accused in the committing Magistrate's Court. We reproduce the questions and answers seriatim and number them:

Q. From the statement of witnesses it appears that there was illicit intimacy between M*st.* Gaji Pardhanin and you and that she had been trying to live with you. What have you to say?

A. She used to work in my garden and at cultivation. I had no illicit connection with her.

Q. Then from the statement of witnesses it appears that she came to your hut on the night of April 3, 1940 and made an attempt for living with you, that you then turned her out and taking her to the *nullah* you struck her on the head with this *lathi* (Art. A) as a result of which she died. What have you to say?

A. Yes Sir, I gave her a blow with *lathi* (Art. A) on her head. She fell down in the *nullah* and died.

Q. On the following day in the morning you came to Hinganghat and related all this to your master's Dewanji Devidas and he brought you to the Station-house where you made this report (Ex. P-1 read over to the accused) to the Station-house Officer. What have you to say?

A. I had told this fact to my master's Dewanji and exactly the same thing to the Station-house Officer. My report which had been read over to me is true.

Q. Then you took the Station-house Officer and the Panches to your hut and produced this stick (Art. A) from under the cot. To whom does this *lathi* belong?

A. This *lathi* is mine. I produced it to the Station-house Officer.

Q. After this you pointed out the spot where the corpse lay to the Station-house Officer and the Panches. What have you to say?

A. Yes Sir.

Q. Have you to state anything else?

A. Your honour is *ma-bap*.

We do not consider that there is any impropriety in any of the questions. The inadmissibility of the confessional part of the first information has not the complete bearing on the question which the learned Counsel would ask us to hold that it has, since there is the admission of Devidas, and on his statements the questions could be properly put. Question No. 2 gives the circumstances leading up to the fact that he had confessed that he had struck the woman a fatal blow and he admits that he did and that she fell down in a *nullah* and died. Nor can we see any objection to question No. 3 on which the learned Judge has come to no definite conclusion. It cannot be disputed that the accused did go to Hinganghat that morning, and there was evidence that he had related the circumstances to Devidas. It is also obvious that he did go to the Police Station, and the question is well within the proper limits of s. 342, of the Criminal P. C., in that it is put to give him an opportunity to explain salient points in the evidence against him, points which are likely to prove fatal unless explained, and the answer of the accused is in fact an answer to every part of the question, namely, that he says that he told the fact to his master's Dewanji and told exactly the same thing to the Station-house Officer. We do not consider that anything in this examination can be said to be improper.

The learned Counsel in attacking the conviction on all the points of law to which we have referred omitted to consider, even if the propositions of law advanced were sound, the effect of the extra-judicial confession made to Devidas That extra-judicial confession is undoubtedly admissible. It was of course retracted in the Sessions Court, but the fact that it was made appears to us undisputable. It was a natural thing for an honest man to do, and his conduct in going to the Police Station accompanied by Devidas (and his conduct is of course relevant) is inexplicable on any other ground than that he had come to Hinganghat with the intention of telling his master what he had done and in his master's absence he told his representative Devidas. The subsequent discoveries fully corroborate this extra-judicial confession, and on that alone the conviction could be sustained. There is also the full confession made in the committing Magistrate's Court.

The accused has been sentenced to death.

There is no doubt from the medical evidence that he did strike more than one blow and that all the blows were delivered on the woman's head. We see no reason to disbelieve the circumstances as given by the accused, and indeed there is no evidence on the record to contradict them. Although we agree that the provocation was not sufficiently grave or sudden to take the offence outside the provisions of s. 302 of the I. P. C., there was nevertheless some provocation which can be urged for the passing of the lesser sentence which the law permits. A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion—and in this case the suggestion amounted to importunity—that he should instal her as a permanent mistress, which would undoubtedly result in heavy caste penalties. That there had been importunity and argument is deducible from the fact that he undoubtedly escorted the woman from his hut to the place where the body was found, a distance of some 150 yards, and it is evident that he was trying to get rid of the woman who was doing her best to persuade him to instal her permanently. We do not consider that she was taken to the *nulla* with the express purpose of being killed in a secluded spot; the subsequent conduct of the accused negatives this. Taking these circumstances into consideration we consider that the punishment of transportation for life is more suitable. The appeal is accordingly dismissed, but the sentence of death is not confirmed and that of transportation for life is substituted for it.

D. *Appeal dismissed,*

PATNA HIGH COURT

Criminal Revision Petitions Nos. 75 of 1938 and 7 of 1939

May 11, 1939

FAZL ALI AND MANOHAR LALL, JJ.

RADHAKRISHNA DAS AND ANOTHER —PETITIONERS

versus

HARI NAIK—OPPOSITE PARTY

Patna High Court Rules, Chap. III, rr. 3, 13, 16, Chap. XIII, r. 10—"Affidavit", meaning of—Petitioner verifying statements in petition by solemn affirmation —Person verifying petition must appear before Commissioner for oaths to verify it—O. VI, r. 15, Civil Procedure Code (Act V of 1908), if applies to applications to High Court — Petition verified by petitioner himself, if requires court-fee under r. 10, Chap. XIII—Recasting of rules suggested.

The word "affidavit" is comprehensive enough to include both statements sworn to and affirmed and although a distinction is drawn in r. 3 of the Patna High Court Rules between the verification of a petition by solemn affirmation and its verification by an affidavit, there are several rules in Chap. III which show that where the facts stated in a petition are verified by the solemn affirmation of the petitioner the procedure should be the same as when they are verified by an affidavit and it is obvious from rr. 13 and 16 that the person verifying the petition must appear before the Commissioner for Oaths to verify it. There is nothing in Chap. III or any other Chapter of the Rules to show that O. VI, r. 15, Civil P. C., has been made applicable to applications filed in the High Court.

The rules of the High Court ought to be recast in plainer language and if in fact it is intended that a petition which is verified by the petitioner himself does not require a court-fee under r. 10 of Chap. XIII, it must be said so in clear language.

Cr. R. P. from an order of the Sessions Judge, Ganjam, Puri Division, Berhampur, dated August 30, 1938.

Mr. *M. S. Rao*, for the Petitioner.

Mr. *C. M. Acharya*, for the Opposite Party.

Fazl Ali, J.—These two revisions may be conveniently dealt with together, but before dealing with their merit I wish to refer to two preliminary questions of some importance which arise in Criminal Revision No. 7 of 1939 (*Gaji Das* v. *Hari Naik*). These questions are (1) whether the application presented by the petitioner Gaji Das in this Court has been properly verified as required by r. 3, Chap. III of the Rules of the Patna High Court, (2) whether a court-fee of Rs. 2 is chargeable when the verification is made by the petitioner himself and not by a person other than the petitioner. Gaji Das has not filed any affidavit in support of the statements made in his petition nor did he appear before the Commissioner for Oaths at Cuttack to verify them by his solemn affirmation. He has merely signed a declaration at the end of the petition which runs as follows :

"I Gaji Das, the abovenamed petitioner, do solemnly affirm and declare that the above facts are true, to the best of my knowledge, that this my declaration is true, that it conceals nothing and that no part of it is false."

Mr. Subba Rao, who appears on behalf of Gaji Das, asks us to hold that such a verification is in order and has been made in compliance with r. 3 of Chap. III. His contention is that when a petition is verified by the petitioner himself, all that he is required to do is to verify it in the manner in which pleadings are verified in a civil suit and it is not necessary for him to verify it in the presence of a Commissioner

for Oaths or any other officer. In my opinion, this contention is not borne out either by r. 3 or any of the other rules of Chap. III. Rule 3, runs as follows :

"The facts stated in every petition shall be verified either by the solemn affirmation of the petitioner or by an affidavit to be annexed to the petition."

No doubt this rule draws a distinction between verification by the solemn affirmation of the petitioner and verification by an affidavit, but there are several rules in Chap. III which show that where the facts stated in a petition are verified by the solemn affirmation of the petitioner the procedure should be the same as when they are verified by an affidavit. Rule 13 provides that :

"Every Commissioner before whom a petition is verified or an affidavit is made shall, at the end of the petition or affidavit, certify the verification of the petition or making of the affidavit in the prescribed form."

Again r. 16, states that :

"Every person verifying a petition or making an affidavit, if not personally known to the Commissioner before whom the petition is verified, or the affidavit is made, shall be identified to such Commissioner by some one known to him, and the Commissioner shall state at the foot of the petition or affidavit, as the case may be, the name, address and description of the person by whom the identification was made."

It is obvious that these provisions would have been unnecessary in so far as they relate to the verification of a petition by solemn affirmation, if it was intended that the person verifying the petition need not appear before the Commissioner for Oaths to verify it. There is also no justification for holding that the verification by solemn affirmation referred to in r. 3 should be made in the same manner as the verification of pleadings in a civil suit. So far as verification of pleadings is concerned, it is governed by a specific rule of the Civil P. C. that rule being O. VI, r. 15. There is, however, nothing in Chap. III or any other Chapter of the Rules of this Court to show that O VI, r. 15, has been made applicable to applications filed in the High Court. These applications are governed by a different set of rules and must conform to them. Besides the use of the words 'solemn affirmation' suggests that it is to be made before a Court or some person authorised to administer oaths and affirmations. I am therefore unable to hold that the petition of Gaji Das has been properly verified. At the same time it must be conceded that the points raised in this case have brought to light certain defects in the rules relating to the verification of applications. The word 'affidavit' is defined in Bouvier's Law Dictionary as follows :

"A statement or declaration reduced to writing or sworn to or affirmed before some officer who has the authority to administer oath or affirmation."

Thus, this word is comprehensive enough to include both statements sworn to and affirmed. Notwithstanding this, r. 3 is so drafted as to suggest that there is some distinction between the verification of a petition by solemn affirmation and its verification by an affidavit. There are certain other rules in Chap. III which also seem to draw a distinction between the "verification of a petition" and an 'affidavit' : *see* rr. 13, 16, 17, 18 and 19. Rule 11 says that

"when the petitioner in any petition or the declarant in any affidavit, speaks to any facts within his knowledge, he must do so directly and positively using the words 'I affirm (or make oath) and say'."

The language of this rule suggests that those who framed it intended to draw a distinction between a verification by a petitioner and an affidavit by a declarant, but it is not clear why it was necessary to make that distinction. Again, as I have already pointed out, on reading the various rules of Chap. III it would appear that those who framed them must have intended that where a petition is verified on oath or by solemn affirmation, the oath or affirmation should as a rule be administered by the Commissioner for Oaths, yet curiously enough there is no rule expressly requiring a petitioner to appear before the Commissioner for the purpose of verifying his petition or swearing an affidavit. In view of these defects it is difficult to reject this petition merely on the ground that it does not conform to r. 3.

The second question also is not free from difficulty. It appears that according to r. 13, Chap. XIII (Part III of the Patna High Court Rules) a fee of Rs. 2 is leviable "for swearing or affirming every affidavit intended to be used in the High Court." It is contended by the learned Advocate appearing for the petitioner that if this rule is read along with some of the rules of Chap. III where a distinction has been drawn between a verified petition and an affidavit, one must hold that the fee of Rs. 2 can be levied only when an affidavit or a declaration by a person other than the petitioner is either sworn or affirmed, and not when the petition is verified by the petitioner on solemn affirmation. It is suggested that the word 'affirming' has been used in contrast with the word 'swearing' in this rule because the Oaths Act permits the making of an affirmation

where a party has some objection to taking an oath, and it is contended that where the application is verified by the petitioner himself it is only just that no fee should be charged because the petitioner is already required to pay a court-fee on the petition itself. Some of these arguments can be easily met, but it does appear to me that the rule is not clear, and I am therefore not disposed to reject the present application on the ground that it is not sufficiently stamped. In my opinion, the rules ought to be recast in plainer language and if in fact it is intended that a petition which is verified by the petitioner himself does not require a court-fee under r. 10 of Chap. XIII it must be said so in clear language.

As to the merits of these two applications there is very little indeed to be said. In both the cases the petitioners sought to prosecute one Hari Naik for making certain false statements before a Deputy Magistrate in criminal case. In Criminal Revision No. 7 of 1939 the Magistrate refused to make a complaint under s. 476, Criminal P. C., and an appeal from his order was dismissed by the Sessions Judge. Both the Magistrate and the learned Judge were of the opinion that contradictory statements were made by the opposite party in a state of confusion and that it was not expedient in the interest of justice that a complaint should be lodged. In Criminal Revision No. 75 of 1938 the trying Magistrate made a complaint to the District Magistrate, but the complaint was dismissed by the latter on a similar ground and the order of the District Magistrate was upheld on appeal. In my opinion, no case has been made out for setting aside the order of the learned Sessions Judge refusing to direct the prosecution of the opposite party under s. 193, I. P. C. The result is that both the applications are dismissed.

Manohar Lall, J.—I agree.

S. *Applications dismissed.*

MADRAS HIGH COURT

Referred Trial No. 42 and Criminal Appeals Nos. 197 and 198 of 1940

April 30, 1940

BURN AND LAKSHMANA RAO, JJ.

In re KARUPPAN CHETTI AND ANOTHER—ACCUSED.

Criminal trial—Confession—Divergences between confessions before Police and Magistrate—If ground for rejecting them—Evidence Act (I of 1872), s. 30—Confession by accused implicating co-accused—Evidentiary value of—It can be used as positive evidence.

Slight divergences between the two confessions the one made to the Police Officer and the other to the Magistrate or the omissions from the confessions of facts spoken to by the prosecution witnesses are not sufficient reasons for rejecting the confessions.

The confessions of an accused implicating the co-accused are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under s. 30, Evi. Act, along with such other evidence as there may be. Such confessions may help the Court to decide whether the other evidence is or is not credible. It cannot, however, supply the place of positive evidence regarding the commission of the crime.

Refd. T. and Cr. As referred by the Additional Session Judge, Madura Division, in C. C. No. 119 of 1939.

Messrs. *K. S. Jayarama Iyer, N. Krishnamurthi* and *C. K. Venkatanarasimham*, for the Accused.

The Public Prosecutor, for the Crown.

Burn, J.—The appellants were accused Nos. 2 and 3 in S. C. No. 119 of 1940 in which the learned Additional Sessions Judge of Madura tried them and one Pethnasami Chetti (accused No. 1) on the charge that accused Nos. 2 and 3 had murdered one Chockalingam Chetti, on June 17, 1939 and that accused No. 1 had abetted the commission of the murder by them. The learned Additional Sessions Judge considered that the evidence of abetment by accused No. 1 was insufficient and acquitted him, but accused Nos. 2 and 3, the learned Additional Sessions Judge, agreeing with the assessors, found guilty of the offence of murder.

There is no doubt about the fact that Chockalingam Chetti was murdered on the night of June 17, 1939, at Bodinaickanur. He was stabed in 24 places and his head was cut off. The case was undoubtedly one of murder. The chief evidence against the appellants consisted of confessions made by accused No 3. He was arrested on June 26, in the house of a country doctor (P. W. No. 29) to whom he had gone for treatment of a wound on his leg. When the Circle In-

spector saw him, accused No. 3 made a long confession to the Inspector which has been recorded in Ex. AA. The learned Additional Sessions Judge has only admitted in evidence under s. 27, Evi. Act, certain portions of this statement which in his opinion relate distinctly to important facts discovered in consequence of the information given by accused No. 3 Accused No. 3 said that he was prepared to show the weapon which had been used by himself and accused No. 2 in killing Chockalingam Chetti. He also said that he would show the place where the head had been buried separately from the trunk. He took the Police to a place about a furlong to the north of Bodipuram and there he produced from under a bush a dagger(M.O. No. 1) and an aruval (M. O. No. 2). According to his story the dagger had been used by himself and the aruval by accused No. 2. The evidence of the doctor who made the *post mortem* examination showed that at least two kinds of weapons had been used, a stabbing instrument and an ordinary cutting instrument. Accused No. 3's story that M. Os. Nos. 1 and 2 were the weapons used may therefore be true but it was not confirmed by the results of chemical and serological examination. The chemical examiner was unable to find blood on the dagger (M. O. No. 1). He found blood on the aruval (M. O. No. 2) but it was in such a disintegrated condition that it was not possible to apply the test for human blood. Accused No. 3 also pointed out the place where he said the skull had been buried. Here again information was not fully corroborated by the fact discovered for the skull was not found there. It was corroborated to some extent however because the Police found a nasty smell and some human hair. A human skull was found a few days later about a furlong further off, and the lower jaw bones separated from it. The doctor was able to find that the jaw bones fitted the skull but he was not able to say that the skull was the skull of the person to whom the trunk had belonged.

Accused No. 3 was taken before the Sub-Magistrate on 28th. On July 1, he made a long and detailed confession to the Sub-Magistrate of Tirumangalam which is Ex. J. The Sub-Magistrate took all the possible precautions to ensure that he should not make a confession of any kind unless he really wanted to do so and the Sub-Magistrate was satisfied that he was making a statement voluntarily. Accused No. 3 persisted in confessing throughout the proceedings in the Court of the Magistrate who held the preliminary enquiry. When he was questioned on September 30, 1939, more than three months after the offence, he again repeated his confession and in fact added details which he had not mentioned before. The Sub-Magistrate decided to commit the three accused for trial on October 4, and even on that date when accused No. 3 was asked if he had any witnesses to be examined in the Sessions Court he said that he had none, but he did not disown his confessions. This is somewhat important because the plea of learned Counsel for accused No. 3 is that his confessions ought to be held to be irrelevant as having been made under inducement. It was alleged that the Inspector of Police had induced him to confess by promising that he should be taken as an approver.

If the confessions of accused No. 3 are true, there is no doubt about his participation in the murder of Chockalingam Chetti for he says that he stabbed him in several places. We have been asked to say that the confessions cannot be relied upon because they do not tally with all the evidence that has been given by the prosecution witnesses and because they are not idential. There are slight differences between the confessions made on July 1, and on September 30. We do not think, however, that these divergences between the two confessions or the omissions from the confessions of facts spoken to by the prosecution witnesses are sufficient reasons for rejecting the confessions. The allegation that the Police Inspector induced accused No. 3 to confess by promising to take him as an approver cannot be believed. It is clear, we think, that these confessions were made voluntarily by accused No. 3 and that, so far as concerns his participation in the murder, they are true. They are rather strongly corroborated by the discovery on information given by him of the two weapons and of the place where something dead had been buried. The confessions are strongly corroborated by the evidence given by three witnesses, P. Ws. Nos. 27, 28 and 29. As already stated, accused No. 3 was arrested in the house of P. W. No. 29 who is a country physician. Accused No. 3 had been taken to that house by his relation P. W. No 27 and by P. W. No. 28. All these three witnesses said that when he was asked to explain the wound on his legs, accused No. 3 admitted that he and accused No. 2 at the instigation of accused No. 1 had killed a Chetti in Bodinaickanur. The assessors and the learned Sessions Judge, we think, were undoubtedly right in holding that accused No. 3 was

guilty of the offence of murder. We confirm his conviction for murder and also the sentence of death and dismiss his appeal.

The case of accused No. 2 is quite different. The evidence against him was that of several witnesses who said that, on three or four days before this murder was committed they had seen him in company with accused No. 3 in Bodinaickanur. Accused No. 3 belongs to Mallapuram which is a long way from Bodinaickanur. There was evidence also given by P. W. No. 26 that on the night of June 17, accused No. 2 went to Bodipuram along with accused No. 3 and both of them entered the house of accused No. 2. The evidence of P. W. No. 26 was accepted by the learned Sessions Judge. Learned Counsel for accused No. 2 has criticised the evidence of P. W. No. 26 rather severely because he was unable to explain consistently how he happened to get up and come out of doors in the middle of the night and see accused Nos. 2 and 3. In one place he said that he thought somebody was knocking at the door of the house in which he was sleeping. But in the Sessions Court he says that he got up and came out because he heard somebody knocking at the door of the house of accused No. 2. The learned Sessions Judge was apparently impressed by the demeanour of this witness and we find it difficult to reject his evidence. Besides this, the only other item of evidence against accused Nos. 2 was given by a Police foot-print expert. In the confession of accused No. 3 before the Sub-Magistrate on July 1, it was stated that, after committing the murder, accused Nos. 3 and 2 ran away in a north easterly direction and passed over some clay bricks which had been laid to dry. When these bricks were examined, marks of human feet were found on them. The foot-print expert took specimen prints from the feet of accused Nos. 2 and 3 in clay which was as nearly as possible of the same texture as that of the bricks found near the brick kiln. Having compared these test prints with the prints found on the bricks near the kiln, the expert said that in his opinion the foot-prints had been made by accused Nos. 2 and 3. We have examined the prints ourselves and find it very difficult to express any opinion.

It is quite conceivable that the eye of the expert can see a good deal more in matters of this kind than an untrained eye. But it has to be remembered that the brick kiln where these foot prints were found is about a quarter of a mile away from the place where Chockalingam Chetti was murdered. The positive evidence therefore even if it is all accepted, is simply that before the murder the 2nd accused was in the company of the third ; immediately after the murder, or very shortly after the murder, he was in company with accused No. 3 and his foot-prints have been found alongside the foot-prints of accused No. 3 on some soft bricks about a quarter of a mile away from the scene of the crime. On these facts learned Counsel for accused No. 2 asked us to say that accused No. 2 cannot be held guilty of the murder of Chockalingam Chetti. We think that this contention is well founded. Accused No. 3 implicated accused No. 2 in the crime in his confessions and if accused No. 3's confessions are true, accused No. 2 took in fact a leading part in the killing of Chockalingam Chetti. But the confessions of accused No. 3, as has frequently been held, are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under s. 30, Evi. Act, along with such other evidence as there may be. This has been generally interpreted to mean that confessions like these given by accused No. 3 in this case may help the Court to decide whether the other evidence is or is not credible. It cannot however supply the place of positive evidence regarding the commission of the crime. In the present case, for instance, if we were in doubt as to the credibility of the evidence given by P. W. No. 26, that doubt might be resolved by taking the confessions of accused No. 3 into consideration. But since the rest of the evidence does not show that accused No. 2 took part in the crime the confessions of accused No. 3 cannot be used to supplement it and to furnish the sole evidence of the actual murder. The circumstances proved against accused No. 2 by the witnesses to whom we have referred, do not in our opinion lead inevitably to the inference that he took part in the murder of Chockalingam Chetti. For these reasons, we set aside the conviction of accused No. 2 and the sentence of death and direct that he be set at liberty.

N.-S. *Order accordingly.*

ALLAHABAD HIGH COURT
Full Bench
Second Appeal No. 24 of 1938
November 22, 1940
THOM, C. J., GANGA NATH AND BRAUND, JJ.
MAHA RAM AND ANOTHER—DEFENDANTS —APPELLANTS
versus
HARBANS—PLAINTIFF—RESPONDENT

Agra Tenancy Act (III of 1926), ss. 271, 264—Issue submitted to Civil Court under s. 271—Application to Civil Court to refer issue to arbitration—Sch. II, Civil Procedure Code, if applies to such application—S. 271, if requires personal decision by Court—Reference by Civil Court to arbitration—Decision based on award is decision of Court—Reference to Civil Court under s. 271, whether delegation of authority by Revenue Court—Revenue Court, if competent to pass decree on basis of Civil Court's judgment—Sch. II, Civil Procedure Code applies to proceedings under s. 271 in Civil Court by virtue of s. 141 Civil Procedure Code—Reference by Civil Court to arbitration, of issue referred to it under s. 271—Finding based on such award, validity—Reference to arbitration, if inconsistent with s. 271 within meaning of s. 264—Civil Procedure Code (Act V of 1908), S. 141, Sch. II—Sch. II deals with procedure only—If covered by s. 141—Arbitration—Parties to reference and arbitrators aware of subject-matter of reference—Award made with respect to such subject-matter—Objection that application for reference did not specify matter of reference, if can be raised in second appeal.

The provisions of Sch. II, Civil P. C., clearly apply to applications in a suit. An application made to the Civil Court to whom the issue of proprietary title had been referred under s. 271 Agra Ten. Act praying that the issue be referred to Arbitration is an application in a suit and hence governed by Sch. II, Civil P. C. [p. 19, col. 1.]

There is nothing in s. 271, Agra Ten. Act from which it can be inferred that the Legislature intended that the decision of the Civil Court should not proceed upon an arbitration award. Where there has been a reference to arbitration and the award has been accepted, the decision in the suit is the decision of the Court, notwithstanding the fact that the Judge himself is not the person who has decided the question in issue between the parties. The provisions of O. XX, Civil P. C., governing the delivery of judgments and the granting of decrees, etc. relate, just as clearly as s. 274, Agra Ten. Act, to judgments and decrees of the Court. The provisions of Sch. II, of the Code however are without doubt applicable to proceedings in the Courts and decisions based upon arbitration awards are decisions of the Courts. [*ibid.*]

There is no delegation by the revenue Court under s. 271 Agra Ten. Act. The provisions in regard to reference of an issue to the Civil Court are mandatory. The revenue Court has no discretion in the matter. In so far as this issue is concerned, the Civil Court is a Court of original jurisdiction, and in disposing of the issue that Court is not exercising an authority delegated by the Revenue Court. The Civil Court is in fact seised of the suit in which the issue referred to it under s. 271 arises and is therefore competent to refer the issue to arbitration under Sch. II, Civil P. C. *Nand Ram* v. *Fakir Chand* (2), doubted.

Para. 16 (2) of Sch. II, Civil P. C., does not provide that the decree which is to follow upon the judgment must be the decree of the Court which granted the application to refer an issue to arbitration. Hence the Revenue Court is competent to pass a decree on the finding of the Civil Court on an issue submitted to it under s. 271 even though the finding is based on an award in arbitration. [p. 19, col. 2.]

Section 141, Civil P. C., applies to all proceedings in any Court of civil jurisdiction and is not restricted to original proceedings. The proceedings in the Civil Court after the record has been sent to that Court by the revenue Court in accordance with s. 271, Agra Ten. Act, are undoubtedly proceedings in a Court of civil jurisdiction. Hence Sch. II, Civil P. C., applies to such proceedings by virtue of s. 141. Consequently the Civil Court has jurisdiction to refer the issue submitted to him under s. 271, Agra Ten. Act, to arbitration and the finding based upon the award in the arbitration is a valid finding and the decree of the Revenue Court based upon such finding is perfectly legal. Reference to arbitration by the Civil Court of the issue submitted to it under s. 271 is not inconsistent with s. 271, within the meaning of s. 264. *Thakur Prasad* v. *Fakirullah* (3), explained and distinguished. 103 Ind. Cas. 69 (4), and 96 Ind. Cas. 705 (5), not approved. *Risal Singh* v. *Bhola Ram* (6) distinguished 3 Ind. Cas. 904 (7), approved.

Schedule II, Civil P. C., is procedure and nothing else but procedure. The right to arbitrate is not conferred by Sch. II. This right is a common law-right which is part of the right of contract. Schedule II, merely provides for the manner in which after a suit has been instituted the right may be exercised. Schedule II, is therefore covered by s. 141. [p. 21, col. 2.]

Where in a case of a reference to arbitration by the Court, the parties as well as the arbitrators are well aware of the subject-matter of the reference and the arbitrators have passed an award with respect to that matter, an objection that the actual application for a reference to arbitration did not specify the matter to be arbitrated upon cannot be allowed to be raised for the first time is second appeal. [p. 26, col. 1.]

S. A. from the decision of the Additional District Judge, Meerut, dated November 29, 1937.

Messrs. *P. L. Banerji* and *Jagnandan Lal*, for the Appellants.

Mr. *G. S. Pathak*, for the Respondent.

Thom, C. J.—This is a defendants' appeal arising out of a suit under s. 44, Agra Ten. Act. The plaintiff sought to eject the defendants from certain plots of land. The defendants in their defence pleaded that they were proprietors of these plots and not tenants. In these circumstances the revenue Court in which the suit was instituted referred an issue on the question of proprietary title to the Civil Court under s. 271, Agra Ten. Act. The record of the suit was submitted to the Civil Court as directed by s. 271, Agra Ten. Act. The parties thereupon presented a joint application to the Munsif in which they prayed that the matter in issue be

referred to arbitration. The issue was referred to arbitration and in accordance with the provisions of Sch. II, Civil P. C., arbitrators were appointed and award was pronounced. Objections to the award which was against the defendants were dismissed by the learned Munsif who accepted the award, decided the issue submitted to him in terms of the award and sent back the record with his finding to the Court of the Assistant Collector. The Assistant Collector accepting the finding decreed the suit. The defendants appealed to the District Judge on two grounds. Firstly, they challenged the decree of the Assistant Collector upon the ground that it had proceeded upon an invalid finding. It was contended that the Munsif had no jurisdiction to refer the issue submitted to him to arbitration and that therefore his finding based upon the arbitrators' award was invalid. The decree of the learned Assistant Collector which followed the finding of the learned Munsif based upon the award was consequently invalid. The appellants also objected to the decree of the Assistant Collector upon the further ground that the Assistant Collecter had refused them leave to amend their written statement.

The District Judge rejected both contentions and dismissed the appeal. In second appeal in this Court the decision of the District Judge is challenged only upon the first ground, *viz.*, that the finding of the Munsif, on which the revenue Court's decision is based, is invalid for the reason that the Munsif had no jurisdiction to refer to arbitration the issue referred by the revenue Court under s. 271, Agra Ten. Act.

Section 271 provides :

"(1) If (*a*) in any suit or application filed in a revenue Court against a person alleged to be the plaintiff's tenant or under s. 44, the defendant pleads that he is not a tenant, but has a proprietary right in the land, or (*b*) in any suit instituted under Chap. XIV, the defendant pleads that the plaintiff has not got the proprietary right entitling him to institute the suit, or (*c*) in any suit instituted under s. 121 a dispute as to the proprietary right in the land in suit is raised,

and such question of proprietary right has not been already determined by a Court of competent jurisdiction, the revenue Court shall frame an issue on the question of proprietary right and submit the record to the competent Civil Court for the decision of that issue only."

For the appellants it was contended that the provisions of Sch. II, Civil P. C., which relate to arbitration in a suit are not applicable to proceedings in a Civil Court where as issue has been referred by the revenue Court under s. 271, Agra Ten. Act. Paragraph 1 of Sch. II provides :

"(1). Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced, apply to the Court for an order of reference."

Paragraph 3 provides :

"(1). The Court shall by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time at it thinks reasonable for the making of the award, and shall specify such time in the order. (2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter 'in the same suit.'"

Paragraph 16 provides :

"(1). Where the Court sees no cause to remit the award or any of the matters referred to arbitration for consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award."

It was urged on behalf of the appellants that the arbitration provisions of the Civil P. C. apply to proceedings in a suit and not to proceedings which are not proceedings in a suit such as for example, proceedings in the Civil Court to which an issue has been referred under s. 271, Agra Ten. Act. A suit was a proceeding, it was maintained, which commenced with the presentation of a plaint and for this proposition the appellants relied on the case in *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd* (1). In that case the Privy Council held that a suit was a proceeding which commenced with the presentation of a plaint. The question raised in the appeal before the Privy Council was as to whether an application by a liquidator under s. 186, Companies Act, was a suit within the meaning of s. 3, Lim. Act. The Board held that such an application was not a suit inasmuch as it had not commenced with the presentation of a plaint. Learned Counsel for the appellants maintained that the proceedings in the Civil Court following the submission of the record under s. 271, Ten. Act, by the revenue Court had not commenced with the presentation of a plaint. They were therefore not a proceedings in the suit and conse-

(1) (1933) A L J 175, 142 Ind. Cas. 7; A I R 1933 P C 63; 54 A 1067; 60 I A 13; Ind. Rul. (1933) P C 43; (1933) M W N 190; 35 Bom L R 319; 37 L W 445; 64 M L J 403; 37 C W N 379; 57 C L J 166 (P C).

quently the Munsif had no jurisdiction to refer the issue submitted to him to arbitration. This contention in my judgment is unsound.

The provisions of Sch. II, Civil P. C., clearly apply to application in a suit. The application made to the Munsif to whom the issue of proprietary title had been referred praying that the issue be referred to arbitration was in my opinion an application in a suit. No doubt the suit was instituted in the revenue Court; nevertheless, the proceedings in the Civil Court were not separate and independent proceedings. They were proceedings in the suit itself. In these proceedings, in fact, the main issue in the suit was decided. It was maintained for the appellants however that it was plain from the terms of s. 271, Agra Ten. Act, that the Legislature had excluded the proceedings in the Civil Court under that section from the operation of Sch II. Civil P. C. In this connection Counsel relied upon the terms of s. 264 of the Act. Section 264 *inter alia* provides that

"the provisions of the Civil P. C. shall not apply to provisions inconsistent with anything in the Agra Ten. Act."

Section 271, it was urged, specifically directed that the issue submitted by the revenue Court should be decided by the Judge of that Court himself and that therefore the arbitration provisions of the Civil P. C. were inconsistent with the provisions of that section. The terms of s. 271 do not support this contention. The section directs that

"the revenue Court shall frame an issue on the question of proprietary title and submit the record to the competent Civil Court for the decision of that issue only."

There is nothing in my view in this provision from which it can be inferred that the Legislature intended that the decision of the Civil Court should not proceed upon an arbitration award. Where there has been a reference to arbitration and the award has been accepted, the decision in the suit is the decision of the Court, notwithstanding the fact that the Judge himself is not the person who has decided the question in issue between the parties. It may be observed in this connection that the provisions of O. XX, Civil P. C., governing the delivery of judgments and the granting of decrees, etc. relate, just as clearly as s. 271, Agra Ten. Act, to judgments and decrees of the Court. The provisions of Sch. II of the Code however are without doubt applicable to proceedings in the Courts and decisions based upon arbitration awards are decisions of the Courts.

It was further maintained for the appellants that on the principle of *delegatus non potest delegare* the Munsif had no jurisdiction to refer the issue submitted to him to arbitration. In support of this contention reliance was placed on *Nand Ram* v. *Fakir Chand* (2). In that case a Bench of this Court decided that a Court to which an issue had been referred under O. XLI, r. 25 (which corresponds to s. 566 of the old Civil P. C., had no jurisdiction to refer an issue to arbitration. In my opinion, this is a somewhat doubtful decision, but it is not necessary in the present appeal to consider the question therein decided. It is sufficient to point out that there is no delegation by the revenue Court under s. 271, Agra Ten. Act. The provisions in regard to reference of an issue to the Civil Court are mandatory. The revenue Court has no discretion in the matter. The Legislature has in fact appointed the Civil Court as the forum to which questions of proprietary title must be taken. In so far as this issue is concerned, in short, the Civil Court is a Court of original jurisdiction, and in disposing of the issue that Court is not exercising an authority delegated by the revenue Court.

The appellants further contended that "Court" referred to in the provisions of Sch. II, Civil P. C., was the Court seised of the suit. The revenue Court, originally, in the present appeal was the Court which was seised of the suit and therefore it was urged the arbitration provisions were not applicable. Learned Counsel for the appellants particularly relied upon para. 16 (2) of Sch. II, which provides that upon a judgment following an award "a decree shall follow." It was contended specially that the decree must be the decree of the Court which referred the issue to arbitration. Upon a consideration of the terms of s. 271 however I am satisfied that the Civil Court was in fact seised of the suit. The section directs that the record shall be submitted to the Civil Court after an issue is framed. When the record has been received by the Civil Court it is clear in my opinion that the suit is pending in that Court. Where there is a question of proprietary title in a suit under s. 44, Agra Ten. Act, there is a divided jurisdiction. The Revenue Court may not

(2) 7 A 523; A W N 1885, 139.

determine the issue of proprietary title. That issue is reserved for the Civil Court. So far as that issue is concerned therefore after the record has been sent to the Civil Court that Court is seised of the suit. It is to be observed further that para. 16 (2) of Sch. II, does not provide that the decree which is to follow upon the judgment must be the decree of the Court which granted the application to refer an issue to arbitration. The Court which referred the issue to arbitration under the provisions of this paragraph "shall proceed to pronounce the judgment according to the award." The paragraph does not direct that the Court shall thereafter pass a decree in accordance with the judgment. It provides that "a decree shall follow."

In my judgment there is nothing in the provisions of Sch. II, which would justify the inference that these provisions do not apply to proceedings in Civil Courts under s. 271, Agra Ten. Act. It was contended by the respondent that even if in terms the provisions of Sch. II, Civil P. C., did not apply to proceedings in the Civil Court under s. 271, Agra Ten. Act, these provisions were made applicable by s. 141 of the Code. Section 141 provides :

"The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction."

It was urged that the proceedings in the Civil Court under s. 271, Agra Ten. Act, were "proceedings in a Court of Civil jurisdiction" and that therefore Sch. II was applicable thereto. In my judgment if the provisions of Sch. II, are not by the terms of these provisions applicable to proceedings in the Civil Courts under s. 271, Agra Ten. Act, they are certainly made applicable by s. 141 of the Code. Section 141 refers to all proceedings in any Court of Civil jurisdiction, and the proceedings in the Civil Court after the record had been sent to that Court by the Revenue Court in accordance with s. 271, Agra Ten. Act, are undoubtedly proceedings in a Court of Civil jurisdiction.

It was contended for the appellants however that s. 141 referred only to "original proceedings" and that, inasmuch as the proceedings in the Civil Court on the reference of an issue by the Revenue Court were not original proceedings s. 141 had no application. This argument was based upon a decision of the Privy Council in *Thakur Prasad* v. *Fakirullah* (3) and certain decisions which purport to follow it. Reference in particular was made to the case in *Sarat Krishna Bose* v. *Bisheshwar Mitra* (4). In my opinion the decision of the Privy Council in *Thakur Prasad* v. *Fakirullah* (3) does not support the appellants' argument and it appears to me that the decisions in *Sarat Krishna Bose* v. *Bisheshwar Mitra* (4) and in the other cases to which we were referred in which the same view of the law was taken proceed on not only a misinterpretation but on a misreading of the decision of the Privy Council. In *Thakur Prasad* v. *Fakirullah* (3) the Privy Council decided that s. 647, Civil P. C. of 1882, which corresponds to s. 141 of the Code, 1908, did not make s. 373 of the older Code applicable to execution proceedings. The facts of the case were that an appellant first applied for execution of his decrer on August 28, 1885. He did not actually prosecute that application and on January 5, 1886 his pleader stated that the case might be struck off the list of pending cases " for the present." An order was accordingly made striking the case off the list for default." On August 24, 1888 the applicant made a second application. This was within three years from the date of his first application and was in good time if the period of limitation was to be reckoned from that time but out of time if the first application was to be treated as a nullity because it had been struck off the list.

By the Civil P. C., of 1882 it was provided under s. 373 that if a plaintiff withdraws from a suit or abandons part of his claim without the permission of the Court to bring a fresh suit he shall be precluded from bringing a fresh suit for the same matter or in respect of the same part. By s. 647 of the same Code it was enacted that the procedure therein prescribed should be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction other than suits and appeals. The Board held that the provisions of s. 373 were not made applicable to proceedings in execution by virtue of s. 647. In the course of the judgment of the Board it is observed :

"It is not suggested that s 373, Civil P. C., would by its own force apply to execution proceedings. The suggestion is that it is applied by force of s. 647. But the whole of Chap. 19 of the Code consisting of 121 sections is devoted to the procedure in execution and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that

(3) 17 A 106; 22 I A 44; 6 Sar 526 (P C).

(4) 54 C 405; 103 Ind. Cas. 69; A I R 1927 Cal. 534; 31 C W N 576.

the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in probates, guardianship and so forth and do not exclude executions."

It is to be remarked that the Board's decision is confined to the question as to whether by virtue of s. 647, s. 373 is made applicable to proceedings in execution. Their Lordships decided that it was not. The Board did not decided however that s. 647 did not apply to proceedings in execution. It is further to be observed that the Board did not purport to give an exhaustive list of proceedings to which s. 647 applied. Nevertheless in the later cases to which we were referred, notably in *Sarat Krishna Bose* v. *Bisheshwar Mitra* (4) referred to above, and *Basaratulla Mean* v. *Reazuddin Mean* (5) it was assumed that the Board had decided that s. 647 did not apply to execution proceedings and that the Board did give an exhaustive list of the proceedings to which the section did apply which list could be extended only to proceedings *ejusdem generis*. In *Sarat Krishna Bose* v. *Bisheshwar Mitra* (4) for example, Mukerji, J. in interpreting the Privy Council decision observed:

"Their Lordship's decision makes it perfectly plain that this section does not apply to applications for execution, but only to original matters in the nature of suits such as proceedings in probates, guardianship and so forth."

The Board did not however decide that s. 647 applied only to such proceedings. In short, their Lordships observed that s. 647 includes original matters and not that it includes only original matters. It cannot be inferred from the decision of the Board, therefore, that s. 647, which corresponds to s. 141, Civil P. C. of 1908, did not apply to matters which were not original matters in the nature of proceedings in probates and guardianship and so forth. The decision of the Board is based upon the consideration that Chap. XIX of the Code was a self-contained chapter of 121 sections devoted to procedure in execution and further that the provisions of s. 373, Civil P. C., were inapplicable to execution proceedings. Clearly the Board did not intend to decide that s. 647 had no application at all to execution proceedings. The provisions of the Code relating to the hearing of witnesses, taking of evidence, pronouncing of judgment and passing of decrees clearly applied to Chap. XIX of the Code, but only in virtue to s. 647. In this connexion it is to be remarked that by an Amending Act in the year 1892 an explanation was added to s. 647 to the effect that this section was not applicable to execution proceedings. This explanation was omitted however from the Code of 1908 and it is permissible to conjecture that it was not repeated because it had been found in practice to be to wide in its operation. Interpreted literally, the explanation would have excluded the application of the general provisions of the Code above referred to to execution proceedings.

Now, in the present case, there is no self-contained chapter relating to proceedings under s. 271, Agra Ten. Act, comparable to Chap. XIX of the 1882 Code which corresponds to O. XXI, of the 1908 Code. Furthermore, the arbitration proceedings of Sch. II are essentially applicable to the proceedings in the Civil Court when an issue has been remitted under s. 271. The question of proprietary title raised between the parties in suits under s. 44, Agra Ten. Act, is pre-eminently a question to which the arbitration provisions of Sch. II, are easily applicable and appropriate. In short the grounds upon which the Privy Council decided the case reported in *Thakur Prasad* v. *Fakirullah* (3) are absent in the present case.

Learned Counsel for the appellants contended finally that Sch. II, Civil P. C. contained provisions which conferred substantive rights and that it was not concerned merely with the procedure and that therefore it was not covered by s. 141 which related only to procedure. This contention in my judgment is unsound. Schedule II, is procedure and noting else but procedure. The right to arbitrate is not conferred by Sch. II. This right is a common law-right which is part of the right of contract. Its existence is recognized in other statutes, for example, in s. 28, Contract Act. The exercise of the right is encouraged as a matter of policy by statute and by the Courts, and the provisions of Sch. II, Civil P. C., merely provide for the manner in which after a suit has been instituted the right may be exercised. The right to arbitrate is a valuable right. In the exercise of this right parties to a dispute may, if they are so minded, avoid the expense and delay of protracted litigation. If the Legislature had intended that the right to arbitrate should be denied to parties to a dispute in which a reference has been made under s. 271, Agra Ten. Act, it is reasonable to conclude that it would have made definite and specific provision to that effect. The Legislature would never have left the deprivation of this right to be inferred from certain provi-

(5) 53 C 679; 96 Ind. Cas. 705; A I R 1926 Cal 773; 30 C W N 570.

sions relating to procedure in which the right is not mentioned or even indirectly referred to. In the result I hold that the learned Munsif had jurisdiction to refer the issue submitted to him under s. 271, Agra Ten. Act, to arbitration, and that the finding based upon the award in the arbitration is a valid finding. In my judgment the appeal should be dismissed.

Ganga Nath, J.—I concur.

Braund, J.—I agree in thinking that this appeal must be dismissed. The only question that has been argued before us is whether a Civil Court, to which an "issue on the question of proprietary right" has been submitted under s. 271 (1), Agra Ten. Act, 1926, can itself refer that issue to arbitration under para. 1 of Sch. II, Civil P. C., 1908. As a result of the long and able arguments that have been addressed to us, I have come to the conclusion that the question is not as difficult as at first sight it would appear to be. The starting point of the enquiry is, of necessary, the true construction of s. 271, Agra Ten. Act, 1926. If the effect of that section is that the Legislature has directed that "the issue of the question of proprietary right" is to be "decided," and a "finding" on it arrived at, by the particular Civil Court to which it is submitted, and by no one else, in the sense that it is to be what I may call the "personal" decision and the "personal" finding of the Judge of the Civil Court—then '*credit questio*', because no provision of the Civil P. C., 1908, could override such a statutory direction: *See* s. 264 (*a*), Agra Ten. Act, 1906 and s. 4, Civil P. C., 1908. If, on the other hand, s. 271, Agra Ten. Act, 1906, contains, on its true construction, no such direction, then it will be open to us to consider to what extent, if at all, the procedure of Sch. II, Civil P. C., is in fact available to the parties to an issue submitted to the Civil Court under s. 271 of the Act. I think that it is right to approach the matter in this way because it seems to be the logical way to deal with it. Section 271, Agra Ten. Act, 1926, so far as it is relevant, runs thus:

"271 (1). If....., such question of proprietary right has not been already determined by a Court of competent jurisdiction, the revenue Court shall frame an issue on the question of proprietary right and submit the record to the competent Civil Court for the decision of that issue only.... (2) The Civil Court, after reframing the issue if necessary, shall decide that issue only and return the record together with its finding on that issue to the revenue Court which submitted it."

Those, I think, are the relevant parts of s. 271. What is said on behalf of the appellants is that the language of sub-s. (2), and particularly the words "shall....return.... its finding." require that the "decision" and the "finding" shall be what I have referred to above as being the 'personal' decision and finding of the Civil Court, and not a decision or finding which is merely adopted from some one else. The argument is an attractive one and has caused me some slight difficulty, but I am inclined to think that that is not the real meaning of the language used. The primary provision for the disposal of the issue is the one contained in sub-s. (1). It is that the revenue Court is to "submit the record to the competent Civil Court for the decision of that issue only." It is, to my mind, significant that it does not say that the decision is necessarily to be the decision of the Civil Court itself. There is nothing personal about it. It is submitted to the Civil Court merely "for the decision of that issue." And, so far as sub-s. (1) goes, I think that its provisions will be fully complied with, if the decision is arrived at by any of those procedural processes which under the Civil P. C. are applicable in the normal way to issues pending in a Civil Court. It seems to me that the issue will have been decided in the Civil Court to which it is submitted, if it is decided in accordance with the award of an arbitrator under Sch. II to the Code just as much as if it is decided as the result of a trial in Court. So far, therefore, as sub-s. (1) of s. 271, Agra Ten. Act, is concerned there is nothing in it which, in my opinion, requires the 'personal' decision of the Civil Court. Then comes sub-s. (2) which requires that

"the Civil Court.... shall decide that issue only and return.... its finding on that issue to the revenue Court...."

In view of the language of sub-s. (1), I think it would be reading too much into sub-s. (2) to construe it as meaning that the 'decision' and the 'finding' must be the personal decision and finding of the Judge of the Civil Court. It is true that the sub-section uses the words 'shall decide' and 'its finding,' but I do not think that a decision or finding is any the less a decision or finding of particular Court because, in arriving at it, that Court has adopted a certain form of procedure which the Civil P. C. gives the parties a right to have resort to in any suit or other proceedings pending before it. That, of course, touches on the second of the questions which will arise and which I intend to deal with later. I find a good deal of support for this view from O. XX,

r. 5 of Sch. I, Civil P. C., 1908, itself. Order XX, is the order which says how a Court which is seized of a suit is to proceed; and, by r. 5, where issues have been framed, it has to state "its finding or decision"—the same words, be it observed, as are to be found in s. 271 (2), Agra Ten. Act, 1926. And yet those words, notwithstanding s. 4 of the Code, afford not the least obstacle to the application to the issues in a suit of the arbitration provisions of Sch. II. The words 'its finding' and 'its decision' obviously do not mean in O. XX, r. 5 that the 'finding' and decision' of the Court has to be its personal finding and decision. I have difficulty therefore in seeing why, in s. 271 (2), Agra Ten. Act, 1926, they should be used in any stricter sense. For these reasons, I think that upon its true construction there is nothing in s. 271, Agra Ten. Act, 1926, which makes it intrinsically impossible to apply to an issue submitted to a Civil Court under it the procedure of arbitration sanctioned by the Civil P. C.

If therefore it is open—as I have said I think it is—to us to consider the question, the next, and only remaining, matter to consider is whether the provisions of Sch. II, Civil P. C., 1908, did in fact apply to an issue submitted by a Revenue Court to a Civil Court under s. 271, Agra Ten. Act, 1926. But before dealing with that question, I desire to refer shortly to a decision of two Judges of this Court which has, in part, given rise to this reference. The case is *Nand Ram* v. *Fakir Chand* (2). The matter arose in that case out of the submission of certain issues by a District Judge to a Subordinate Judge under s. 566, Civil P. C., 1882—now O. XLI, r. 25 of Sch. I, Civil P. C., 1908. To that extent there may be some difference between that case and the one before us, though I do not myself perceive it. The question was whether it was open to the Subordinate Judge to refer the issue remitted to him to arbitration—the same question as in the present case. It was held that it was not. The learned Judge who delivered the longer of the two judgments puts it upon the principle that it is not open to a Court to which jurisdiction has been delegated itself to delegate it.

But, with great respect, I venture to doubt, at any rate in the case of an issue submitted under s. 271 of the Agra Ten. Act, 1926, whether any case of delegation arises. The jurisdiction which the Civil Court exercises in consequence of that section is not delegated to it from any other Court. It is an original statutory jurisdiction to try a particular issue. The Civil Court is the only Court that has that jurisdiction. All that really happens is that the record is received from another Court. But that is not "delegation" of jurisdiction. Nor do I really think that the application of the arbitration provisions of Sch. II, Civil P. C., is 'delegation' either, except in the very loosest sense. It, again, is merely the exercise of a right to obtain a decision in a particular way. The arbitrators do not decide the matter 'for' the Judge, because, once an application has been made to refer a matter to arbitration under Sch. II, (assuming it applies), the Judge has lost his jurisdiction altogether, except so far as he has ultimately to pass a judgment giving effect to the arbitration. I think therefore that it is a misuse of language, at any rate in the case before us, to regard the matter as one of 'delegation' at all. The other of the learned Judges who dealt with the case to which I am now referring put it very briefly on the ground, as I read it, that the Judges' jurisdiction was limited by s. 56, Civil P. C., 1882, to deciding the issue remitted to him and extended to nothing else. I desire to say nothing here about the true construction of O. XLI, r. 25, as it does not arise. But in the present case, as I have already pointed out, I do not take the view that the jurisdiction of the Civil Court under s. 271, Agra Ten. Act, is limited in the same way as Oldfield, J., held the jurisdiction of the Subordinate Judge to be limited in *Nand Lal* v. *Fakir Chand* (2), under s. 566 of the Code of 1882. Upon the same grounds also I am prepared to distinguish *Risal Singh* v. *Bhola Ram* (6) which is also cited in the order of reference to us.

Having arrived at that point, I think that nine-tenth of the difficulty in the case is overcome. It remains to consider whether in fact there is anything in the Act or the Code which permitted resort to be had by the parties, on an issue submitted under s. 271, Agra Ten. Act, 1926, to arbitration under Sch. II, Civil P. C., 1908. In my judgment, the effect of s. 141, Civil P. C., 1908, is to make available to the parties in such a case the provisions of Sch. II, and to render a "decision" and "finding" of a Civil Court referred to in s. 271, Agra Ten. Act, arrived at and 'returned' in pursuance of such an arbitration, a valid decision, finding and return. For myself, I prefer to put this upon the footing of the applicabili-

(6) A W N 1906, 221.

ty of s. 241 of the Code rather than upon the footing that, in the circumstances of submission of an issue under s. 271, Agra Ten. Act, the "suit" itself can be said to be pending in two Courts at once and that, therefore, para. 1 of Sch. II, Civil P. C., directly applies. If I understand it rightly, that is one of the arguments addressed to us by Mr. Pathak from which he draws the conclusion that the Court referred to in that section is, or may be, the Civil Court to which the issue is remitted. I do not wish to express a concluded view upon that proposition, which, I think, as a matter of construction of the section, presents considerable difficulty and is not necessary to the decision of this appeal. I prefer to found myself upon the direct application of s. 141, Civil P. C., 1908, rather than upon the immediate application of para. 1 of Sch. II or upon an assumption, which is to my mind before, that, after proceedings have been commenced in any Court, there exists, under the Contract Act or otherwise, anything in the nature of a common law right in the parties to go to arbitration. Section 141, Civil P. C., 1908, is in these terms :

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

We have to deal with the section as it stands and the only relevance of the history of it is in order to understand the authorities which have from time to time construed it. Nor do I think that we are in this appeal in the least concerned with those numerous authorities, as such, in which it seems to have been determined that execution proceedings are not 'proceedings' within the meaning of s. 141. I should myself have entertained no doubt that, according to any ordinary use of language, an issue submitted by a revenue Court to a Civil Court under s. 271, Agra. Ten. Act, 1926, was, once it had been so submitted, a "proceeding" in a "Court of Civil jurisdiction." If it is not a proceeding, what is it? I do not think it is a "suit." If it had been, para. 1, Sch. II, would have directly applied. The word "proceedings" in the section is not in any way limited or restricted and, but for certain dicta of their Lordships of the Judicial Committee of the Privy Council, I should have been contended to assume that an issue of the kind we have before us was a "proceeding in a Court of civil jurisdiction." The passage which has raised the argument upon which Mr. Banerji relies is to be found in *Thakur Prasad* v. *Fakirullah* (3) at p. 111* where in reference to s. 647, Civil P. C. of 1892, their Lordships say :

"Their Lordships think that the proceedings spoken of in s 647, include original matters in the nature of suits such as proceedings in probates guardianships, and so forth, and do not include executions."

A good deal of use of this passage has been made, of which a decision of a Bench of two Judges of the Calcutta High Court is an example. The learned Judges in *Sarat Kriskna Bose* v. *Bisheshwar Mitra* (4), at p. 410†, in dealing with a question whether s. 141 was applicable to a proceeding for restoration of a suit under O. IX, r. 9, say :

"An elaborate research into the history of s. 141 and an exhaustive analysis of the case law bearing on it will be found in the recent judgment of Page, J., in *Basaratulla Mean* v. *Reasuddin Mean* (5). Now amidst the hopelessly conflicting mass of judicial decisions which have clustered round s. 141 and s. 647, which stood in its place before, the solid bed-rock on which it is safe to take one's stand is the decision of the Judicial Committee in *Thakur Prasad* v. *Fakirullah* (3). Their Lordships' decision makes it perfectly plain that the section does not apply to applications for execution, but only to 'original' matters in the nature of suits such as proceedings in probates, guardianships and 'so forth'. "The expression 'so forth' must, in my opinion, be read as meaning proceedings *ejusdem generis* with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificates and the like and the expression 'original matters, in my opinion confirms that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connection therewith."

With great respect I think that this passage may possibly find in the dictum of their Lordships of the Judicial Committee a good deal more than was intended by its authors. The word 'only' nowhere appears in the language used by their Lordships. They say merely that the proceedings referred to in s. 141 "include" the original matters which they specify. For myself, I doubt whether it was in their Lordships' minds to lay down that nothing that was not "original" could possibly be included in the proceedings contemplated by s. 141 of the Code and I respectfully agree with the comment to the same effect which has been made by Sir George Knox in this Court in *Khushalgir* v. *Gobindgir* (7). In any case, what they do say falls short. I think, of even a dictum that only 'original' matters fall within the 'proceedings' contemplated by the section. Even if, however, we had been bound to take the

(7) 6 A L J 760; 3 Ind. Cas. 904.

*Page of 17 A.—[*Ed.*]

†Page of 54 C.—[*Ed.*]

same view of the dictum of the Judicial Committee as the Calcutta High Court has taken of it, I should still have had no hesitation in holding that the issue of proprietary right in this case before the Civil Court was an "original matter." The issue in question started life as one of the issues involved in the suit in the Revenue Court. That suit was unquestionably an 'original' suit and the issues in it were 'original' issues or matters. All that has happened is that one of the issues in that suit has, because of the law, had to be transferred—'submitted' is the word used—to be heard in another Court—the Court. That issue has not changed its character on that account. It is the same issue that it was in the Revenue Court, where it was an 'original' issue. It is, I think, still an 'orinigal' issue in the Civil Court and, *a fortiori*, it is an 'original' matter. I think the appellant is seeking in this connection to put upon the word 'original' a meaning connoting that it must arise in the same Court as that in which the suit originated. But that, in my view, is not the meaning of the word 'original' in this context.

I think, therefore, that the hearing of this issue in the Civil Court was a 'proceeding" in the Civil Court and moreover, an 'original matter'. But then Mr. Banerji says that, even if it is, the provisions of Sch. II to the Code are not 'procedure' and cannot, therefore, be applied under s. 141. He says that the right to go to arbitration is a "substantive right" and not a matter of procedure at all. I do not agree. Schedule II provides both a right and a method by which the trial of a suit is to proceed. It provides a means for the disposal of the suit. It indicates what course the Court is to take in certain events. All this is, to my mind, 'procedure' pure and simple and none the less so because the parties are given a statutory privilege of adopting it. There are many matters of procedure which constitute 'rights' as well—the right to deliver interrogatories, to obtain particulars of pleadings, to obtain and inspect documents, and to have discovery are all 'rights' as well as matters of procedure. Finally, it is suggested that, if all else fails, then it is not procedure 'provided in this Code', because, as I understand the argument, the procedure is to be found set out, not in the body of the Code or in the rules, but in a schedule. I hardly think that this need be seriously dealt with. Schedule II is part of the Civil P. C., being introduced by s. 89, and there is nothing in the definition of the word 'Code' in s. 2 (1) which says otherwise. All that definition says is that the word 'Code' includes the rules.

There is one other matter which in deference to Mr. Banerji's careful argument, I desire to refer to. He says that, even if by virtue of s. 141, Sch. II would *prima facie* be applicable to the hearing of an issue in a Civil Court of the kind we have here, it ought, in the special circumstances of this kind of case, to be held to be excluded by implication because it is wholly inappropriate to the procedure under s. 271, Agra Ten. Act. That again, is an ingenious, but, I think false, argument. It rests on para. 16, Sch. II. That section provides (1) that the Court shall proceed to pronounce 'judgment' according to the award and (2) that the judgment shall be followed by a decree. What is said is that, if the provision of Sch. II, were applicable to an issue submitted to the Civil Court under s. 271, Agra Ten. Act, 1926, the proceedings would not result in a judgment' at all by the Court which receives the award nor, if it were, would that judgment be 'followed' by a decree of the Court that passed it. From this we are asked, I think, to conclude that there is such an inconsistency that the provisions of Sch. II must, notwithstanding s. 141, be excluded by necessary implication. It is true, I think, that para. 16 of Sch. II, had it been drafted with special reference to proceedings such as those we are considering, might have been differently worded. But I can on a reasonable construction of s. 16 see no real inconsistency. I do not think that there is any stranining of the language in treating the 'judgment' referred to in the section as synonymous with the decision and finding which the Civil Court is enjoined to return to the Revenue Court under s. 271, Agra Ten. Act, 1926, particularly having regard to the definition of 'judgment' given in s. 2 (9) of the Code. And, if that be so, then a decree would in fact 'follow' the judgment. The section says neither that the decree shall follow it immediately nor that the decree shall be by the same Court as pronounces the judgment. The decree by the Revenue Court which finally disposes of the proceedings will, I think, satisfy the section.

A final suggestion has been made that the actual application for a reference to

arbitration did not specify the matter to be arbitrated upon. It was, in fact, a carelessly drawn application. But up to this moment every one—not excluding the parties themselves and the arbitrators—has been perfectly well aware that it was the issue of proprietary right that was submitted to arbitration and that is what the arbitrators decided. This objection is taken here for the first time. It would, I think be wrong of us to entertain it. For these reasons I think that the issue of proprietary right submitted to the Civil Court was one which was capable of being submitted to arbitration under Sch. II, Civil P. C. I think that, by virtue of s. 141, Sch. II to the Code did apply to this 'proceeding' in the Civil Court and that the application for submission to aribitration was rightly made to, and granted by, the Civil Court. It follows that I agree that this appeal should be dismissed.

S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Rule No. 1587 of 1937
April 15, 1940

B. K. MUKHERJEA AND MOHAMED AKRAM, JJ.

BHUTNATH JANAN AND ANOTHER—MORTGAGEES—PETITIONERS

versus

GOPAL PROSAD SAHU—MORTGAGOR—OPPOSITE PARTY

Mortgage—Usufructuary—Mortgage bond containing term mentioning period after which mortgagor undertakes to redeem property on payment of principal—Whether inconsistent with usufructuary mortgage—Estoppel—Misrepresentation.

Where the mortgagee is given possession of the mortgaged property and the stipulation is that he should remain in possession till the sum advanced is paid and enjoy the usufruct in lieu of interest, the mortgage is usufructuary even if the mortgage bond mentions a period or term, after which the mortgagor undertakes to redeem the property on payment of the principal money. Such a term is quite consistent with the mortgage being a usufructuary mortgage and does not by itself import any personal liability. It simply amounts to a proviso for redemption, and fixes the minimum period within which the right of redemption can be exercised. A provision in the deed that in case of dispossession the mortgagee would be able to realise the principal and interest at certain rate, is in the nature of an indemnity clause and does not alter the nature of the mortgage. *Luchmeshar Singh* v. *Dookh Mochan Jha* (2), relied on.

If a party is fully acquainted with the actual facts of the case, there can not be in fact any misrepresentation by the other party upon which the former could have been induced to act or alter his position.

Mr. *Sarat Chandra Janah*, for the Petitioners.

Mr. *Gopendra Nath Das*, for the Opposite Party.

B. K. Mukherjea, J.—This rule is directed against an order of the Munsif, Third Court, Tamluk, dated July 29, 1939, made in a proceeding under s. 26 G (5), Ben. Ten. Act. The father of the opposite party executed a mortgage bond in favour of the petitioner's father some time in the year 1920, by which possession of the mortgaged property was delivered over to the mortgagee. More than 15 years having elapsed from the date of the registration of the deed, the opposite party presented this application under s. 26 G (5), Ben. Ten. Act, for restoration of possession of the mortgaged property. The Munsif allowed this prayer and it is against this order that the present rule has been obtained. Two points have been taken by Mr. Janah, who appears in support of the rule. It has been argued in the first place that the mortgage bond having expressly recited that the mortgaged property was held at a fixed rate of rent and was not an occupancy holding the mortgagor was estopped from saying that it was an occupancy *jote*, and as such the provision of s. 26 G (5) did not apply. The second point taken is that the mortgage was not a usufructuary mortgage properly so-called but it was an anomalous mortgage and the mortgagor was not entitled to claim restoration of the mortgaged property. As regards the first point, it seems to me that on the facts found no question of estoppel can possibly arise. It has been found by the Court below, that the mortgagee was fully cognisant of the fact that the lands were held by the mortgagor as an occupancy *raiyat*. It was so recorded in the C. S. records, and the *khatian* numbers were expressly given in the mortgage bond; the bond itself at one place described the land as an occupancy holding, though at the beginning they were described as a *mokarari* tenancy. As the plaintiff must be held on the findings of the Court below, to be acquainted with the actual facts of the case, there could not be in fact any misrepresentation by the mortgagor, upon which the mortgagee could have been induced to act or alter his position. The first contention of Mr. Janah therefore must fail.

The second point raised by him cannot also be supported. From the mortgage bond it appears to be perfectly clear that the mortgagee was given possession of the mortgaged property and the stipulation was that he should remain in possession till the sum advanced was paid and enjoy the usufruct in lieu of interest. It is true that the mortgage bond mentions a period or term, after which the mortgagor undertakes to redeem the property on payment of the principal money but as we have already held in an earlier case *vide* Civil Revision No. 1197 of 1939 *Khoar Jamadar* v. *Abdul Sobhan Khan* (1) the finding of such a term is quite consistent with the mortgage being a usufructuary mortgage and does not by itself import any personal liability. It simply amounts to a proviso for redemption, and fixes the minimum period within which the right of redemption can be exercised, *vide Luckmeshar Singh* v. *Dookh Mochan Jha* (2) that the Legislature contemplates such a term in a usufructuary mortgage is apparent from the pravision of s. 62 (*b*), T. P. Act. In present case, it is not said that the mortgage will be entitled to demand the money after the expiry of the due date and the covenant on the other hand is that the mortgagee would go on holding and enjoying the property, until the mortgagor was in position to redeem the property by paying the money. We have not been able to find out any other provision in the deed, which imposes a personal liability on the mortgagor or gives the mortgagee a right of sale. There is indeed a provision that in case of dispossession the mortgagee would be able to realise the principal and interest at the rate of 24 per cent. per annum. Both that as we have already held in several cases is in the nature of an indemnity clause and does not alter the nature of the mortgage. The result is that both the grounds urged by Mr. Janah fail and the Rule is discharged. There will be no order as to costs.

Mohamed Akram, J.—I agree.

s. *Rule discharged.*

(1) A I R 1940 Cal. 426; 191 Ind. Cas. 713; 44 C W N 756; 71 C L J 484; 13 R C 274.
(2) 24 C 677.

ALLAHABAD HIGH COURT

First Appeal No. 222 of 1938
September 5, 1940
COLLISTER AND BAJPAI, JJ.

Thakurain JAMUNA KUNWAR—APPELLANT

versus

Thakur ARJUN SINGH—RESPONDENT

Hindu Law—Widow—Maintenance—Husband, if can dispose of property so as to jeopardise wife's right to maintenance—Provision as to maintenance of widow in husband's will, value of—If deprives Court's power to fix reasonable maintenance—In order to claim maintenance, widow, if bound to reside in husband's house—Direction in husband's will that widow must reside at family house, if can be ignored for just cause—Civil Procedure Code (Act V of 1908), s. 34—Suit for arrears of maintenance—Widow leaving husband's house due to strained relations with adopted son, caused by herself—No demand for payment made in writing—No damages proved to have accrued, due to withholding of maintenance—If entitled to interest on arrears—Agra Estates Act (VII of 1920), Sch. II—Suit claiming maintenance against estate—Plea that estate was governed by Act and that plaintiff was not entitled to maintenance at rate higher than as provided in Sch. II, not raised in trial Court—If can be raised in appeal.

A widow is entitled to be maintained by persons who may have inherited the estate of her husband, so long as she does not lose such right by reason of inchastity on immorality. It is not open to a husband to dispose of his property in such a manner as to jeopardise the rights of his wife. If a provision is made by a Hindu husband in his will as regards the maintenance to be granted to his widow after his death, this can only be taken as a suggestion made by the husband as to what would be a reasonable provision for her maintenance and cannot deprive the Court of its power to fix a reasonable maintenance. Even if the husband bequeathed his property ignoring the wife's claim to maintenance absolutely, the bequest will not defeat the widow's claim to maintenance and will defeat her claim. [p. 30, col. 1.]

Ordinarily a widow is not bound to remain at the residence of her deceased husband in order to claim maintenance provided she does not leave it for unchaste purposes and when there is a direction in the will that she must reside at the family house the direction can be ignored for just cause. [p. 31, col. 2.]

Held, on facts that there were sufficient grounds for the widow to leave the residential house. *Mulji Bhaishankar* v. *Bai Ujam* (1) and 116 Ind. Cas. 409 (2), relied on.

Where owing to strained relations between the widow and her husband's adopted son, the root cause of which was the widow herself, the widow left her husband's house and sued for maintenance and no demand for payment of maintenance and no damages had been proved to have accrued to her because the maintenance was withheld:

Held, that the equitable jurisdiction of the Court could not be attracted in awarding interest to widow on arrears of maintenance inasmuch as she brought the trouble on herself. Nor could she claim interest under s. 73, Contract Act merely because the money was withheld. She was, however, entitled to interest *pendente lite* and future, under s. 34, Civil P. C. at the rate of 6 per cent. per

annum from the date of the suit up till the date of realization.

Where in a suit claiming maintenance against an estate the defendant has not raised a plea that as the estate was governed by the Agra Estates Act and that the plaintiff under no circumstances was entitled to maintenance at a rate higher than Rs. 50 a month as provided in Sch. II, Estates Act, he cannot be allowed to raise such a plea in appeal if it results in a serious prejudice to the plaintiff. [p. 29, col. 1.]

Mr. *S. B. L. Gour*, for the Appellant.

Mr. *B. S. Darbari*, for the Respondent.

Bajpai, J.—This is an appeal by the plaintiff Thakurani Jamna Kunwar. She brought a suit in the Court below against Thakur Arjun Singh for the recovery of "a sum of Rs. 29,000 with costs and *pendente lite* and future interest to be declared a charge on the property detailed at the foot of the plaint." The allegations in the plaint were that the plaintiff's husband, Thakur Laiq Singh was a very big *zamindar* and *talugadar* and the income from his *zamindari* property alone was Rs. 41,000 per annum. Apart from this *zamindari* property he was alleged to have an orchard yielding an income of Rs. 2,000 per annum and money lending business on an extensive scale together with deposits in the bank of about Rs. 50,000 and ornaments of gold and silver. Thakur Laiq Singh died in November 1931 and it was said that the defendant entered into possession of the entire estate of Thakur Laiq Singh and the plaintiff, as the widow of the said Thakur, was entitled to maintenance and the Court could declare a charge on the property in the possession of the defendant. The sum of Rs. 29,000 was made up as follows :

	Rs.
(1) Maintenance allowance from December 1931 to January 1933 at Rs. 300 per mensem	4,200
(2) Maintenance allowance from February 1933 to May 1937 at Rs. 400 per mensem	20,800
(3) Interest at the retrogressive rate at 8 annas per cent. per mensem ...	4,000
Total ...	29,000

The Court below dismissed the plaintiff's suit and hence the present appeal before us. The pleas contained in the written statement might be mentioned in some detail. It was alleged that the plaintiff had no cause of action for the suit, that the defendant's adoptive father, the late Thakur Laiq Singh, by his will dated March 29, 1928, authorised the defendant to pay Rs. 100 per mensem to the plaintiff on the condition that she did not leave the residential place and that the same would be permissible only if the defendant refused to keep or maintain the plaintiff. The defendant alleged that he never refused to keep or maintain the plaintiff and as the plaintiff had now left the residential house and lived separately she was not entitled to any separate maintenance under the terms of the will. It was further said that the plaintiff was not entitled to file any suit for maintenance or arrears of maintenance of declaration without admitting the defendant's right and title as the adopted son of the deceased. No plea was taken to the effect that under the United Prov. Estates Act (Local Act VII of 1920) the plaintiff was in no event entitled to maintenance at a rate exceeding Rs. 50 a month.

The plaintiff went into the witness-box and several witnesses were examined on her behalf. The defendant entered the witness-box on December 13, 1937 when in answer to a question by his Counsel in examination-in-chief he stated that his estate, so far as he remembered, was under the Agra Estates Act. On December 14, 1937 a notification in the *United Province Govt. Gazette* dated May 23, 1930 was filed which showed that Thakur Laiq Singh of Labhua had applied to the Govt. under s. 3, United Prov. Estates Act VII of 1920, for a declaration that the provisions of Part I of the said Act should apply to him, and the Governor in Council after enquiry had decided to grant the application and therefore it was being notified that the declaration was made under s. 6 of the said Act and that the provisions of Part I of the Act had been made applicable to the applicant in respect of the immovable property in which he had a separate, permanent, heritable and transferable right at the date of the notification as entered in the schedule printed below. Then a list of the *zamindari* property belonging to Thakur Laiq Singh was given and the revenue thereof was put down as Rs. 26,619-10-9 and the profits were put down as Rs. 41,603-8-0. This document was admitted in evidence by the learned Civil Judge on December 17, 1937. No issue had been struck with reference to the United Prov. Estates Act, and indeed none could have been struck because, when the written statement was filed, no such plea had been taken. Even after the filing of the notification in the *Govt. Gazette* the defendant did not insist on any new issue being struck. It, however, appears that some argument was advanced in the Court below, but the learned Judge was of the opinion

that

"the amount of Rs. 50 per month would be too low and inadequate and can, by no means, suffice to meet the expenses of the plaintiff."

The learned Judge also in the beginning of his judgment says :

"This is an admitted fact that the deceased Thakur Laiq Singh was a big *zamindar* and was the owner of Labhua estate, and that his entire estate was governed by the provisions of the Agra Estates Act, VII of 1920."

The admission amounts only to this that the Labhua estate was governed by the provisions of the Agra Estates Act, VII of 1920, and not that every item of the property detailed at the foot of the plaint was governed by the Agra Estates Act. We have taken some pains to state at length the circumstances under which the notification in the *Govt. Gazette* was filed in the Court below and to mention the admissions (such as they were) made at the time of argument and the arguments (such as they were) advanced before the Court below in connection with the provisions of the Agra Estates Act.

Before us, however, it was strenuously contended on behalf of the defendant that whatever our decision might be on other points, the plaintiff under no circumstances was entitled to maintenance at a rate higher than Rs. 50 a month as provided in Sch. II, Estates Act. The Govt. revenue of the property that came under the Estates Act was stated in the notification to be Rs. 26,000 odd and therefore the plaintiff, as the senior widow of the deceased estate holder, was not entitled to more that Rs. 600 a year. Learned Counsel for the plaintiff-appellant has contended that we should not allow this plea to be taken at this late stage because it would seriously prejudice the plaintiff. It is said that if this plea had been taken in the Court below, then the plaintiff might well have said that, so far as the estate, which is governed by the U. P. Estates Act is concerned, the plaintiff is not entitled to more than Rs. 50 a month, but so far as that property which is not governed by the Estates Act is concerned the plaintiff is entitled to something more, which might be Rs. 100 a month or Rs. 150 a month, or even more. In this connection our attention is drawn to the list given in the Govt. Notification and to the list given at the foot of the plaint. Items Nos. 32, 33 and 34 of the plaint do not find a place in the list given in the Govt. Notification and these three items are not insignificant items because they yield an income of Rs, 2,000 per annum according to the plaintiff. Apart from that the plaintiff, when she entered the witness box, said that Thakur Laiq Singh had a money-lending business on which an income-tax of Rs. 800 was levied and further Thakur Laiq Singh had Rs. 50,000 in the bank and there were ornaments worth about Rs. 6,000. The orchard, therefore, was income-yielding property, but money-lending business was also income-yielding property and there were those deposits in the bank. It is true that the defendant in his statement does not admit the existence of money-lending business and deposits in the bank, but better evidence could have been advanced by both parties and we would have been in a better position to find out as to how much income was derived by Thakur Laiq Singh and Thakur Arjun Singh from these several items of property. There can, therefore, be no doubt that the plaintiff would be seriously prejudiced if we were to allow this plea to be taken at this late stage ; even the defendant was not quite sure if his estate was under the Agra Estates Act because the utmost to which he would commit himself on that point was that the estate 'so far as he remembered' was under the Agra Estates Act.

We have, therefore, come to the conclusion that the defendant is not entitled to rely on the Agra Estates Act and to say that the plaintiff was not entitled to maintenance at a rate higher than Rs. 50 a month. It was then said that the will contained the following provision regarding the maintenance of the widows of Laiq Singh.

"If Arjun Singh neglects the maintenance of or obedience to any of my three wives aforesaid which might be a source of displeasure and trouble to her, the three wives or the wife affected shall have power to have a sum of Rs. 100 per mensem allotted to herself by Kunwar Arjun Singh who shall have no objection. But the condition shall be that none of my wives shall have power to give up her residential house and settle at another place in which case she shall not be entitled to the maintenance allowance aforesaid."

The evidence in the present case does not show that Arjun Singh was in any way neglectful of the claims of the plaintiff or that he did anything to displease or trouble her and therefore the claim to maintenance did not arise at all and, if it did arise, it was forfeited because the plaintiff was now admittedly living at a different house and had given up her former residential home.

It may be noted that the plaintiff did not base her claim to maintenance on the will, but on the general right of a Hindu widow

to be maintained by the person in possession of her husband's estate. The plaint does not contain any reference to the will nor is there any clear admission by the plaintiff that the defendant is the adopted son of Thakur Laiq Singh, but the case was argued before us by the plaintiff on the assumption that the defendant was the adopted son of Thakur Laiq Singh and reference was made to the will by learned Counsel for both parties. On the evidence that has been produced in this case, namely the adoption deed dated April 21, 1924, the will dated March 29, 1928 and the fact that the property was mutated in the name of the defendant there can be no doubt that the defendant was the adopted son of Thakur Laiq Singh, and that being so the only question which we have got to decide is whether the plaintiff is entitled to maintenance and, if so, at what rate.

There is no suggestion that the plaintiff has lost her right to maintenance by reason of unchastity or immorality, but the argument is that the will of Thakur Laiq Singh ought to be given effect to and the condition about the wdow's stay in the residential house was imperative and could not be ignored with impunity. But the wife is entitled to be maintained by her husband and a widow is entitled to be maintained by persons who may have inherited the estate of her husband. It is not open to a husband to dispose of his property in such a manner as to jeopardise the rights of his wife. If a provision is made by a Hindu husband in his will as regards the maintenance to be granted to his widow after his death, this can only be taken as a suggestion made by the husband as to what would be a reasonable provision for her maintenance and cannot deprive the Court of its power to fix a reasonable maintenance. It cannot possibly be argued that even if the husband bequeathed his property ignoring the wife's claim to maintenance absolutely, the bequest will affect the widow's claim to maintenance and will defeat her claim. The plaintiff, as we said before, did not rely on the will; it is only the defendant who relies on the will as a bar to the plaintiff's claim. We have said enough to show that we are not bound by any directions contained in the will on the point beyond the fact that the suggestions contained therein might be taken into consideration when we propose to determine the amount which, in our judgment, appears to be adequate and reasonable.

It was then said that the plaintiff lost her right of maintenance out of the estate of her hasband because she had left the residential house. As a pure proposition of law the contention is not tenable. It is not enjoined in the Hindu Shastras that a widow should remain in the residential house of her late husband under all circumstances and beset by all kinds of difficulties. In *Mulji Bhaishankar* v. *Bai Ujam* (1), the learned Judges referred to Vyavastha No. 226 quoted at p. 261 of Vol. I of Shama Charan Sarkar's "Vyavastha Chandrika" where it was stated that a widow was

"not entitled to maintenance by residing elsewhere without a just cause if she was directed by her husband to be maintained in the family house".

The Vyavastha, therefore, is that even if there is a direction by the husband that the wife should be maintained in the family house, the direction can be ignorned if there was a just cause for the wjte to leave the house. There is the direction in the will that the widow should remain in the residential house and therefore we have got to see whether there was any just cause for the plaintiff to leave the residential house. This brings us to the consideration of a prior litigation between the parties. On April 8, 1933 the plaintiff brought a suit against tne defendant and others repudiating the adoption of the defendant and claiming the entire estate of Thakur Laiq Singh. The suit was brought *in forma pauperis*, but the Court was of the opinion that the plaintiff had sufficient means to pay the necessary court-fees and ultimately the suit was dismissed because the plaintiff did not pay the requisite court-fees. We have no doubt—and this is the view of the Court below—that the plaintiff was induced to file the suit at the instance of some interested persons and the result was that feelings between the plaintiff and the defendant became strained. On July 8, 1933 Jamuna Kunwar actually filed an application in Court, when an enquiry was being made regarding her pauperism, that the defendant Arjun Singh was threatening her to give a statement as desired by him and therefore the statement of the petitioner should be recorded by a Commissioner and the defendant Arjun Singh

(1) 13 B 318

should be asked to allow the applicant to go to her *mukhtar-i-am's* place so as to enable her to give an independent statement. The plaintiff soon after July 8, 1933 left the residential house and has not come back to live with the defendant ever since then.

The question which we have got to decide is whether the plaintiff under the peculiar circumstances of the case was justified in leaving the residential house. It is pointed out that in her statement in the former suit the plaintiff admitted that she had no trouble at Thakur Arjun Singh's place and that he was providing her with all her necessities and therefore the plaintiff was herself to blame in leaving the residential house. The defendant in his statement in the present case admits that after the institution of the pauper suit relations between the plaintiff and himself were strained, that he has no personal enmity with the plaintiff because he knows that she is a very good woman, but she has been under the influence of persons who want to oust him from the estate and has been under the influence of such persons since about 1932. The plaintiff in the present case said that the defendant threatened to get her murdered, but this statement is undoubtedly an exaggeration and has been denied by the defendant. As admitted by the defendant, the house of the plaintiff, where she now resides is about two or two and a half furlongs away from the former residential house and is in the some village. We feel inclined to accept the statement of the defendant that the plaintiff has fallen into the hands of some persons not well disposed towards the defendant and they induced the plaintiff to file the former suit. The plaintiff cannot be blamed for this, but the fact remains that there was a prior litigation by which the plaintiff wanted to oust the defendant from the entire estate and the relations between the parties have become very much strained. That being so, the plaintiff felt, and rightly felt, that the former house where Arjun Singh reigned supreme was not the proper place for her to live and the plaintiff for a just cause had left the house. In *Ekradeshwari Bahuasin* v. *Homeshwar Singh* (2) their Lordships of the Privy Council held that

"a Hindu widow who has left the residence of her deceased husband, not for unchaste purposes, and resides with her father, is entitled to maintenance, also to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she has incurrep debts in maintaining herself and gives no reason for the change of residence."

It is true that this case was not complicated by any direction in any will executed by the husband, but what we think to be the correct law on a matter like this is that ordinarily a widow is not bound to remain at the residence of her deceased husband in order to claim maintenance provided she does not leave it for unchaste purposes and when there is a direction in the will that she must reside at the family house the direction can be ignored for just cause, and we have held in the present case that there were sufficient grounds for the widow to leave the residential house.

This brings us to the question as to what would be the proper amount of maintenance, regard being had to the status of her husband, regard being had to the circumstances under which she was living when her husband was alive. It might be borne in mind that for several years during the husband's lifetime the plaintiff was not the favoured wife, and whereas Laiq Singh and his fourth wife were living together in one house the plaintiff was living in another house. She was however provided with all the necessities of life and now she is about 65, and although we do not think that the Archaic injunctions of the ancient Hindu lawgivers regarding the abstemious austerity of a Hindu widow's life can be or ought to be enforced in these days, we cannot lose sight of the fact that the plaintiff is an old woman who has lived all her life in a village, nor can we completely ignore the directions contained in the husband's will. He thought that Rs. 100 a month was an adequate allowance for the widow and this was the allowance which he fixed not only for the plaintiff but for his other wives as well. After having considered the case from every view point we think the plaintiff is entitled to maintenance at the rate of Rs. 100 a month.

We have now got to consider if the plaintiff is entitled to any arrears of maintenance. There can be no doubt that the plaintiff, as long as she lived with Thakur Arjun Singh, was maintained

(2) 8 Pat. 840; 116 Ind Cas. 409; A I R 1929 P C 128; 56 I A 182; 33 C W N 637; 10 P L T 345; 49 C L J 579; 31 Bom. L R 816; 6 O W N 526; (1929) A L J 695; 30 L W 1; 57 M L J 50; (1929) M W N 468 (P C.)

by him. This was admitted in her statement in the earlier suit and this is quite clear from the allegations in the plaint where she seems to allege that she is entitled to maintenance at the rate of Rs. 400 per mensem but she could claim only Rs. 300 per month from December 1931 to January 1933 which suggests that up till that time she was getting like Rs. 100 a month from the defendant. It may be that after January 1933, when the former litigation was contemplated, the defendant began to ignore the plaintiff's right to maintenance, but we know that she did not leave the house up till July 7, 1933, and we therefore would not be justified in giving arrears for a period prior to July 8, 1933. The defendant, even after he had heard of the contemplated litigation, might well have tried to placate the plaintiff in every possible manner in order to prevent the suit, but it is quite clear that after the plaintiff left the house the defendant has not been paying any maintenance to the plaintiff. It is so stated by the plaintiff and there is no clear denial on the point by the defendant. We think the plaintiff is entitled to arrears of maintenance from July 15, 1933 at the rate of Rs. 100 a month.

The plaintiff claimed interest at a retrogressive rate of 8 annas per cent. per mensem from the time that the arrears fell due. Interest on such arrears could be claimed only under the Interest Act or under s. 73, Contract Act, or on equitable grounds. The plaintiff did not claim under any written instrument. As a matter of fact, she ignored the direction in the will where Rs. 100 per month was fixed as her allowance and claimed as muchas Rs. 400 a month. Nor have we fixed her maintenance at Rs. 100 a month because of the will. It is clear therefore that if the plaintiff can get interest it must be because interest "it payable by law" which may include equitable grounds. There is no law which has been pointed out to us.. No demand for payment seems to have been made in writing. The only provision to which reference has been made is s. 73, Contract Act, but that can afford no justification for awarding interest merely because money has been detained. No damages have been proved to have accrued to the plaintiff because maintenance was withheld. The equitable jurisdiction of the Court is not attracted in the present case in favour of the plaintiff inasmuch as she or her supposed well-wishers have brought this trouble on herself. It appears that she was living in perfect amity with the defendant before the institution of the former suit and the suit was of her own seeking and was forced on the defendant. We think that the plaintiff is not entitled to any interest on arrears of the maintenance amount. Under s. 34, Civil P. C., we are however, entitled to give interest *pendente lite* and future, and we think that the plaintiff is entitled to interest at the rate of 6 per cent. per annum from the date of the suit up till the date of realization.

It was contended that the plaintiff was entitled to her entire costs irrespective of the fact that the plaintiff had lost to a great extent at least so far as the amount of maintenance was concerned. It is true that the defendant denied the plaintiff's right to any maintenance whatsoever, but we connot consider the defendant's attitude in this respect as amounting to contumacy sufficient to disentitle him to such costs to which he may be entitled by reason of his success. We think the ordinary rule of proportionate costs ought to apply in the present case also. The plaintiff and the defendant will pay and receive costs in the Court below as well as in this Court according to failure and success. To the extent indicated above we allow this appeal and declare that the sum decreed, which will be at the rate of Rs. 100 a month from July 15, 1933 up to the end of May 1937 with interest *pendente lite* and future at the rate of 6 per cent. per annum from the date of suit up till the date of relizatien, will be a charge on the property specified at the foot of the plaint.

S. *Order accordingly.*

PATNA HIGH COURT

Appeal from Oiginal Decree No. 105 of 1938

November 20, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

JOYRAM NARAYAN AND ANOTHER—
—DEFENDANTS—APPELLANTS

versus

Raja Sri Sri SHIVA PRASAD SINGH
—PLAINTIFF AND MOTIBALA DEBYA
—DEFENDANT No. 9—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Lessees of minerals hypothecating property to secure sums due by way of royalty—Suit for royalty against lessees and sub-lessees by sale of property—Decree passed—Sale not recovering full amount of royalty—Personal decree for balance, if can be passed against both the lessees and sub-

lessees—Costs—Lower Court wrongly passing decree against appellant at invitation of respondent—Appeal by appellant to rectify mistake—Respondent not contesting appeal—His liability for costs of appellant.

Where the lessees of minerals had hypothecated certain property to secure sums due by way of royalty, and the lessor in his suit asks that the amount due for royalty should be recovered by sale of the properties hypothecated and impleads the sub-lessees, a mortgage decree can be passed against the sub-lessees together with the lessees because they are interested in the property sought to be sold. But where the amount recovered by the sale does not prove sufficient, a personal decree under O. XXXIV, r. 6, Civil P. C. cannot be obtained against the sub-lessees merely because they are interested in the property. They were in no way personally liable to the plaintiff and, therefore, a personal decree cannot be passed against them.

Where the fact that the Court passed the decree at the invitation of the plaintiff-respondent and has compelled the appellants to bring proceedings in appeal and to incur costs in order to have the matter rectified, it would be inequitable to make the defendants appellants, who were clearly right, liable to pay the whole of the costs of the appeal, merely on the ground that the plaintiff-respondent did not contest the appeal.

A. from a decision of the Subordinate Judge, Dhanbad, dated December 18, 1937.

Mr. *S. C. Majumdar*, for the Appellants.

Mr. *N. N. Roy*, for the Respondents.

Harries, C. J.—This is a defendants' appeal from a decree of the learned Subordinate Judge of Dhanbad dated December 18, 1937.

The plaintiff, Raja Shiva Prasad Singh, Raja of Jharia, brought a suit for royalty in the Court of the learned Subordinate Judge and impleaded in that suit the lessees of minerals and the sub-lessees. It appears that the lessees had hypothecated certain property to secure sums due by way of royalty, and plaintiff in his suit asked that the amount due for royalty should be recovered by sale of the properties hypothecated. The plaintiff succeeded in this suit and obtained a preliminary decree and later a final decree. The properties hypothecated were put to sale in execution of the decree, but the amount recovered by the sale did not prove sufficient to satisfy the whole decree.

The Raja then applied under O. XXXIV, r. 6, Civil P. C. for a personal decree against all the defendants, namely, the lessees and the sub-lessees, and such personal decree was given to him by the learned Subordinate Judge.

The sub-lessees have preferred the present appeal and have contended that in no circumstances whatsoever could be a personal decree be passed against them. The learned Subordinate Judge appears to have thought that as a preliminary decree for sale was made not only against the lessees but also the sub-lessees a personal decree should also be passed against them. The learned Subordinate Judge has, however, overlooked the fact that a mortgage decree was passed against the sub-lessees together with the lessees because they were interested in the property sought to be sold. It is, however, perfectly clear that no personal decree can be obtained against the sub-lessees merely because they are interested in the property. They were in no way personally liable to the plaintiff and, therefore, a personal decree should not have been passed against them.

Counsel representing the plaintiff has made it clear that he does not contest this appeal, but he has asked that no costs should be awarded against his client. It cannot be overlooked, however, that the plaintiff asked for this personal decree against the present appellants, though clearly he was not entitled to do so. The lower Court was clearly mistaken; but the lower Court acted on the invitation of the plaintiff. Had the plaintiff not asked for such a decree, the need for this appeal would never have arisen. The fact that the Court passed the decree at the invitation of the plaintiff-respondent has compelled the present appellants to bring these proceedings and to incur costs in order to have the matter rectified. That being so, it would be inequitable to make the present defendant-appellants, who are clearly right, liable to pay the whole of the costs of this appeal. However, as the plaintiff-respondent has not contested the appeal, this is clearly a case where the full hearing fee should not be granted.

For the reasons which I have given, I am satisfied that no personal decree should have been passed against defendant-appellants, the sub-lessees, and that being so, I would allow this appeal, set aside the decree of the Court below in so far as it affects the defendant-appellants and dismiss the claim against them. The defendant-appellants will have the costs in this Court and in the Court below, but I would assess the hearing-fee in this Court at one hundred and fifty rupees.

Manohar Lall, J.—I agree.

D. *Order accordingly.*

MADRAS HIGH COURT

Second Appeal No. 931 of 1937

September 19, 1940

LEACH, C. J. AND HORWILL, J.

MUNICIPAL COUNCIL, PALNI

—APPELLANT

versus

Sri DHANDAYUTHAPANI DEVASTHANAM, PALNI—RESPONDENT

Madras District Municipalities Act (V of 1920), s. 83 (1)—Power house built on part of hill set apart for religious purposes—Power used for lighting temple and way leading to it and also supplied to shop-keepers at profitable rates—Power house, held not exempt from tax.

The words "places set apart for public worship .....other purpose" in s. 83 (1), Mad. District Municipalities Act read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. Where a power house is built on a part of a hill which is set apart for religious purposes, is used for the purpose of lighting the way upto the temple on the hill and the temple itself and the electricity is supplied to the shop and hotel-keepers within the hill at a profitable rate, the power house being used for commercial as well as religious purposes is not exempt from taxation. *Municipal Council, Srirangam* v. *Srirangam Devasthanam* (1), Overruled.

Mr. *K. S. Sankara Aiyar* for Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *T. M Krishnaswami Aiyar*, for the Respondent.

Leach, C. J.—The Municipal Council of Palni has assessed to the property tax leviable under s. 81, Mad. District Municipalities Act, 1920 a power house belonging to the Sri Dhandayuthapani Devasthanam. The power house is situate at the foot of the Palni-andavar Hill and within the Municipal limits. The trustees objected on the ground that this building was exempt from taxation by reason of the provisions of s. 83 (1) (*a*) of the Act. The property having been assessed to this tax and the tax having been paid the trustees instituted a suit in the Court of the District Munsif of Palni for the recovery of the amount. The District Munsif, found against the plaintiff and dismissed the suit but on appeal his decision was reversed and the suit was decreed. The Municipal Council now appeals to this Court.

It is common ground that the whole hill was set apart for religious purposes. On the top of the hill is a famous temple which is approached by means of a long flight of steps. At the top of the hill there are also shops and a hotel which supply the needs of the pilgrims who visit the temple. In 1929 the trustees built the power house and installed electric plant for the purpose of lighting the way upto the temple and the temple itself. Later on, they supplied electricity to the shopkeepers and the hotel-keeper for which the trustees charged profitable rates. The fact that electricity was supplied to the shops and to the hotel led the Municipal Council to assess the power house to the property tax. If the power house is to be exempt from this tax the building must come within the purview of s. 83 (1) (*a*) because there is no other section in the Act which can relieve the trustees from the obligation of paying the property tax. Section 83 (1) reads as follows:

"The following buildings and lands shall be exempt from the property tax—(*a*) place set apart for public worship and either actually so used or used for no other purpose, choultries buildings used for educational purposes including hostels, public buildings and places used for the charitable purpose of sheltering the destitute or animals libraries and play grounds which are open to the public and such ancient monuments protected under the Ancient Monuments Preservation Act, 1904 or parts thereof as are not used as residential quarters or as public offices."

It is not necessary to go beyond the words "places set apart for public worship and either actually so used or used for no other purpose." as it is clear that the power house is not a building of the nature of any of those subsequently mentioned. In our opinion the words "places set apart for public worship and either actually so used or used for no other purpose" read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. It has been suggested that the use of the word 'or' instead of 'and' makes a difference. It does make a difference, but not the difference suggested. If the word were 'and' not 'or' there would only be exemption when a place was set apart for public worship and actually used for that purpose, but as a result of using the word 'or' there is exemption when the place has been set

apart for public worship but is not actually in use. The drafting leaves much to be desired, but it is obvious that the intention is to exempt buildings which are intended for religious purposes and are not being used for secular purposes.

What is the position here? The hill has been set apart for public worship and it cannot be disputed that if this power house were merely used for lighting the temple and the approach to it the power house would be exempted from taxation. But, inasmuch as the power house, which stands on a part of the hill, is being used for comercial purposes as well as purposes of public worship the conditions of the exemption are not fulfilled. The Municipal authorities are not suggesting that because a part of the hill, namely, the site of the power house, is being used for other purposes the whole hill and everything erected thereon should be deemed to be taken out of the section. Their case is merely confined to the power house and we considered that it is well-founded.

In the course of arguments two decisions of this Court were referred to, namely *Municipal Council, Srirangam* v. *Srirangam Devasthanam* (1) and *Municipal Council, Tirupati* v. *Mahant Prayag Dossjee Varu* (2). The first case certainly supports the trustees, but we consider that it was wrongly decided. The second case is not really in point. In *Municipal Council, Srirangam* v. *Srirangam Devasthanam* (1), the Council wished to assess to property tax certain shops within the Srirangam temple. The learned Judge (K. S. Menon, J.) considered that as the word 'or' and not the word 'and' was used in s. 83 (1) (*a*), the shops were not taxable. We have said sufficient to indicate that in our opinion this argument cannot be accepted and that the decision of K. S. Menon, J., ought not to be followed. In *Municipal Council, Tirupati* v. *Mahant Prayag Dossjee Varu* (2), the question was whether buildings used for stabling Devasthanam horses which were employed in carrying drums in temple processions or allowed for the use of pilgrims to whom honour was shown by the *Mahant* were exempt from the property tax. It was held that they were exempt. This decision is not open to criticism, because the buildings were used for purposes connected with worship in a public place. If the power house with which this appeal is concerned were merely used for lighting the approach to the temple and the temple itself, there would, as I have already indicated, be no doubt, that the Municipality would not be entitled to levy the tax. But the power house is being used for commercial as well as religious purposes and this brings it within the taxing section. The appeal will be allowed and the suit dismissed with costs here and in the two Courts below.

N.-S. *Appeal allowed.*

(1) (1936) M W N 1088.
(2) 27 M L J 231; 26 Ind. Cas. 96; A I R 1915 Mad. 594.

BOMBAY HIGH COURT

Civil Revision Application Nos. 552 and 553 of 1939
August 23, 1940
BROOMFIELD AND DIVATIA, JJ.

VITHALBHAI MOTIBHAI AND OTHERS— PLAINTIFFS—APPLICANTS
versus
NADIAD ELECTRIC SUPPLY Co., LTD.— DEFENDANTS—OPPONENTS

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revisional powers under, extent of.

Under s. 25, Prov. Small Cause Courts Act, the High Court has wider powers of interference than those given by s. 115, Civil P. C., and it will interfere in exercise of that power on grounds similar to those which would justify interference under s. 115, Civil P. C., or, apart from those grounds, when there is reason to think that there has not been a fair trial or that a palpable injustice has been committed or even in the case of a simple error of law if it is a matter of general importance. Section 25 however, cannot, be used in such a way as to give an ordinary right of appeal on points of law. *Shiva Nathaji* v. *Joma Kashinath* (1), relied on, 174 Ind. Cas. 1004 (2) and *Poona City Municipality* v. *Ramji* (3), referred to.

C. R. App. from the orders of the Joint Sub-Judge, Nadiad, in Small Cause Suits Nos. 1653 and 1241 of 1938.

Mr. *J. C. Shah*, for the Applicants.
Messrs. *E. B. Ghaswala* and *A. A. Adarkar*, for the Opponents.

Broomfield, J.—These are two revision applications in Small Cause Court suits. The parties are on the one hand certain inhabitants of Nadiad who have an electric motor for the purpose of irrigating their lands and therefore require electrical energy; the other party is a Nadiad Company which supplies electrical energy. In one of the cases there is a question as to the construction of an agreement between the parties. In the other case another agreement between them had to be con-

strued. There was a question whether it was consistent with certain sections of the Electricity Act and there was also a question whether the agreement had been obtained by undue influence, which of course was a pure question of fact. They are therefore quite ordinary Small Cause Court suits. The amount of money involved is very trivial, Rs. 45 in one case and Rs. 38 in the other. *Prima facie* it appears therefore that these are disputes which the Legislature intended to be settled by the Small Cause Court and not by a Bench of two Judges of the High Court or by the High Court at all.

The principles according to which the High Court will exercise its extraordinary powers of revision were laid down long ago in a Full Bench case, *Shiva Nathaji* v. *Joma Kashinath* (1). It is true that the Court was there concerned directly with the provisions of s. 622, old Civil P. C., which correspond to the present s. 115. Nevertheless the principles there laid down in a very learned and exhaustive judgment are also applicable in our opinion to a very considerable extent to the exercise of the power of revision under s. 25, Prov. Small Cause Courts Act. One of the principles laid nown was (p. 372*):

"If the Court finds that the external conditions of jurisdiction of investigation, and of command, have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of such Court."

Another principle is:

"The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it."

Under s. 25, Prov. Small Cause Courts Act, this Court has no doubt wider powers of interferance than those given by s. 115 of the Code, and although the intention of the Legislature obviously was that these comparatively unimportant cases should be finally decided by the Small Cause Courts, it is no doubt right and proper that the High Court should have these powers of revision in reserve. We do from time to time interfere in exercise of that power on grounds similar to those which would justify interference under s. 115 or, apart from those grounds, when there is reason to think that there has not been a fair trial or that a palpable injustice has been committed or even in the case of a simple error of law if it is a matter of general importance. In the present cases the most that can be argued is that there has been an error of law. But it cannot possibly be argued that there is any matter of general importance. The disputes, which are not in themselves serious disputes, concern the parties to the litigation and no one else. It would be entirely wrong in our opinion and contrary to the intentions of the Legislature to allow s. 25 to be used in such a way as to give an ordinary right of appeal on points of law.

We are informed that these cases were referred to a Bench instead of being disposed of by a Single Judge of this Court because a doubt was felt as to whether certain observations of the learned Chief Justice in *Bell & Co. Ltd.* v. *Waman Hemraj* (2) were consistent with the decision of this Court. In *Poona City Municipality* v. *Ramji* (3). Mr. Shah who appears for the applicants here says that the learned Chief Justice laid it down that the High Court should only interfere in revision in cases where it appears that there has been no fair trial by the inferior Court. We do not agree, however, that the learned Chief Justice said anything of the kind. He did not attempt to give any exhaustive list of cases in which interference would be justified, and the case where there has been no fair trial was only mentioned as one of the cases in which interference would be proper. With all respect we see nothing to criticise in the observations in this case, and we see no inconsistency between them and what was held in *Poona City Municipality* v. *Ramji* (3). In the present cases, we see nothing whatever which invokes the exercise of our extraordinary jurisdiction. We do not propose therefore to go into the merits and we discharge the Rule with costs in both cases.

S. *Rule discharged.*

(1) 7 B 341; 7 Ind Jur. 656 (F B).

* Page of 7 B.—[*Ed.*]

(2) 40 Bom. L R 125; 174 Ind. Cas. 1004; A I R 1938 Bom. 223, 10 R B 513.

(3) 21 B 250.

MADRAS HIGH COURT

Second Appeals Nos. 261 and 262 of 1937
February 21, 1940
HORWILL, J.

SECRETARY OF STATE—APPELLANT
versus
MALRAJU VENKATA NARASIMHARAO BAHADUR AND ANOTHER—RESPONDENTS

Madras Survey and Boundaries Act (VIII of 1923), s. 14—Suits under—Government, if necessary or proper party—Costs—Trial Court's discretion—Interference with.

The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Govt., in no sense represent them in their actions under the Survey and Boundaries Act. They are Statutory Officers given statutory powers and they act in a *quasi*-judicial manner; and their decisions are binding on parties in the absence of a suit. The Govt. is not in the least interested in the result of the suits; for the Survey Officer, in making his decisions acts not as an agent of the Govt., but as a statutory officer specially empowered under the Act. Consequently the Govt. is neither a necessary nor a proper party in suits under s. 14, Mad. Survey and Boundaries Act.

The discretion exercised by the trial Court in allowing the defendant his costs on the ground that he was not necessary party cannot be interfered with in the absence of sufficient grounds.

S. As. against the decree of the Sub-Judge, Ellore, in A. S. Nos. 233 and 188 of 1936.

Mr. *B. Sitarama Rao*, Govt. Pleader, for the Appellant.

Mr. *K. Kameswara Rao*, for the Respondents.

Judgment.—These appeals arise out of suits under s. 14, Survey and Boundaries Act. The porition in these two suits is a very curious one. The plaintiff was the same in the two suits and, before they were actually filed, he seems to have come to some arrangement with the two second defendants; for they filed no written statement. The common defendant No. 1 was the Secretary of State; and all the issues were framed because of the written statement of defendant No. 1. The trial Court found that the Secretary of State was not a necessary party; and while decreeing the suits, as defendant No. 2 in each case did not oppose, ordered that defendant No. 1 be given his costs on the ground that he was not a necessary party. The appeals were heard by two Judges. In A. S. No. 233 of 1936, the Judge held that the Secretary of State was not a necessary party; but that his attitude in supporting the case of defendant No. 2 and joining issue with the plaintiff disentitled him to receive costs. He thought moreover that although the Secretary of State was not a necessary party, he was a proper party. In A. S. No. 188 of 1936 (S. A. No. 262 of 1937) the Principal Subordinate Judge found that defendant No. 1 was a necessary party in each case. The appeals of the plaintiff against the orders as to costs were allowed and the Govt. was ordered to pay its own costs in both Courts in both suits.

The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Govt., in no sense represent them in their actions under the Survey and Boundaries Act. They are Statutory Officers given statutory powers and they act in a *quasi* judicial manner; and their decisions are binding on parties in the absence of a suit. The Govt. was not in the least interested in the result of the suits; for the Survey Officer, in making his decisions acted not as an agent of the Govt., but as a statutory officer specially empowered under the Act. The learned Principal Subordinate Judge in A. S. No. 188 of 1936 says:

"If the Govt. is not a party to the proceeding, I do not think any order passed by a Civil Court may be binding (on the Govt.),"

and, later, "it is the Govt. that demarcates the survey numbers." This is incorrect. It is not the Govt. that makes the survey; but a Survey Officer specially empowered by the statute. Clearly, the lower Appellate Court was wrong in thinking that the Govt. was a necessary party. For the same reasons, the Govt. is not a proper party. The dispute was between—and only between—the two persons interested in the common boundary. Upon the decision of the Civil Court, the survey authorities would have to make the necessary changes in their registers. It is not denied in this Court that the Govt. was neither a necessary nor a proper party. The orders of the lower Appellate Courts are however supported on the ground that Govt., instead of contenting itself with merely stating that it was not a necessary party, tried to uphold the finding of the Survey Officer. The Govt. says in para. 1 of its written statement in each case:

"The allegations in the plaint are not true and this defendant puts the plaintiff to strict proof of all the allegations that are not expressly admitted herein."

Then, in para. 5:

"The allegation that defendant No. 2 encroached upon the suit lands after the inclusion of the suit lands, in his adjoining land, is also absolutely false. But this defendant submits that defendant No. 2 and his ancestors were in possession of the suit land even prior to the block survey."

Paragraph 1 set out above may be excused on the ground that allegations were made in the plaints that the changes were brought about by the collusion of defendant No. 2 with the village officers. But even if it were true that some collusion had taken place, the Govt. would still not have been either a necessary or a proper party, as no relief was asked against the Govt. by way of damages or otherwise. Paragraph 5 cannot be defended in any way. The Govt. certainly should have adopted a neutral attitude on this point. However, although the Govt. adopted an attitude which was not strictly neutral and adopted pleas which were beyond what were directly necessary for the defence of their own subordinates, yet the primary responsibility for raising all these various issues was upon the Court. In fact, the District Munsif should at the outset have realized that defendant No. 1 was not a necessary party; and if he had done that, no issue would have been framed. If there had been any doubt about it, the question whether defendant No. 1 was a necessary party could have been raised as a preliminary issue. However that may be, even if the learned Munsif had any discretion in disallowing the costs of defendant No. 1 on the ground that he had raised pleas which were not necessary, he did not do so. The lower Appellate Court, for reasons which I have held to be wrong, considered that the first Court should have disallowed defendant No. 1's costs. If the trial Court had a discretion, it exercised it in favour of defendant No. 1; and there are no sufficient grounds for interfering with that discretion. The appeals are therefore allowed with costs and that defendant No. 1 given its costs in all three Courts. Advocate's fee one set in this Court.

N. D. *Appeal allowed.*

OUDH CHIEF COURT
Application No. 98 of 1940
December 18, 1940
GHULAM HASAN, J.
DR. MRS. ELSIE, C. GRIFFIN EDWARD—DECREE-HOLDER—APPLICANT
versus
WILLIAM AINSLIE CANNON HOWARD—JUDGMENT-DEBTOR
Lala KISHORI LAL, RIVAL DECREE-HOLDER—OPPOSITE PARTY

***Civil Procedure Code** (Act V of 1908), ss. 63 and 73—Rateable distribution—Attachment under O. XXI, r. 48—Attachment, when complete—Assets received by Court of lower grade — Application under ss 63 and 73 to Court of higer grade — Application transferred to Court of lower grade where assets were received—Applicant whether entitled to rateable distribution from date of execution application or from date of application under ss. 63 and 73—Provincial Small Cause Courts Act (IX of 1887), s. 25 — Revision, scope.*

The attachment under O. XXI, r. 48, Civil P. C., becomes complete and effective as soon as the notice of the order issued by the Court is served upon the disbursing officer, who accepts it. Where the various executions against an officer are pending in the Court of Additional Small Causes and the applicant decree-holder applies under ss. 63 and 73, Civil P. C., to the Court of Small Causes and the application is sent to the Court of Additional Small Causes where the assets were received, the applicant decree-holder is entitled to rateable distribution from the date of her execution application and not from the date of her application under ss. 63 and 73. It cannot be said that because the Office of the Accountant-General postpones the remission of the salary to a latter date there is no effective attachment. Section 73, Civil P. C. does not require the transfer of decrees to the Court where the process of realisation takes place as a condition precedent to an application under s. 63 of the Code and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realisation takes place. If the process of realisation takes place in the Court of an inferior grade, it is the duty of such Court to send the sale proceeds to the superior Court which, under s. 63, Civil P. C., is the proper Court to distribute the assets. But where this is not done, it cannot deprive the decree-holder in the higher grade Court to his right to rateable distribution. 8 Ind. Cas. 372 (1), 171 Ind. Cas. 222 (2), 166 Ind. Cas. 178 (2) (3) and 179 Ind. Cas. 376 (4), relied on. [p. 39, col. 2; p. 40, col. 1.]

The revisional powers under s. 25 of the Prov. Small Cause Court should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. [p. 40, col. 2.]

App. of the order of the Additional Judge of Small Cause Court, Lucknow, dated September 7, 1940.

Mr. *K. P. Srivasata*, for the Applicant.

Mr. *Ram Nath*, for Opposite Party No. 2.

Order.—This is an application under s. 25 of the Small Cause Courts Act arising out of execution proceedings.

The facts in so far as they are material for the purposes of the present application are as follows:—

It appears that Lala Kishori Lal held a decree against William Ainslie Cannon Howard, Assistant Superintendent, Govt. Central Press, Allahabad, which he had obtained from the Court of the Additional Judge, Small Causes, Lucknow. Lala Kishori Lal applied on August 31, 1939, before the Additional Judge, Small Cause Court, for execution of his decree by attachment of the salary of the judgment-debtor

After a somewhat unusual delay due to the fact that the salary of the judgment-debtor had been attached at the instance of various other decree-holders, the salary was sent to the Additional Small Cause Court Judge sometime in May 1940.

Dr. Mrs. Elsie C. Griffin Edward also obtained a decree for Rs. 795-4-5 against the same judgment-debtor from the Court of the Judge Small Causes. On August 31, 1939, she applied for execution of the decree against the judgment-debtor by attachment of his salary under O. XXI, r. 48 of the Civil P. C.

In answer to this attachment the Office of the Accountant-General, United Provinces, wrote on October 9, 1939, as follows:—

"Until the money liable to attachment from the officer's monthly pay in execution of other orders of attachment previously received in this office has been correctly recovered no action can be taken on the Court's orders referred to above. The recovery in respect of the above orders will commence after the orders of attachment issued previously have been fully complied with".

Subsequently on July 22, 1940, Dr. Edward filed an application before the Judge, Small Cause Court, purporting to be under ss. 63 and 73 of the Civil P. C stating that she had got the salary of the judgment-debtor attached in her decree but since the salary had already been attached in the decree of Lala Kishori Lal, the salary attached had not been received by the Court. She, therefore, prayed that either she should be allowed to share in the rateable distribution of the salary realised in the Court of the Additional Small Cause Court Judge or that the entire salary should be sent for from that Court and distributed by the Court in which her own execution application was pending. Counsel for Dr. Edward stated before the Court that if the file was transferred to the Additional Small Cause Court Judge, it would facilitate matters. Thereupon the learned Judge of the Court of Small Causes transferred the file to the Additional Judge and the application for rateable distribution to be disposed of there. This order was passed on August 7, 1940.

The learned Additional Judge has held that Dr. Edward is no doubt entitled to share in the assets under s. 73 of the Civil P. C., but that her right to rateable distribution arose only after July 22, 1940, when she applied for rateable distribution, and that she is not entitled to share in the rateable distribution from the date of her application for execution. Aggrieved by that decision she has filed the present application, to which the judgment-debtor and the contesting decree-holder Lala Kishori Lal are parties.

The only question that arises for determination before me is whether the applicant is entitled to share in the rateable distribution from the date of her application for execution, namely August 31, 1939, or only from July 22, 1940, when she made the application purporting to be under ss. 63 and 73 of the Civil P. C. I am of opinion that this application should succeed.

Upon the facts of the case stated above it must be held that the case is covered by s. 63 read with s. 73 of the Civil P. C. The order of attachment was made under O. XXI, r. 48 of the Civil P. C., which runs as follows:—

"Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall subject to the provisions of s. 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of order to such officer as the Govt. may.....appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be."

I do not agree with the contention raised on behalf of the opposite party that there was no attachment in this case. There is no doubt whatever that the order of attachment was actually issued by the Court in pursuance of the provisions of O. XXI, r. 48, and that the Office of the Accountant-General duly received the order of attachment but intimated to the Court that the money could not be sent until the order of attachment issued by other Courts previously had been fully complied with. It cannot be said that because the Office of the Accountant-General postponed the remission of the salary to a later date there was no effective attachment. The attachment in my opinion became complete and effective as soon as the notice of the order issued by the Court was served upon the disbursing officer, who accepted it. Section 63 of the Civil P. C. lays down:—

"(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Court than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is

no difference in grade between such Courts, the Court under whose decree the property was first attached."

According to s. 63 the proper course would have been to send the entire amount of attachment to the Small Cause Court Judge as he was undoubtedly higher in grade and possessed higher pecuniary jurisdiction than the Additional Small Cause Court Judge. However, the applicant's Counsel agreed to have the execution application sent to the Additional Small Cause Court Judge as he thought that it would expedite disposal. That fact, however cannot deprive the applicant of the right to share in rateable distribution under s. 73 of the Civil P. C. It may be mentioned that the money is still lying in the Court of the Additional Small Cause Court Judge and has not been withdrawn by the contesting decree-holder.

It has been held by a Bench of the Judicial Commissioner's Court in *Mohan Lal* v. *Humayun Jah*, (13 O. C. 291) (1), that the object of s. 73, Civil P. C. is twofold, firstly, to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property, and secondly to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them.

In *Ram Rachhpal Shiam Lal* v. *Gur Narain Brothers*, (1937 O. W. N. 1040) (2), it was held that where attachment of the same property has been made by different Courts at the instance of different decree-holders of the common judgment-debtor, s. 73, Civil P. C., does not require the transfer of decrees to the Court where the process of realisation takes place as a condition precedent to an application under s. 63 of the Code and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree the Court where the realisation takes place. If the process of realisation takes place in the Court of an inferior grade, it is the duty of such Court to send the sale proceeds to the superior Court which, under s. 63, Civil P. C. is the proper Court to distribute the assets. The case in (13 Oudh Cases 291) (1), and the case of *Surendra Kumar Guha* v. *Jamini Kumar Guha*, (A. I. R. 1936 Cal. 723) (3) were followed in this case.

Reference may also be made to a comparatively recent decision of the Lahore High Court in *Simla Banking and Industrial Co., Ltd.* v. *Indo Swiss Trading Co, Ltd.* (A. I. R. 1938 Lahore, 754) (4), in which after a discussion of the various authorities it was held that s. 73 is to be read together with s. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to reteable distribution under s. 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets.

In view of these decisions it is not necessary for me to refer to other decisions in support of the same proposition.

Learned Counsel on behalf of the opposite party has contended that this Court should not interfere with the decision of the Court below under s. 73, Civil P. C. in revision, save in very exceptional circumstances and has relied on certain cases in support of that proposition. Generally speaking, it is no doubt true that the revisional powers of this Court under s. 25 of the Small Cause Court should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. I am, however, of opinion that the facts of this case clearly justify interference with the order of the lower Court in the ends of substantial justice.

I, therefore, hold that the applicant is entitled to rateable distribution from the date of her application for execution of the decree, namely August 31, 1939.

I allow the application, set aside the order of the lower Court and direct that the applicant should be allowed to share in the rateable distribution from August 31, 1939. The applicant will get her costs in this Court as well as in the Court below.

D. *Application allowed.*

(1) 13 O C 291; 8 Ind. Cas. 372.
(2) 1937 O W N 1040; 171 Ind. Cas. 222; 10 R O 97; 1937 O L R 534; A I R 1938 Oudh 12.
(3) A I R 1936 Cal. 723; 166 Ind. Cas. 178 (2); 40 C W N 1307; 9 R C 484; I L R (1937) 1 Cal. 391.
(4) A I R 1938 Lah. 754; 179 Ind. Cas. 376; 11 R L 556; 41 P L R 91.

NAGPUR HIGH COURT

Second Appeal No. 276 of 1937
October 18, 1939
POLLOCK, J.

GANPATRAO—APPELLANT

versus

NAGORAO AND ANOTHER—RESPONDENTS

Res judicata—*Party's estate vesting in his mortgagee prior to suit to which mortgagee was not party—Decision is not binding on him—Evidence Act (I of 1872), ss. 13, 33, 90, 35—Rights of party not in issue in previous suit—Judgment, admissibility of, in subsequent suit—Scope of s. 33—Copy not thirty years old—Presumption under s 90, if can apply—Endorsement by Sub-Registrar that executant presented document for registration and admitted execution, if relevant fact under s. 35—Registration—Sub-Registrar making endorsement that executant admitted execution, whether attesting witness—Deed—Execution—Evidence—Registration endorsement, if can be treated as sufficient proof.*

The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; consequently the decision in the suit is not binding on the mortgagee. *Sita Ram* v. *Amir Begam* (1), 36 Ind. Cas. 443 (2), and 138 Ind. Cas. 329 (3), relied on. [p. 42, col. 1.]

Where rights of a party in a subsequent suit were not in issue in a previous suit, the judgment in the previous suit is not admissible in subsequent suit.

Section 33, Evi. Act covers not only cases of privity of estate and succession of title, but also cases where both the following conditions exist, *viz.* (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question issue in the first proceeding is identical. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, *i. e.* that he was (in the latter case), in effect, fighting that person's battle as well as this own. 145 Ind. Cas. 216 (5), relied on. [p. 42, col. 2; p. 43, col. 1.]

The presumption contained in s. 90 of the Evi. Act cannot apply to a copy that is not itself 30 years old. 156 Ind. Cas. 864 (6), relied on. [p. 44, col. 1.]

An endorsement by the Sub-Registrar showing that the executant presented the will for registration and acknowledged execution is a relevant fact under s. 35, Evi. Act. [*ibid*.]

A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution, is an attesting witness. 166 Ind. Cas. 686 (7), referred to. [*ibid.*]

The Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution but it is certainly open to the Court, to treat it as sufficient proof. 46 Ind. Cas. 279 (8), referred to [*ibid.*]

S. A. from the appellate decree of the Court of the Additional District Judge, Bhandara, dated January 29, 1937.

Messrs. *P. A. Pandit* and *R. G. Rau*, for the Appellant.

Mr. *P. P. Deo*, for the Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for possession of a 0-6-2⅔ share in *Mauza* Rawanwadi in the Tahsil and District of Bhandara. One Pemsha Gond once owned an estate known as the Rawanwadi *zamindari* consisting of 10 villages, of which Rawanwadi was one. He left three sons, each of whom inherited a 0 5-4 share in the *zamindari*. The genealogical tree is given in the judgment of the lower Appellate Court, Ganpatsha and his brothers Anantsha and Daulatsha, who represented half the eldest branch, inherited a 0-2-8 share or 10⅔ pies each. The youngest branch came to an end with the death of Mohansha in 1900, and it is the plaintiffs' case that Mohansha's share of 0-5-4 devolved on Ganpatsha by virtue of a registered will dated November 20, 1894, so that Ganpatsha thus became the owner of a 0-6-2⅔ share in the *zamindari*. Mohansha's share was mutated in the name of Ganpatsha. At an imperfect partition of Rawanwadi and other villages of the *zamindari* in 1910 Ganpatsha was held entitled to a 0-6-2⅔ share, and in the settlement that followed in 1916-17 Ganpatsha was again recorded as having a 0-6-2⅔ share in Rawanwadi. On January 21, 1915 Ganpatsha and his sons mortgaged a 0-6-2⅔ share in Rawanwadi and Tekapar, another village in the *zamindari*, to the plaintiffs, who brought a suit in 1930 to enforce their mortgage and purchased the mortgaged property at the ensuing Court auction in 1932. When, however, they attempted to take possession of the share in Rawanwadi they were resisted by the defendant Pande. Hence the present suit.

The defendant's case is that there was a private partition in 1897 at which the *zamindari* was divided as follows: Mohansha and Ganpatsha got a 0-16-0 share in Tekapar; Kisansha, Manwarsha and Pitamsha got a 0-16-0 share in Khursipar and Kodamendhi; and in the other seven villages, including Rawanwadi, Anantsha and Daulatsha got an 0-8-0 share and Dinkarsha got the other 0-8-0 share. On January 24, 1912, Anantsha and Daulatsha executed a registered sale-deed of their share in the *zamindari* in favour of the Jekatdar family who sold it in 1918 to the defendant Pande. In the sale-deed of 1912 Anantsha and Daulatsha purported to sell a 0-2-8 share in all the villages of the *zamindari*, stating that they really owned a 0-2 8 share and Ganpatsha owned a 0-5-4 share, originally

Mohansha's share but that owing to the fraud of Ganpatsha he had got himself recorded as having a 0-6-2⅔ share and they were recorded as having a 0-1-9⅓ share. They went on to add that there had been a private partition at which an 0-8-0 share in seven villages, as mentioned above, had been allotted to them, and that if the co-sharers admitted this partition then the vendees would be entitled to an 0-8-0 in these seven villages instead of a 0-2-8 share in all the villages. In 1922, after the death of Ganpatsha and Anantsha, Panda successfully sued Daulatsha and the representatives of Ganpatsha for an 0-8-0 share in these seven villages including Rawanwadi and obtained possession of Rawanwadi in 1932, *vide* Ex. B. 29.

The lower Courts have held that there was no partition in 1897 as alleged by the defendant Pande. In the suit brought by Pande against Daulatsha and the representatives of Ganpatsha in 1922 it was held that there was such a partition, but that suit was instituted after Ganpatsha had mortgaged his share in Rawanwadi to the plaintiffs and the lower Courts have held that the plaintiffs are, therefore, not bound by the decision in that suit. That view is, in my opinion, correct on this ground that

"The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; for the simple reason that a decree of Court in such cases can neither create new rights, nor take away existing ones, but can only enforce the rights as they stand between the parties, and in enforcing such rights cannot go beyond the rights of the parties to the litigation"

per Mahmood, J. in *Sita Ram* v. *Amir Begam* (1). This view has been followed in *Ramchandra Dhondo* v. *Malkappa* (2), where the learned Judges remarked at p. 685* that they did not understand why the plaintiff should be in any worse position because he had afterwards altered his original position of mortgagee to that of auction-purchaser, as the question would still be whether at the time of the previous suit the mortgagor possessed sufficient estate to represent and bind his mortgagee. *See also Govindan Asari* v. *Nagayan Chettiar* (3).

The matter, therefore, is not *res judicata*, but the appellant has contended that the judgments in that former suit are admissible to prove that there was a partition in 1897, and I have been referred to the decision in *Maroti* v. *Jagan Nath Das* (4). That decision does not help the appellant. It was held there that though the judgment in a previous case is inadmissible to prove the truth of the fact which it states, yet where the right of a party has already been concluded by a previous judgment that fact can be proved by production of the judgment since the existence of the judgment itself is relevant. In the present case, however, the plaintiffs are not bound by the decision in the former suit and the question whether the rights of Ganpatsha's representatives were concluded by that decision is immaterial. I, therefore, agree with the lower Courts that the judgments in the previous suit are inadmissible in evidence. Section 13 of the Evi. Act cannot apply because the rights of the plaintiffs were not then in issue.

The lower Courts' finding that there was no such partition as alleged in 1897 is clearly a finding of fact, but the appellant seeks to challenge that finding on the ground that certain evidence has been wrongly excluded. One such piece of evidence is the statement made by Sadasheo Rao as a witness in the previous case, Ex. D-9. Though there is no evidence to show that Sadasheo Rao is dead, it was so assumed in the lower Appellate Court without protest from the plaintiffs. Assuming he is dead his statement would be admissible under s. 33 of the Evi. Act if the previous suit was "a proceeding between the same parties or their representatives-in-interest," *i.e.* if the representatives of Ganpatsha can be said to have been the representatives of Ganpatsha's mortgagees. The representatives of Ganpatsha denied the partition of 1897, as the plaintiffs now deny it. Their Lordships of the Privy Council held in *Krishnayya Rao* v. *Venkata Kumara Mahipathi Surya Rao* (5), that this section

"covers not only cases of privity of estate and succession of title, but also cases where both the following conditions exist, *viz* (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of

(1) 8 A 324 (336); A W N 1886, 101.
(2) 40 B 679; 36 Ind. Cas. 443; 18 Bom L R 757; A I R 1916 Bom 204.
(3) A I R 1932 Mad 238; 138 Ind. Cas. 329; (1932) M W N 160; 35 L W 429; Ind. Rul. (1932) Mad 556.

*Page of 40 B.—[*Ed.*]

(4) A I R 1939 Nag 72; 180 Ind. Cas. 118; 1938 N L J 466; 11 R N 339; I L R (1940) Nag 699.
(5) A I R 1933 P C 202 (206 & 207); 145 Ind. Cas. 216; (1933) A L J 1039; 6 R P C 12; 38 L W 409; 65 M L J 479; 35 Bom L R 1076; 58 C L J 305; (1933) M W N 1191; 38 C W N 1; 15 P L T 1; 57 M 1; 60 I A 336 (P C).

both in the answer to be given to the particular question issue in the first proceeding is identical."

They went on to say,

"What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered *i. e.* that he was (in the latter case), in effect, fighting that person's battle as well as his own."

On that principle the evidence given by Sadasheo Rao in the previous case would appear to be admissible in the present case.

Even however taking this evidence into consideration I agree with the lower Courts that no partition was made in 1897. Undoubtedly there was an attempt to make a partition, and a partition, on the lines alleged was proposed, as is clear from the statement of Ganpatsha in 1917-18 in Ex. D. 26, but it seems to me equally clear that such a partition was not effected. After the death of Mohansha in 1900 his 0-5-4 share in the *zamindari* was mutated in the name of Ganpatsha without any objection, and Ganpatsha was thereafter recorded as a 0-6-2⅔ co-sharer. In the proceedings to conciliate the debts of Anantsha and Daulatsha in 1904-05 they were shown as possessing a 0-2-8 share in each of the ten villages of the *zamindari* and their debts were made a charge on these shares: *vide* Ex. D-32. Here and there some of the partition proposals were carried out, though not for some years afterwards. In 1904-05 Manwarsha, Pitamsha and Kisansha applied to be recorded as possessing respectively 0-4-0, 0-4-0, and 0-8-0 shares in Khursipar and Kodamendhi, of which they said they had been given possession in accordance with the partition, and this was allowed in spite of the objection of Dinkarsha: *vide* Ex. D-12-16. In 1907 Ganpatsha asked that the 0-8-0 share recorded in the names of Kisansha, Dinkarsha, Manwarsha and Pitamsha in Tekepar should be recorded in his name, as they had exchanged their shares in this village for shares in other villages: *vide* Ex. D-19-24. It is however worthy of note that Anantsha and Daulatsha continued to be recorded as having a 0 1-9⅓ share in Tekepar and were so recorded at settlement in 1916-17 and that Daulatsha sold a 0-1-8⅔ share in this village in 1925: *vide* Ex. P 34.

The imperfect partition proceedings of 1909 10 were initiated by one Deo to whom Dinkarsha had sold a 0-4-0 share in Rawanwadi and an 0-8-0 share in Purkabodi and Mahaka. The appellant contends that in the absence of a partition Dinkarsha could not have had more than a 0-2-8 share in each of the villages. Anantsha and Daulatsha took the objection that Dinkarsha had no proprietary share at all in these villages, but the Revenue Court held that he had an 0-8-0 share in each of them before his sale to Deo, and it would seem that he obtained such a share through the various adjustments that went on from 1904 onwards. Ganpatsha from the start claimed that he had a 0-6-2⅔ share in each of these villages, but it was only towards the close of the partition proceedings that Anantsha and Daulatsha objected to this and alleged that they had a 0-2-8 share in all the villages, of the *zamindari* and Ganpatsha had only a 0-5-4 share which was of course quite inconsistent with the alleged partition. The revenue officer made no inquiry into the rights of the parties, as required by s. 136-G of the C. P. Land Revenue Act of 1881 then in force, but on finding that Ganpatsha was recorded in the revenue records as holding a 0-6-2⅔ share in each of these villages and Anantsha and Daulatsha as having a 0-1-9⅓ share made the partition accordingly. Anantsha and Daulatsha raised the same objection at the settlement of 1916-17 but were told they should have raised the point in the partition proceedings and were referred to the Civil Courts.

Objection has also been taken to the exclusion of Ex. D-42 a certified copy of an unregistered *kabuliyat* executed by Mohansha and Ganpatsha in 1897, acknowledging that they had received the entire village of Tekepar in lieu of their share in the other villages. An unregistered *kabuliyat* would not of course create title and the lower Appellate Court's finding that the loss of the original has not been proved must be accepted in second appeal.

After considering the evidence given by Sadasheo Rao in the previous suit with all the facts proved in the present suit I have come to the conclusion that the proposed partition was not carried out, though some of the proposals were adoped later. Evidence of the imperfect partition proceedings was apparently not given in the previous suit.

A certified copy of the will said to have been made by Mohansha in favour of Ganpatsha has been produced. Evidence was given to prove the loss of the original and that evidence was accepted

by the lower Appellate Court. Secondary evidence is therefore admissible. The presumption contained in s. 90 of the Evi. Act cannot apply to a copy that is not itself 30 years old; *Basant Singh* v. *Brij Raj Saran Singh* (6). There is however an endorsement by the Sub-Registrar showing that Mohansha presented the will for registration and acknowledged execution. Under s. 57 (5) of the Regis. Act the copy is admissible to prove the contents of the original, and the above endorsement by the Sub-Registrar is a relevant fact under s. 35 of the Evi. Act. Though there is some difference of opinion on the point, the balance of authority is in favour of the view that a Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness: see Sarkar on Evidence, 6th Edition at pp. 593 and 594, and the cases there cited. This is the view that I followed in *Kanchhedilal* v. *Jabbarsha* (7). In *Jagannath* v. *Dhiraja* (8), Lindsay, J. C, held that the Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. With that I agree, but it is certainly open to the Court, in my opinion, to treat it as sufficient proof; *see Shamsunnissa Bibi* v. *Ali Asghar* (9) and *Sri Ram* v. *Muhammad Abdul Rahim Khan* (10). In the present case there was no specific denial that such a will was executed and there was no allegation that it was afterwards cancelled. Though there was no specific reference to the will in the mutation proceedings that followed Mohansha's death, the will was presumably the reason why Ganpatsha's claim to Mohansha's share was not challenged. Ganpatsha's right to at least a 0-5-4 share was not challenged in the imperfect partition proceedings in 1909-10, and the entry of Ganpatsha in the settlement *khewat* of 1916-17 as having a 0-6-2⅔ share in Rawanwadi must be presumed to be correct till the contrary is proved. That the defendant has certainly not proved.

(6) A I R 1935 P C 132; 156 Ind. Cas. 864; (1935) M W N 768; (1935) O W N 759; (1935) A L J 847; 39 C W N 1057; 42 L W 231; (1935) O L R 461; (1935) A L R 789; 69 M L J 225; 37 P L R 614; 16 P L T 669; 37 Bom L R 805; 57 A 494; 62 I A 180.

(7) 19 N L J 123; 166 Ind. Cas. 686; A I R 1936 Nag 171; 9 R N 141.

(8) 46 Ind. Cas. 279; 5 O L J 19.

(9) A I R 1936 Oudh 87; 159 Ind. Cas. 780; 8 R O 205; 1935 O W N 1376; 1935 O L R 714.

(10) A I R 1938 Oudh 69; 172 Ind. Cas. 882; 1938 O W N 67; 1938 O L R 44; 10 R O 200; 13 Luck 723.

I therefore hold that Ganpatsha was entitled to a 0-6-2⅔ share in Rawanwadi when he mortgaged his share to the plaintiffs and that the plaintiffs are now entitled to this share. The question of limitation has been argued but it was not pleaded and does not form one of the grounds of appeal. I think it is clear that the plaintiff's claim is not barred by limitation.

The appeal therefore fails and is dismissed with costs. Counsel's fee Rs. 150.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Revision Petition No. 1252 of 1939

August 2, 1940

WADSWORTH, J.

KARNAM SUBRAMANYA RAO—PETITIONER

versus

PULLA RAMI REDDI—RESPONDENT

Res judicata—*Issue made subject of final order—That order cannot be ignored by succeeding Court.*

Section 11, Civil P. C. is not exhaustive of the applicability of the principle of *res judicata*. When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review: 60 Ind. Cas. 631 (1) and 38 Ind Cas. 584 (2), relied on.

Mr. *P. C. Parthasarathy Ayyangar*, for the Petitioner.

Mr. *P. Chandra Reddy*, for the Respondent.

Order.—In this case a former District Munsif heard arguments on the question whether the petition under Mad. Act IV of 1938 would lie under s. 19, having regard to the provisions of s. 10 (2) (*ii*) and he passed a considered order that there was no vendor's lien in respect of the liability and no obstacle under that section to the application. He then adjourned the matter for further enquiry. He was transferred and his successor instead of proceeding with the matter where his predecessors left it, re-opened the issue which had been decided and gave a contrary finding and dismissed the application on that finding. I am of opinion, that he had no jurisdiction to do that. Granting that the matter is not precisely covered by s. 11, Civil P. C, that section is not exhaustive of the applicability of the principle of *res judicata*: *Hook*

v. *Administrator-General of Bengal* (1). When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review : *vide Basanta Kumar* v. *Kusum Kumari* (2). If the correctness of this order is to be attacked otherwise, it can only be done by way of appeal against the final order on the application, which remedy is still open. The petition is allowed with costs and the application is remitted to the trial Court for disposal on the merits.

N.-S. *Petition allowed.*

(1) 48 C 499; 60 Ind. Cas. 631; A I R 1921 P. C. 11; 48 I A 187; 19 A L J 366; 40 M L J 423; 29 M L T 336; (1921) M W N 313; 33 C L J 405; 3 U P L R (P. C.) 17; 23 Bom. L R 648; 25 C W N 915; 14 L W 221 (P. C.).

(2) 44 C 28; 38 Ind. Cas. 581; A I R 1917 Cal. 184.

SIND JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 4 of 1938
March 15, 1940
WESTON, J.

Haji HUSSAIN HABIBULLAH—
APPLICANT
versus
Haji VALI MAHAMMAD AND ANOTHER—
RESPONDENTS

Civil Procedure Code (Act V of 1908), O. III, r. 1 —Vakalatnama *in Form IV prescribed by Sind Civil Courts Circulars, whether empowers Advocate to enter into compromise in the case, on behalf of client—Specific authority for specific compromise, necessity of.*

A *vakalatnama* in Form IV prescribed by Sind Civil Courts Circulars authorising an Advocate or a Pleader to appear and act in a case does not give him power to compromise the case on behalf of his client. Form IV does not warrant the *vakalatnama* to contain the power to compromise. This power is inadequate to validate a compromise made by the Advocate or the Pleader. Specific authority for specific compromise is essential. 34 Ind. Cas. 928 (1), followed, 163 Ind. Cas. 240 (2) and 123 Ind. Cas. 545 (3), distinguished, 161 Ind. Cas. 764 (4), referred to.

C. R. App. to revise the judgment and decree of the District Judge, Hyderabad, dated October 19, 1937.

Mr. *M. L. Lalvani*, for the Applicant.

Mr. *Fatehchand Assudamal*, for the Respondents.

Order.—This is a revision application against the order of the District Judge of Hyderabad in Civil Appeal No. 63 of 1937 of this Court directing a decree in terms of the compromise application filed by the Advocates of the parties, and the ground upon which we are asked to set aside this order is that the Advocates of the parties had no authority to compromise on behalf of their clients. In *Sirdarkhatun* v. *Muradali* (1), following earlier decisions of this Court it was held that a Pleader duly appointed to act for a party has authority to do all acts incidental to that general authority. He may make application referring the matter in dispute the arbitration or make admissions so as to bind his client. A presumption of such powers having been delegated to him is essential to the due conduct of the litigation. No such presumption however is necessary in the case of a power to compromise the suit. A power to compromise contained in a *vakalatnama* is not warranted by Form IV prescribed in the Sind Courts Civil Circulars and is inadequate to validate a compromise made by the Pleaders and proof of specific authority for the specific compromise is necessary. It should be stated here that in the present case the Pleaders were Advocates and that they had filed powers in Form IV which empowered them to appear and act. It is not suggested that they had any general or any special powers from their clients to compromise. In *Ghanshamdas Lokumal Shivdasani* v. *Nanikram Khubchand Advani* (2), it was held that

"when parties do not themselves notify a compromise to the Court or give their written consent thereto and Pleaders act as agents of the parties to compromise, their authority must be clear and unequivocal. When such an authority is not contained in a *vakalatnama* giving power to compromise either generally or specially, or in any other writing but there is a mere statement by the Pleaders themselves at the foot of the compromise that they have special powers to compromise, this is not enough."

This was a case of Pleaders, not Advocates and the learned Judges in the course of their judgment state :

"We should make it clear that we are not concerned here with the power of Advocates either in this Court or in the *mofussil*, for less are we concerned with the power of barristers."

We have been referred to the case in *Sourendranath Mitra* v. *Tarubala Dasi* (3), where it was held that

"an Advocate in India who derives his general authority from being briefed in a suit on behalf of his client has implied authority to settle and com-

(1) 9 S L R 218, 34 Ind. Cas. 928; A I R 1916 Sind 64.

(2) 29 S L R 437; 163 Ind. Cas. 240, A I R 1936 Sind 59; 9 R S 2.

(3) 57 C 1311; 123 Ind. Cas. 545; A I R 1930 P C 158; 57 I A 133; Ind. Rul (1930) P C 177; (1930) A L J 489; 32 Bom. L R 645; 51 C L J 309; 58 M L J 551; 34 C W N 453; 11 P L T 461; 31 L W 803 (P. C).

promise in all matters connected solely with the action in which he has received a brief."

But their Lordships state at p. 1319* :

"Their Lordships desire to confine their decision on this point to the case of Advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derive their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority such as a *vakalatnama*, different considerations may well arise, and in such cases their Lordships express no opinion as to the existtence of any implied authority of the kind under discussion."

The Lahore High Court in *Ramzan* v. *Gopal Das* (4), relying upon this Privy Council decision has extended the power of Advocates to compromise to Advocates who appear only to plead without power-of-attorney. The question decided in *Sirdarkhatun* v. *Muradali* (1), was left expressly undecided by Privy Council in *Sourendranath Mitra* v. *Tarubala Dasi* (3). The present case is on all fours with the Sind case which was decided by Bench of this Court and which we think we are bound to follow. We must therefore hold that the Advocates had no power to compromise in the present case. We must allow the application, set aside the decree of the District Judge and remand the appeal to him for disposal on its merits. We think the parties should bear their own costs in this Court. Order accordingly.

D. *Application allowed.*

(4) 17 L 456; 161 Ind. Cas. 764; A I R 1936 Lah. 199; 38 P L R 961; 8 R L 801.

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MADRAS HIGH COURT

Appeal No. 42 of 1937

August 15, 1939

WADSWORTH, J.

KATACHIKANDI THIYYATHIKANDI ABDULLA KAKA—APPELLANT

versus

KADUMANDRA K. MUTHANNA—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 67 (2), Rule under, promulgated by Coorg Local Government —Rule, if restrains execution of Coorg decree for money by sale of land when it is transferred for execution in British India.

The rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Govt of Coorg. It cannot be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India.

A. against the appellate order of the District Court, North Malabar, dated October 29, 1936.

Messrs. *O. T. G. Nambiar* and *C. K. Kerala Verma*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

Judgment.—This appeal raises the question of the effect of a special rule promulgated by the Local Govt. of Coorg to govern the execution of decree in that province, upon the execution of such decrees, when transferred to a Court in British India. The appellant is the judgment-debtor. The Subordinate Judge of Coorg passed a money decree against him and that decree was transferred for execution to the Court of the District Munsif of Cannanore. Under s. 67 (2), Civil P. C., the Chief Commissioner of Coorg has promulgated a rule to the effect that

"lands, houses and other buildings and all immovable property shall not be liable to attachment or sale in execution of decrees of Civil Courts in Coorg with the exception of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed."

The argument of the appellant is that this rule must be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. As the rule stands, the words 'in Coorg' might be read either as qualifying 'decrees of Civil Courts' or as qualifying the words 'shall not be liable to attachment or sale in execution'. The former interpretation is possibly the more natural reading of the English words. But I am of opinion that it cannot be the proper interpretation of the clause. The reason for the rule is doubtless the curious tenures in Coorg whereunder the person in separate enjoyment of land commonly has no power of alienation without the consent of distant relatives, who are all notionally regarded as having an interest in land given for enjoyment to each member of a large family. Sub-s. (1) of s. 67, Civil P. C., expressly restricts the power of making special local rules regarding the sale of any class of interests in land in execution of decrees for money, to those cases in which the interests are so uncertain or undetermined as, in the opinion of the Local Govt., to make it impossible to fix their value. Sub-s. (2) does not contain any such restriction but it empowers the Local Govt. to re-enact any special rule already in force before the Code came into operation in the province. It is reasonable to

suppose that the object of sub-s. (2) is to deal with cases substantially similar to those dealt with in sub-s. (1).

Having regard to the language of s. 67 (2), one must, I think, read this rule as a rule merely governing the execution of decrees within the province of Coorg, for the power to re-enact such special rules seems to contemplate only the enactment of rules restricting execution of money decrees within the local area. One may even doubt whether any local rule purporting to restrict or control the execution of decreesin another province would have any validity, having regard to the provisions of s. 40 which prescribes that where the decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province. Clearly the Code contemplates the exercise of the rule making power with reference to execution in any province by the Govt. of that province. One must therefore read this special rule in the light of the general provisions of the Civil P. C. and in so far as it is ambiguous, it must be interpreted having regard to the powers which the Local Govt. of Coorg could legally exercise under the Civil P. C. In my opinion, the Local Govt. of Coorg had not the power, nor is it likely to have intended to frame rules to restrict the execution of its decrees when transferred to a Court in the Madras Presidency.

I am therefore of opinion that the rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Govt. of Coorg. It follows therefore that the Courts below are right in holding that the decree-holder can execute his decree in the Madras Presidency by the sale of land situated there, in spite of the restrictions under the special rule upon its execution within the province of Coorg. The appeal is therefore dismissed with costs. Leave to appeal is refused.

N.-S. *Appeal dismissed.*

OUDH CHIEF COURT

Criminal Revision Application No. 134 of 1940

January 2, 1941

THOMAS, C. J.

DEBI SINGH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 439—Revision against appellate order of District Magistrate—No revision filed before Court of Session—Chief Court, if can entertain—Wrong advice of Counsel—Effect of.

It is the uniform practice prevailing in the Chief Court to refuse to entertain an application in revision against an appellate order of the District Magistrate where the applicants have not gone in revision to the Court of Session, which has concurrent jurisdiction. The advice given by the Counsel that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicants to file the application in the Chief Court. 171 Ind. Cas. 167 (1) and 147 Ind Cas. 797 (1) (8), relied on, 145 Ind. Cas. 726 (2), 102 Ind. Cas. 352 (3) and 101 Ind. Cas. 603 (4), referred to.

Cr. R. App. of the order of the District Magistrate, Hardoi, dated August 9, 1940.

Mr. *Akhlaque Husain*, for the Applicants.

Messrs. *Raj Kumar Singh* and *Har Narain Das*, for the Opposite Party.

Order.—This is an application in revision against an appellate order of the learned District Magistrate of Hardoi, dated August 9, 1940, upholding the conviction of the applicants.

The applicants were convicted by a Bench of Honorary Magistrates, Second Class, Hardoi, under s. 379, I. P. C. and sentenced to a fine of Rs. 20 each.

They appealed against their conviction to the learned District Magistrate of Hardoi, who dismissed it on August 9, 1940, but reduced the sentence to a fine of Rs. 10 each.

The application for revision in this Court was filed on October 14, 1940.

A preliminary objection has been taken by the learned Counsel for the opposite side that this Court is precluded from entertaining the present application by reason of the uniform practice prevailing in this Court refusing to entertain an application in revision where the applicants have not gone in revision to the Court of Session, which has concurrent jurisdiction. In support of his contention the learned Counsel has relied on a decision of mine reported in *Raja Ram* v. *King-Emperor*, (1937 O. W. N. 1044) (1), and also on the decisions

(1) 1937 O W N 1044; 171 Ind. Cas 167; 10 R O 92; 38 Cr. L J 1024; 1937 O L R 523.

of the Allahabad High Court reported in *Emperor* v. *Muhammad Hashim*, (I. L.. R. 55 Allahabad 261) (2), *Nathe Singh* v. *Emperor*, (A. I. R. 1927 Allahabad 829) (3), and *Sukhraj Singh* v. *Emperor*, (A. I. R. 1927 Allahabad, 834) (4). These decisions undoubtedly support the objection raised by the learned Counsel for the opposite party.

On the other hand the learned Counsel on behalf of the applicants has relied on the following decisions:

(1) *Emperor* v. *Mansur Husain*, (I. L. R. 41 Allahabad 587) (5).

(2) *Emperor* v. *Balkrishna Sharma*, (I. L. R. 54 Allahabad 331) (6) and

(3) *Abdul Matlab* v. *Nanda Lal Khatel*, (I. L. R. 50 Calcutta 423) (7).

Justice Kendall in the cases reported in A. I. R. 1927 Allahabad 829 (3) and 834 (4), refused to entertain an application because the applicant had not gone in revision to the Sessions Judge even though there had been an appeal to the District Magistrate.

It is not necessary for me to discuss the cases of other High Courts in a case like this when the uniform practice of this Court is not to entertain an application in revision where the applicant has not gone in revision to the Sessions Judge.

In the case of *Ajudhia Singh* v. *King-Emperor*, (10 O. W. N. 733) (8), Justice Raza held that

"the Oudh Chief Court is precluded from entertaining an application for revision by reason of the practice of the Court refusing to entertain an application in revision where the applicant has not gone in revision either to the Sessions Judge or to the District Magistrate."

In the case reported in (1937 O. W. N. 1044) (1), I observed that "no special grounds were shown to me for entertaining the application for revision."

In the present case the applicant Debi Singh has to-day filed an affidavit in which it is stated that after the dismissal of the appeal by the District Magistrate he was informed by his Counsel that the application for revision of the District Magistrate's order would lie in the Chief Court and that there was no limitation for filing such an application. I do not for a moment think that the Counsel would have told Debi Singh that "there was no limitation for filing such an application," but in any case I am of opinion that the advice given by the Counsel to Debi Singh that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicants to file the application in this Court.

The objects of laying down the rule that an application in revision to the lower Court is an essential step in the procedure, are to prevent the time of the High Court from being wasted by frivolous applications and to obtain an expression of opinion by a Court of superior jurisdiction such as that of the Sessions Judge in case the matter should eventually come before the High Court.

I am, therefore, of opinion that I am precluded from entertaining the present application and I dismiss it.

s. *Application dismissed.*

(2) 55 A 261; 145 Ind. Cas. 726; 1933 A L J 119; L R 14 A 46 Cr.; A I R 1933 All. 283; (1933) Cr. Cas. 523; 34 Cr. L J 1048; 6 R A 152.

(3) A I R 1927 All. 829; 102 Ind. Cas. 352; L R 8 A 67 Cr.; 7 A I Cr. R 438; 28 Cr. L J 544.

(4) A I R 1927 All. 834; 101 Ind. Cas. 603; L R 8 A 36 Cr.; 28 Cr. L J 475.

(5) 41 A 587; 50 Ind. Cas. 837; 20 Cr. L J 347; 1 U P L R (H C) 45; 17 A L J 800; A I R 1919 All. 258.

(6) 54 A 331; 137 Ind. Cas. 686; (1932) A L J 39; L R 13 A 1 Cr.; A I R 1932 All. 125; (1932) Cr. Cas. 150; Ind. Rul. (1932) All. 351; 33 Cr. L J 528.

(7) 50 C 423; 76 Ind. Cas. 990; A I R 1923 Cal. 674; 25 Cr. L J 526.

(8) 10 O W N 733; 147 Ind. Cas. 797 (1); 6 R O 309; 35 Cr. L J 475.

CALCUTTA HIGH COURT

Appeal No. 1126 of 1938

June 27, 1940

EDGLEY, J.

AMIYA BIKASH DATTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHALUXMI BANK LTD., CHITTAGONG—PLAINTIFF—RESPONDENT

Bengal Public Demands Recovery Act (III of 1913), ss. 3 (1), 7—In execution of its mortgage decree plaintiff purchasing property—Plaintiff's name mutated in Collectorate records—Certificate proceedings for recovery of cess in respect of aforesaid property—Notices under s. 7 served—Report to certificate officer that property had already been sold to plaintiff—Notices on recorded proprietors (including plaintiff) served—Plaintiff's name included in sale proclamation—Held, that the plaintiff's name was added within meaning of s. 3 (1) that consequently certificate sale was binding on plaintiff.

Certain property had been purchased by the plaintiff Bank in execution of its mortgage decree and obtained possession. Thereafter the plaintiff applied for mutation in the Collectorate records and the mutation was ordered. In the meantime a certificate had been filed against the former proprietors of this property in respect of arrears of cess. After notices under s. 7, Public Demands

Recovery Act, had been served on the persons against whom the certificate was filed a report was made to the certificate officer to the effect that the property had already been sold to the plaintiff Bank. The case again came before the certificate officer who stated that the names of two more recorded proprietors had been supplied to him and he directed that notices should issue against them. Subsequently, the usual sale proclamation was issued under r. 46 of the rules in Sch. II, to the Act, and admittedly this proclamation contained the plaintiff's name:

Held, that in a case of this sort, to nullify the effect of a certificate sale, a very heavy onus would lie on the plaintiff to show that there had been a non-compliance with the requisite formalities required under the Public Demands Recovery Act, and that the plaintiff's name had not been added within the meaning of s. 3 (1) of the Act. Having regard to the circumstances it was clear in this case that the plaintiff Bank had not discharged this onus. As the plaintiff's name actually appeared in the sale proclamation there was also a presumption to the effect that this sale proclamation was drawn up after notice to the plaintiff as required under r. 46 (2) contained in Sch. II, to the Act.

A. from the appellate decree of the Sub-Judge, 3rd Court, Chittagong dated February 22, 1935.

Messrs. *A. N. Bose, Kohinibenod Rakshit*, and *Durgesh Prasad Das*, for the Appellants.

Messrs. *Gunada Charan Sen* and *Amalendu Sen*, for the Respondent.

Judgment.—The defendants are the appellants in this case and in the suit out of which this appeal arises the plaintiff, the Mahaluxmi Bank Ltd., sued for a declaration to the effect that the plaintiff's right had not been affected by a certificate sale which was held on January 8, 1934 by which the defendants purchased certain property. It appears that this property had been purchased by the plaintiff Bank on August 8, 1931 in execution of a mortgage decree and that the Bank obtained possession in the execution proceedings on November 3, 1931. Thereafter the plaintiff applied for mutation in the Collectorate records and the mutation order was made on September 23, 1932. In the meantime a certificate had been filed against the former proprietors of this property in respect of arrears of cess and at the ensuing certificate sale which was held on January 8, 1934 this property was purchased by Annada Charan Datta, the father of the principal appellant. The plaintiff Bank took the usual steps under the Public Demands Recovery Act to have the sale set aside but as these steps were unsuccessful the Bank instituted the suit out of which this appeal arises. The first Court held that the certificate sale which took place on January 8, 1934 was binding on the plaintiff Bank but this decision was reversed by the lower Appellate Court on the ground that the certificate sale was void. In arriving at this conclusion the learned Subordinate Judge found that there was nothing on the record to show that the plaintiff's name had been inserted in the certificate record at any place except in the sale proclamation. The learned Advocate for the respondent asks me to treat this finding as a findings of fact by which the appeal should be concluded. I am however not prepared to accept this contention, because in arriving at this finding the lower Appellate Court has not taken into consideration certain important circumstances which will presently appear. Admittedly, in a case of this nature the plaintiff Bank would be bound by the sale which took place on January 8, 1934, if the Bank was a "certificate debtor." The expression has been defined is s. 3 (1), Public Demands Recovery Act, in the following terms:

> "Certificate debtor" means the person named as debtor in a certificate filed under this Act, and includes any person whose name is substituted or added as debtor by the certificate officer."

It is not contended that the plaintiff Bank was substituted but it is argued with considerable force that the Bank was added as a debtor by the certificate officer. The circumstances upon which the learned Advocate for the appellants relies in support of this argument, have not received proper consideration in the judgment of the lower Appellate Court. In the first place it is significant that on September 23, 1932, an order was passed for the mutation of the plaintiff's name in the Collectorate records. After notices under s. 7, Public Demands Recovery Act, had been served on the persons against whom the certificate was filed on September 16, 1932, it would appear that a report was made to the certificate officer on April 10, 1933, to the effect that the property had already been sold to the plaintiff Bank. Thereafter, on May 3, 1933, a note Ex. T. was recorded by the certificate officer asking the land registration officer for details with regard to the *mahal* and the names of the other recorded proprietors and there was a direction to the effect that the matter should be put upon May 20, 1933. On the latter date the case again came before the certificate officer who stated that the names of two more recorded proprietors had been supplied to him and he directed that notices should issue against them. It also appears that on October 26,

1933 the usual sale proclamation was issued under r. 46 of the rules in Sch. II to the Act, and admittedly this proclamation contained the plaintiff's name.

In a case of this sort, to nullify the effect of a certificate sale, a very heavy onus would lie on the plaintiff to show that there had been a non-compliance with the requisite formalities required under the Public Demands Recovery Act and that the plaintiffs name had not been added within the meaning of s. 3 (1) of the Act. Having regard to the circumstances set forth above it seems to be clear in this case that the plaintiff Bank has not discharged this onus. On the contrary, in my judgment, the above-mentioned circumstances clearly show that the plaintiff's name was added within the meaning of s. 3 (1) of the Act at any rate as far back as May 20, 1933. It is clear that the peon's report dated April 10, 1933, which drew attention to the fact that the property had been sold to the plaintiff, resulted in enquiries being made in respect to this matter in pursuance of the certificate officer's order, dated May 3, 1933. We know that the plaintiff's name had been mutated in the Collectorate records on September 23, 1932 and it is therefore almost impossible to avoid the conclusion that one of the two recorded proprietors to whom reference was made in the certificate officer's order dated May 20, 1933, must have been the plaintiff. There is a presumption to the effect that the usual notices under s. 7, Public Demands Recovery Act, were duly issued in pursuance of the order made by the certificate officer on May 20, 1933, and as the plaintiff's name actually appears in the sale proclamation dated October 26, 1933, there is also a presumption to the effect that this sale proclamation was drawn up after notice to the plaintiff as required under r. 46 (2) contained in Sch. II to the Act. These presumptions were of course rebuttable, but it is clear that they were not rebutted. In the result, I am of opinion that in view of the considerations and circumstances set forth above, the plaintiff's suit must fail. It follows that the judgment of the lower Appellate Court must be set aside, and this appeal is allowed with costs throughout. The decision of the first Court is restored and affirmed. Leave to appeal under cl. 155, Letters Patent, is refused.

D. *Appeal allowed.*

OUDH CHIEF COURT

Criminal References Nos. 47 and 48 of 1940

January 7, 1941

BENNETT, J.

SOBHA RAM—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY

Motor Vehicles Act (VIII of 1914), s. 112—U. P. Motor Vehicles Rules, 1940, rr. 2 (g), 79 (viii)—Offence under s. 112 read with r. 79 (viii), if can be tried by Honorary Special Magistrate or by stipendiary Magistrate.

In r. 2 (*g*) of the U. P. Motor Vehicles Rules, 1940, "Magistrate" means a stipendiary Magistrate. This presumably means that wherever the word "Magistrate" occurs in the rules it must be understood to mean a stipendiary Magistrate. The rules do not deal with the trial of offences under the Act. The mere fact that the offence of which the accused was convicted is made an offence by r. 79 (*viii*) of the Motor Vehicles Rules is no reason for holding that the Magistrate trying the case must be a Magistrate such as is defined in those rules. The accused can therefore be convicted by Honorary Special Magistrate for offences under s. 112 of the Motor Vehicles Act read with r. 79 (*viii*) of the Motor Vehicles Rules.

Cr. Ref. made by the District Magistrate, Gonda.

The Govt. Advocate, for the Crown.

Order.—These are two references by the District Magistrate of Gonda recommending that the conviction of one Sobha Ram in two cases under s. 112 of the Motor Vehicles Act read with r. 79 (*viii*) of the Motor Vehicle Rules, 1940, be set aside and a re-trial by a stipendiary Magistrate ordered.

Sobha Ram was convicted by an Honorary Special Magistrate and an application in revision was filed before the District Magisteate on the ground that only a stipendiary Magistrate is empowered to try cases under the Motor Vehicles Act. This contention was based on the definition of the word "Magistrate" in the rules framed by the Local Govt. under the Motor Vehicles Act. The District Magistrate accepted the contention, considering that the Honorary Magistrate had no jurisdiction in view of this definition.

I am not satisfied that the Honorary Special Magistrate had no jurisdiction. Rule 2 (*g*) of the U. P. Motor Vehicles Rules, 1940, merely provides that in these rules, unless there is anything repugnant in the subject or context, "Magistrate" means a stipendiary Magistrate. This presumably means that wherever the word "Magistrate" occurs in the rules it must be understood to mean a stipendiary

Magistrate. The rules do not deal with the trial of offences under the Act. Section 132 of the Act provides that no Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try any offence punishable under the Act or any rule made thereunder. The mere fact that the offence of which Sobha Ram was convicted in each case was made an offence by r. 79 (*viii*) of the Motor Vehicles Rules is no reason for holding that the Magistrate trying the case must be a Magistrate such as is defined in those rules. In my opinion the definition can only mean that the word "Magistrate" means a stipendiary Magistrate where this word is used in the rules. I am not therefore prepared to accept these references. I reject them and direct the records to be returned.

D. *References rejected.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 90/31 of 1939
September 30, 1940

ALMOND, J. C. AND MIR AHMAD, J.

KARAM DIN NAWAB DIN—APPELLANTS

versus

ANANT RAM LALA HUKUM CHAND DHAL AND ANOTHER—RESPONDENTS

Partnership Act (IX of 1932), ss. 2 (b), 4, 69—Solitary transaction of money-lending by some persons jointly—Persons, if become partners in firm—Their registration under s. 69, if essential—Contract Act (IX of 1872), ss. 126, 134, 2 (d)—Relative of judgment-debtor offering cheque to decree-holder in satisfaction of his claim—Relative, if surety, if can take advantage of s. 134—Consideration for the transaction—Liability of relative—Second appeal—New plea—Plea of undue influence cannot be raised for first time.

Section 2, cl. (*b*) read with s. 4 Partnership Act is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in s. 8 presumes the existence of a partnership as defined in s. 4 and therefore *a fortiori* the existence of a business mentioned in s. 2, cl. (*b*). A solitary transaction in which persons have jointly lent money even though entered into by more than one person would not make those persons partners in a firm so that their registration should be necessary under s. 69, Partnership Act.

Where a decree-holder has attached his judgment-debtor's property and a relative of the judgment-debtor offers a cheque to the decree-holder in satisfaction of his claim, the relative is not a surety for the judgment-debtor and if he stops payment of the cheque, the decree-holder has an independent cause of action against the relative and the relative cannot take advantage of s. 134 Contract Act.

And where the relative pays certain amount in satisfaction of the decree-holder's claim against the judgment-debtor, the consideration for the payment consists in the decree-holder not insisting on attachment of the judgment-debtor's property. If therefore the relative withholds the payment, he is liable to the decree-holder.

Where undue influence is not pleaded in the lower Courts it cannot be raised for the first time in second appeal because evidence would have been necessary to prove or disprove the exercise of undue influence if it had been taken up in the trial Court.

A from an order of the Addtional Judge, Peshawar, dated March 4, 1939.

Sheikh *Mohd. Shafi*, for the Appellant.

Mr. *Krishan Chandra*, for the Respondents.

Mir Ahmad, J.—On March 27, 1936 Anant Ram and Tara Chand the respondents before us brought a suit on a pronote against Abdur Rashid. They asked for a decree for Rs. 3,000. The principal amount was Rs. 3,500, interest Rs. 56-8-0, and miscellaneous expenses Rs. 43-8-0. An attachment before judgment was ordered on Mach 30, 1936. The bailiff went on April 10, 1936 to carry out the order by attaching the property of Abdur Rashid at Risalpur. At Risalpur one Karamdin, who is said to be a relation of Abdur Rashid, gave the plaintiffs a cheque for Rs. 4,000. The plaintiffs accepted the cheque in full satisfaction of their claim. Karamdin also gave them a covering letter. In this letter he referred to the cheque and stipulated that if the cheque was not honoured he and his property would be responsible for the payment of its value. The bailiff therefore desisted from making the attachment and returned. The cheque was payable at Lahore. It was presented but not cashed because payment was stopped by the drawer.

The plaintiffs then asked the Court in which their suit was pending that Karamdin should be impleaded. Later, however, on June 24, 1936 they presented an application to the Judge intimating that there was a new contract between them and Karamdin, that there was no use impleading him in the old suit against Abdur Rashid, and that they wished to withdraw their suit against Abdur Rashid. It was permitted to be done and the suit was dismissed. The plaintiffs filed a suit against Karamdin on May 4, 1937 for Rs. 4,000 principal and Rs. 255 interest. Several objections were raised by Karamdin but they did not prove of any avail. A decree was granted by the Sub-Judge for Rs. 4,255 with costs against the

defendant. An appeal against that order was presented to the District Court at Peshawar without success. Karamdin has come up on further appeal to the Court: His Counsel has raised the objection that the plaintiffs could not bring the suit because they were a firm and had not got themselves registered as such with the Registrar of firms as required by the Partnership Act. It was admitted by him that the two plaintiffs were not doing any other business together and that they were also not related to each other. Parnership is defined in s. 4, Partnership Act as follows :

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership which one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the firm name."

Section 2, cl. (*b*) of the Act relates to the term 'business' and says "business includes every trade, occupation and profession". Section 8 lays down "a person may become a partner with another person in particular adventures or undertakings." The question is whether the fact that these two persons jointly lent money to Abur Rashid is "business" as contemplated by s. 4 and s. 2, cl. (*b*) or an adventure or undertaking as laid down in s. 8. It does not require any long discussion to show that the answer should be in the negative. Section 2, cl. (*b*) read with s. 4 is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in s. 8 presumes the existence of a partnership as defined in s. 4 and therefore *a fortiori* the existence of a business mentioned in s. 2, cl. (*b*). A solitary transaction of this nature even though entered into by more than one person would not in our judgment make those persons partners in a firm so that their registration should be necessary under s. 69, Partnership Act. We therefore overrule this objection. Counsel next argued that the position of Karamdin was that of a surety under s. 126, Contract Act, and that the plaintiffs having withdrawn their suit against the principal debtor the surety was discharged by the operation of s. 134 of that Act. Section 126 defines a surety as follows :

"A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gave the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."

Section 134, Contract Act, lays down that "the surety is discharged by any contract between the creditor and the principal debtor, by which the principal is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."

Now it is obvious that to be a surety a person should promise to pay if the principal debtor commits a default. In this case no such promise was made by Karamdin. Karamdin offered a cheque which is a legal tender and to all intents and purposes he paid of the decree-holder. It is by his subsequent act of stopping the cheque that he forced the plaintiffs to come into Court. We hold that Karamdin was not a surety. Rather we think that he made a new contract—to wit that his banker shall pay the plaintiffs a sum of Rs. 4,000. It follows that the plaintiffs had an independent cause of action to bring a suit against him alone and he cannot take advantage of s. 134, Contract Act. Counsel then adverted to the question of consideration. He said that there was no consideration for Karamdin to pay the amount and he is therefore not liable for it. We are very clear that the consideration consisted in the plaintiffs' not insisting on the attachment of the property of Abdur Rashid. If Karamdin had not offered the cheque the property would have been attached. Counsel made a feeble attempt to show that the cheque was handed over to the plaintiffs under undue influence. He did not plead undue influence in the lower Courts and we are not prepared to allow him to raise this point at this stage, because evidence would have been necessary to prove or disprove the exercise of undue influence if it had been taken up as a line of defence in the trial Court. Counsel also denied the original liability of Abdur Rashid and wanted to argue that Abdur Rashid did not owe any money to the plaintiffs. We cannot agree with him on this point also. His client gave a cheque for Rs. 4,000 to the plaintiffs and this conduct of his estops him from now saying that the amount was not due from Abdur Rashid. The points raised by Counsel have been disposed of They have all gone against him. We find ourselves in perfect agreement with the concurrent findings of the two Courts below that Karamdin is liabe for the amount for which he passed a cheque to the plaintiffs on April 10, 1936 which was not honoured. The plaintiffs have also been rightly awarded interest on this amount. We dismiss the appeal with costs. Pleader's fee Rs. 150.

B. *Appeal dismissed.*

OUDH CHIEF COURT

Civil Revision Application No. 152 of 1939
January 15, 1941
BENNETT, J.
KHAIRATI KHAN—DEFENDANT—APPLICANT
versus
MUNNEY KHAN—PLAINTIFF—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 152—Decree of trial Court merging into decree of Appellate Court—Jurisdiction of trial Court to amend decree under s. 152 as to its order of costs.

In matters of amendment of the decree under s. 152, Civil P. C., the trial Court has ordinarily no jurisdiction left in cases where the decree of that Court has merged in the decree of the Appellate Court. The principle that notwithstanding the fact that the decree of the trial Court has merged in the decree of the Appellate Court, the former Court has power under s. 152 to make an amendment if the amendment is merely of a clerical or arithmetical mistake cannot be extended where amendment sought relates to costs and there is a dispute between the parties as regards the interpretation to be placed on the order of the trial Court in regard to proportionate costs, which cannot be said, to be a clerical or arithmetical mistake apparent on the face of the record. 123 Ind. Cas. 355 (1), and *Asma Bibi* v. *Ahmad Hussain* (2), *Shivlal Kalidas* v. *Jumklal Nathiji Desai* (3) and 151 Ind. Cas. 568 (4), referred to.

C. R. App. of the order of the Munsif of North Lucknow, dated September 16, 1939.

Mr. *G. D. Khare*, for the Applicant.

Mr. *Ramapat Ram*, for the Opposite Party.

Order.—This is an application in revision under s. 115 of the Civil P. C., against the order passed by the learned Munsif, North Lucknow, on September 16, 1939, ordering the amendment of a decree on an application which was apparently made under s. 152 of the Civil P. C.

The suit brought in the Munsif's Court for arrears of rent and for ejectment. The prayer for ejectment was subsequently given up and the suit was decreed for arrears of rent and the prayer for ejectment rejected on October 17, 1938.

An appeal was filed by the defendant and this appeal was dismissed on May 18, 1939.

On August 9, 1939, the plaintiff applied for amendment of the decree so far as it related to costs. He represented that a larger sum should have been allowed to him.

The order passed by the Munsif was :

"The application is allowed. Decree should be amended as proportionate costs were ordered only as the plaintiff gave up relief for ejectment. Only the costs on relief for ejectment should not have been taxed."

It has been stated in this Court by the learned Counsel for the opposite party that there were actually two grounds on which amendment was sought, the first being the fact that subsequent to the appeal the plaintiff had been obliged to pay an expert in the case a larger fee then was allowed for in the decree, and the second that the order of the lower Court in regard to proportionate costs had been misunderstood in the preparation of the decree.

It is contended in the present application in revision that the Munsif had no jurisdiction to amend the decree as it had merged in the decree of the Appellate Court. It is also contended that the decree was prepared in accordance with the order of the trial Court.

In support of the contention that once an appeal has been heard and decided the decree of the trial Court merges in the appellate decree, I have been referred to three cases, namely, *Munuswami Mudali* v. *Jagannadha Reddi* (A. I. R. 1929 Mad. 830); (1), *Asma Bibi* v. *Ahmad Husain* (I. L. R. 30 All. 290) (2) and *Shivlal Kalidas* v. *Jumklal Nathiji Desai* (I. L. R. 18 Bom. 542) (3).

The head-note in the first case is to the effect that after the lower Court's decree has been confirmed by the Appellate Court the jurisdiction of the lower Court to amend its decree ceases.

In the Allahabad case it was similarly held that the dismissal of an appeal is a decree and supersedes the decree of the Court below. Consequently the Appellate Court is the only Court which has jurisdidiction to amend the decree. In the Bombay case an application for amendment was made to the Appellate Court, that is the Bombay High Court, and it was contended for the defendant that the application should have been made to the lower Appellate Court. The Bombay High Court held that the only decree which existed for the purposes of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into which that of the lower Court became incorporated. The application was, therefore, properly made to the High Court.

For the opposite party I have been referred to a case of the Allahabad High

(1) A I R 1929 Mad. 830; 123 Ind. Cas. 355; (1929) M W N 729; Ind. Rul. (1930) Mad. 499.
(2) 30 A 290; A W N 1908, 109; 5 A L J 584.
(3) 18 B 542.

Court, *Chinta Mani* v. *Debi Prasad* (A. I. R. 1934 All. 971) (4), in which it was held that notwithstanding the fact that the decree of the trial Court has merged in the decree of the Appellate Court, the former Court has power under s. 152 of the Civil P. C., to make an amendment if the amendment is merely of a clerical or arithmetical mistake.

It might, therefore, have been permissible on the authority of this latter ruling for the decree to have been amended by the trial Court, if the correction was merely of a clerical or arithmetical mistake. It appears to me, however, impossible to hold that the correction in the present case was of this nature. So far as the expert's fee was concerned the decree was prepared correctly so far as the facts in regard to the amount were known at the time of its preparation. There is a dispute between the parties as regards the interpretation to be placed on the order of the trial Court in regard to proportionate costs, and it cannot be said, therefore, that there was a clerical or arithmetical mistake apparent on the face of the record. The question should have been raised in the appeal I do not consider that there should be any extension of the principle laid down in *Chinta Man* v. *Debi Prasad* (4), that amendment of a decree may be made by the lower Court under s. 152 where the correction is merely of a clerical or arithmetical mistake. The trial Court has ordinarily no jurisdiction left in cases where the decree of that Court has merged in the decree of the Appellate Court. I find, therefore, that whatever may be the merits of the order passed, the Munsif had no jurisdiction to pass the order.

I accordingly allow this application with costs and set aside the lower Court's order.

s. *Application allowed.*

(4) A I R 1934 All. 971; 151 Ind. Cas. 568; 7 R A 186; 1934 A L J 937; 1934 A L R 867.

BOMBAY HIGH COURT

Appeal No. 25 and Insolvency No. 230 of 1940

September 16, 1940

BEAUMONT, C. J. AND KANIA, J.

JETHMAL NARANDAS AND ANOTHER—DEBTORS—APPELLANTS

versus

MAHADEO ANANDJI DHORIA AND ANOTHER—CREDITORS—RESPONDENTS

Presidency Towns Insolvency Act (III of 1909), s. 13—Court must consider whether petitioning-creditor has good debt—Mere existence of decree, if sufficient—Court, whether estopped from disputing decree.

In insolvency the question which arises is not merely one between the petitioning-creditor and the judgment-debtor. The rights of other creditors of the judgment-debtor have to be considered. If an order of adjudication is made, the rights of those creditors to recover payment independently of their own debts are taken away. Therefore, the Court must consider whether the petitioning creditor in fact has a good debt, and it is not bound by any decree as between the creditor and the debtor. The debtor may be estopped from disputing the decree, but the Insolvency Court is not estopped; the Court must be satisfied about the validity of the debt in the interests of the other creditors. *Ex parte Lennox; In re Lennox* (1), *In re Fraser Ex parte, Central Bank of London* (2), *In re Hawkins; Ex parte, Troup* (3) and *A Debtor, In re* (4), relied on.

Mr. *M. C. Setalvad*, Advocate-General, for the Appellants.

Sir *Jamshedji Kanga*, for the Respondents.

Beaumont, C. J.— This is an appeal from an order made by Somjee, J., in insolvency adjudicating the appellant an insolvent, and, in my opinion, it is perfectly clear that the order ought not to have been made. The facts are these. The appellant and his wife in the year 1935 obtained an advance of Rs. 14,000 from the respondents on the security of ornaments belonging to the wife, and a promissory note was also given for the debt. It is said that in the year 1935 one of the pledged ornaments was sold for about Rs. 3,000. In 1936 there was a further promissory note for the amount then due, which was Rs. 11,840. Then it is said that sometime after that another ornament was sold for Rs. 995. In 1939 the respondents as pledgees gave notice to the pledgor that they intended to sell the pledged goods, and an arrangement was come to on January 5, 1939, by which the pledgees were to take over the remaining ornaments, and the pledgor gave a promissory note for the balance. On that promissory note a summary suit was filed,

and on February 12, 1940, there was a consent decree for the amount claimed and costs, time being given to the debtor to redeem the ornaments. But the ornaments were not redeemed. Accordingly, an insolvency notice was served on the appellant on July 2, 1940. An application was made by the appellant to set aside that notice, but that application was dismissed, and I think rightly so, because there had been no stay of the consent order, and the debtor did not bring himself within the proviso to s. 9 (*i*), Presidency Towns Insolvency Act. The result therefore was that there was an act of insolvency, and on August 13, the creditors presented a petition asking that the judgment-debtor be adjudicated insolvent. On that petition the debtor filed an affidavit, and in para. 4 he stated this:

"Until recently both myself and my wife honestly believed in the statement of the plaintiffs regarding the sale proceeds of the said diamond *kada* and the diamond bracelet."

Those are the two ornaments sold to which I have referred. Then the affidavit goes on:

"Relying on their statement made on oath in the affidavit and their assurance, I accepted their figures. Very recently, however, I came to know that the plaintiffs has caused the said jewellery to be sold through the said Mohanlal to a member of a Ruling Indian family for Rs. 9,000 but that they have failed to account to me or to my wife for the correct amount of the sale proceeds.

So that the case of the appellant is that certain of the ornaments were sold for a much higher figure than the pledgees admitted, and that if the pledgees had accounted for the true figure, there would have been no debt due; that is to say, he challenged the consent decree in effect on the ground that it was obtained by fraudulent suppression of material facts. That affidavit was not answered, but the learned Judge made the order of adjudication. Now, under s. 13, Presidency Towns Insolvency Act, sub-s. (2), at the hearing of a petition the Court shall require proof of (*a*) the debt of the petitioning creditor, and (*b*) the act of insolvency. Sub-section (5) provides that the Court may make an order of adjudication if it is satisfied with the proof above referred to. So that the Court must be satisfied as to the validity of the debt of the petitioning-creditor.

One has to remember that in insolvency the question which arises is not merely one between the petitioning-creditor and the judgment-debtor. The rights of other creditors of the judgment-debtor have to be considered. If an order of adjudication is made, the rights of those creditors to recover payment independently of their own debts are taken away. Therefore, the Court must consider whether the petitioning creditor in fact has a good debt, and it is not bound by any decree as between the creditor and the debtor. The debtor may be estopped from disputing the decree, but the Insolvency Court is not estopped. That principle has been established in many cases. The leading case is *Ex parte Lennox; In re Lennox* (1). That was a very strong case. The debtor had been sued for a sum of £ 1,500 due on two promissory notes, and he had obtained unconditional leave to defend and had put in a defence alleging that there never was any consideration for the notes. Subsequently he withdrew his defence and consented to judgment. On that judgment a bankruptcy notice was served, which was not complied with, and a petition was presented to have the debtor adjudicated bankrupt. The Court of appeal held that the debtor was entitled on the hearing of that petition to challenge the debt on the very grounds which he had set up and abandoned in the suit, the principle being that, however much the debtor might be estopped by his conduct as against the petitioning-creditor, the Court must be satisfied about the validity of the debt in the interests of the other creditors. That case has been followed in *In re Fraser; Ex parte Central Bank of London* (2), *In re Hawkins; Ex parte Troup* (3) and in *A Debtor In re* (4). The basis of the decision is most clearly stated by Lord Esher, M. R, in *In re Fraser; Ex parte, Central Bank of London* (2) where he says (p. 636*):

"The decision in *Ex parte Lennox; In re Lennox* (1) is based upon the highest ground—*viz.*, that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning-creditor.

In this case it seems to me that, on the materials before the learned Judge, is was wrong for him to hold that he was satisfied as to the validity of the debt. In the affidavit of the debtor the point it

(1) (1885) 16 Q B D 315; 55 L J Q B 45; 54 L T 452; 34 W R 51.
(2) (1892) 2 Q B 633; 67 L T 401; 9 Morrell 256.
(3) (1895) 1 Q B 404; 64 L J Q B 373; 14 R 44; 72 L T 41; 43 W R 306; 2 Manson 14.
(4) (1927) 2 Ch. 367; 96 L J Ch. 381; (1927) B & C R 127; 137 L T 507.

*Page of (1892) 2 Q B—[*Ed.*]

made that pledged ornaments had been sold at a much higher price than that admitted to a Ruling Prince through a named agent, and it was for the learned Judge to be satisfied, before making the order, that that allegation was not true. If the Insolvency Judge thinks that *prima facie* the debtor's defence to the debt is not *bona fide*, he can, under s. 13 (6), put the debtor on terms requiring him to give security, and on those terms stand the petition over. But, in my opinion, having regard to the fact that the petitioning-creditors put in no answer at all in answer to the debtor's allegation, it is impossible to say that a *prima facie* case is made out. The judgment by itself does not make out such a *prima facie* case, and I think that the learned Judge should have required evidence as to this alleged sale of ornaments for Rs. 9,000. If the respondents had produced their books and an affidavit by the agent disclosing the name of the purchaser, it may be that that would have been sufficient *prima facie* evidence, but at the moment there is nothing of that sort.

We must, therefore, allow the appeal, set aside the order of adjudication, and remit the petition to the Insolvency Judge with a direction to him to satisfy himself as to the validity of the petitioning creditors' debt. Respondents to pay to the appellant his costs of the appeal, but to be at liberty to set off those costs against any costs which they may incur in obtaining an order of adjudication against the appellant.

Kania, J.—The relevant facts and dates are stated in the judgment just delivered by the learned Chief Justice. Two points arise for consideration. In an application for adjudication under s. 13, Presidency Towns Insolvency Act the petitioning creditor has to prove (1) that there is a debt of the petitioning creditor and (2) an act of insolvency. By reason of the petitioning creditors obtaining a decree and serving a notice as provided by s. 2 of Bom. Act XV of 1939, which notice was made absolute, it may be held that an act of insolvency was proved. When the Court however has to make an order under s. 13, the first requirement, namely, that the debt of the petitioning creditor was proved, still remains to be satisfied. A petitioning creditor may rely on the decree which he has obtained, but it is not conclusive. As held in *Ex parte Lennox; In re Lennox* (1) the Insolvency Court has to be satisfied in spite of *prima facie* evidence contained in the decree that the debt of the petitioning creditor exists. In this case we have not the benefit of the judgment of the lower Court and therefore we do not know whether the learned Judge made the order holding that by reason of the decree the debt was proved. We are told the relevant passage from William's "Law of Bankruptcy" was cited to the Judge. It appears more probable therefore that he held that while it was the duty of the Court to inquire and determine whether a debt of the petitioning creditors existed, on the affidavits, in his view, the same was proved.

The question therefore is whether on the materials before the Court it could come to the conclusion that the debt was proved. In that connection it has to be remembered that para. 4 of the affidavit of the debtor distinctly stated the ground on which he challenged the consent decree obtained between the parties. No affidavit in reply was filed, and throughout the record it does not appear that the names of the parties and the exact price realised from the parties are mentioned at any place. It was argued that the learned Judge considered that the allegations in the affidavit of the debtor were vague as the source of information was not disclosed. If so, the source of information may be required to be stated. I do not think under the circumstances of the case it would be proper to say that because the source of information was not disclosed the affidavits should be discarded and it should be held that the debt was proved. Holding therefore that it was the duty of the trial Court to inquire whether the debt of the petitioning creditors was proved, I am not satisfied that the affidavits as made were sufficient to come to the conclusion at which the learned trial Judge reached. It was pointed out here in the course of arguments that the ornaments in question were sold by Mohanlal. It is disputed that Mohanlal was the agent of the petitioning creditors. It was argued that the petitioning creditors gave credit for the full amount which they had received and therefore there was no fraud. We are not determining any of those questions which the learned trial Judge ought to have inquired into. The judgment pronounced here is not a decision for or against any of those arguments which are advanced on behalf of the petitioning creditors. The only thing which is held

here is that it was the duty of the trial Court to determine whether the debt of the petitioning creditors was proved, and on affidavits alone the question should not have been decided in this case. I agree therefore that the appeal should be allowed, and the matter should be remanded to the trial Court for inquiring whether the petitioning creditors had proved their debt within the meaning of s. 13, Presidency Towns Insolvency Act.

S. *Case remanded.*

CALCUTTA HIGH COURT

Civil Reference No. 2 of 1940

April 22, 1940

DERBYSHIRE, C. J. AND B. K. MUKHERJEA, J.

THE DEPENDENTS OF RAHIM BUX

versus

JAMES FINLAY & Co., LTD.

Workmen's Compensation Act (VIII of 1923), s. 8 (8)—Mother, widow and minor son of deceased Muhammadan awarded compensation—Minor's share put in Post office by the direction of the Commissioner—Mother and minor dying—Commissioner, if can order minor's share to be transferred to widow and open account in widow's name—Widow remarrying, effect of—Jurisdiction of Civil Court in the matter of distribution of minor's share.

The mother, widow and a minor son of deceased Muhammadan were awarded compensation as dependents. The minor's share of the compensation was deposited in the post office by the Commissioner. After the death of the mother and the minor the Commissioner ordered the minor's share to be allotted to the widow and directed the postal authorities to cancel the minor's account and open a fresh account in the name of the widow.

Held, that the order was perfectly valid, as the alteration of the widow's circumstances by the death of the other dependents amounted to a variation of circumstances within the meaning of s. 8 (8) Workmen's Compensation Act. The fact that the widow had remarried was immaterial.

Held, also under s. 8 (8) of the Act the Commissioner for Workmen's Compensation was the proper authority to make a re-distribution of the money which had been allotted to the share of the deceased minor. Consequently, the Civil Court of the Munsif had no jurisdiction to deal with the matter at all. Hence as far as the Commissioner of Workmen's Compensation was concerned, the decree of the Civil Court (though a consent decree) in such a suit was of no effect.

C. Ref. by the Commissioner for Workmen's Compensation, Bengal.

Mr. *Phanindra Kumar Sanyal*, for the Gulbahar.

Derbyshire, C. J.—This case has been referred to us by the Commissioner for Workmen's Compensation, Bengal, for our opinion. The facts are that on November 30, 1934, the employers, Messrs. James Finlay & Co., Ltd., deposited with the Commissioner a sum of Rs. 1,387-8-0 as compensation payable to the dependants of the deceased workman, Rahim Bux. On March 23, 1935 the Commissioner made a distribution under s. 8 (5) of the Act and apportioned the money as follows: to the widowed mother, Rasulan, Rs. 300, to the widow of the deceased, Gulbahar, Rs, 300 to the minor son of the deceased, Muhammad Sahaban, then 2¼ years old, the balance of Rs. 787-8-0. The sums awarded to the widowed mother and to the widow were paid to them in full in May 1935. The sums awarded to the minor son, Sahaban, was invested by the Commissioner in the Post Office Savings Bank under s. 8 (7). In 1936, the Commissioner ascertained that the widowed mother and the minor son, Sahaban, were dead. The only surviving dependant was the widow, Gulbahar. Shortly afterwards the Commissioner received petitions from Syed Mia and Serajul Huq, who were Sahaban's deceased father's brothers, who claimed as heirs of the deceased minor Sahaban 5/6 of the money lying with the Commissioner in the name of Sahaban. On November 12, 1936, the Commissioner for Workmen's Compensation considered these claims and also the rights of the widow. His order was as follows:

"Perused the report of the Sub-Deputy Magistrate, Sandwip. Defendants Nos. 1 and 3, that is, the minor son and the mother of the deceased are reported to be dead. The widow only exists. She is reported to have remarried, but I do not consider her remarriage as any reason at all for depriving her of the residuum of the money. The balance left here in the name of Sahaban is accordingly awarded to to her (Gulbahar). The Post Office Savings Bank account for Sahaban may be closed and a new account opened in the name of Gulbahar."

Accordingly Rs. 815-14-11 was withdrawn from the account of the deceased minor son and was invested under s. 8 (7) in the Post Office Savings Bank in a fresh account in the name of the widow Gulbahar. In May 1938, Rs. 40 out of this was paid to Gulbahar at her request in order to enable her to pay expenses in connection with the purchase of land. In the meantime after the Commissioner's order of variation of the award mentioned by which he rejected the claim of the minor son Sahaban's uncles, Syed Mia and Serajul Huq, the said Syed Mia and Serajul Huq instituted a suit *in forma pauperis* (*i. e.*, Suit No. 164 of 1937) against Gulbahar in the Court of the Munsif at Sandwip in the District of Noakhali, the parties being residents of that locality. On January 11 1938, that Court passed a compromise.

decree by which the Court ordered that the plaintiffs Syed Mia and Serajul Huq were entitled to two-thirds of the amount of Rs. 787-8-0 and that Gulbahar, that is, the deceased's widow, was entitled to the remaining one-third. The Govt. would be entitled to recover Rs. 59-10-0 for court-fees in the pauper suit from the shares of the plaintiffs and the defendant. These proceedings in the Court of the Munsif at Sandwip took place entirely behind the back of the Commissioner who knew nothing about them till he received a letter on June 29, 1938, from the Collector of Noakhali who stated that he intended to realise the Govt. dues of Rs. 59-10-0 on account of court-fees in the pauper suit. In the meantime Gulbahar alleged that the compromise decree was obtained by fraud. Then there was correspondence about the matter with the result that six questions of law have been put to us by the Commissioner for Workmen's Compensation, Bengal under s. 27 of the Act for our decision by way of opinion.

The first of these questions is :

"Is the order of the Commissioner dated November 12, 1936, under s. 8 (8) of the Act by which he varied the original order of distribution in favour of the sole surviving dependent Gulbahar (deceased workman's widow) good in law, on its merits ?"

In my opinion it was. The deceased's mother was dead. The deceased's minor son had died. The result was that the circumstances of the widow when varied. Whether she had married again or not does not matter; she may be a widow again. What does matter is that when her son died she could no longer look forward to his support in the future if she should need it. In my opinion, her circumstances had varied. The minor son also was dead. The question arose what shall be done with his share of the compensation ? Such an alteration of the circumstances is, in my view, a variation of the circumstances within the meaning of s. 8 (8) of the Act, and the Commissioner was entitled to make an order varying the former order of the allocation of compensation in order to meet the new circumstances that had arisen. It seems to me that the order that he made was fair and equitable. It gave the compensation which Sahaban was entitled, to his mother, who was the remaining dependent of the deceased workman. In my opinion it was a perfectly good and valid order.

The next question the Commissioner asks is: "Was that order appealable ?" There was no appeal from it and, as far as I can see, no question of law was involved. It was a question entirely within the Commissioner's discretion and no appeal could under the circumstances have been brought. The result is that the order was good in law. The next question the Commissioner asks is :

"If that order is good in law, was a civil suit by the uncles of the deceased dependant (minor son) Sahaban in the Court of the Munsif of Sandwip in Noakhali barred by s. 19 (2), Workmen's Compensation Act ?

Section 19 (2) provides :

"No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act."

This suit which was brought in the Court of the Munsif at Sandwip was brought to obtain distribution of the money which had formerly been allotted under the Act to Sahaban. Under s. 8 (8) of the Act the Commissioner for Workmen's Compensation was the proper authority to make a re-distribution. Consequently, the Civil Court of the Munsif in Noakhali had no jurisdiction to deal with the matter at all.

The next question is :

"If the suit was so barred, is the decree dated January 11, 1938 passed by the Court of the Munsif, a nullity ?"

The answer is that it is invalid. As far as the Commissioner of Workmen's Compensation is concerned, it is of no effect. The fifth question is "if that decree is a nullity, can the plaintiffs (uncles of Sahaban) or the Collector of Noakhali execute the decree"? The answer is plainly 'no.'

The last question is :

"Should payments be made to the sole surviving dependent Gulbahar at the discretion of the Commissioner in accordance with the Workmen's Compensation Act ? "

There can only be one answer to that which is 'yes'. We direct that the costs of Gulbahar be paid by the Commissioner out of the fund to which she is entitled and we assess the costs in this case at two gold *mohurs*.

B. K. Mukherjea, J.—I agree.

D. *Order accordingly.*

OUDH CHIEF COURT

Second Civil Appeal No. 358 of 1937
January 6, 1941
BENNETT, J.

Khan Sahib Syed KAZIM HUSAIN—
PLAINTIFF—APPELLANT
versus
Mst. MANGALA DEVI AND ANOTHER—
DEFENDANTS—RESPONDENTS

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 33—Debtor whether must be agriculturist at date of loan and suit.

For the purpose of s. 33, U. P. Agri. Relief Act, an agriculturist debtor must be an agriculturist at the date of the loan as well as at the date when the suit is brought. 168 Ind. Cas. 655 (1) and 183 Ind. Cas. 517 (2), referred to.

S. C. A. against the order of the 1st Civil Judge, Kheri, dated June 3, 1937.

Mr. *M. Wasim*, for the Appellant.

Messrs. *R. B. Lal* and *M. M. Lal*, for Respondent No. 2.

Judgment.—This is a second civil appeal from the judgment and decree passed by the learned First Civil Judge of Kheri, on June 3, 1937, setting aside in first appeal the order passed by the learned Additional Munsif of Kheri decreeing the suit brought by a debtor for accounts under s. 33, of the Agri. Relief Act.

The suit was brought by *Khan Sahib Syed* Kazim Husain against two brothers, Seth Pearey Lal and Seth Ram Swarup for a settlement of account in respect of a loan transaction evidenced by a mortgage-deed dated June 21, 1928, executed by him in their favour. The defendants contested the suit, alleging that the plaintiff was not an agriculturist within the meaning of the Act.

Seth Pearey Lal died during the pendency of the appeal and his widow *Mst.* Mangala Devi has been brought on the record in his place. Orders relating to the substitution of Seth Pearey Lal's representatives were passed by Mr. Justice Hamilton in March and October, 1939. There has been some argument by Counsel on the construction to be placed upon these orders, but they were construed by the office to mean that *Mst.* Mangala Devi should be substituted for her deceased husband Seth Pearey Lal, and I can see no reason to think that this was not Mr. Justice Hamilton's intention. From his order of October 3, 1939, this is, I consider, quite clear.

The only questions that fall to be determined in this second appeal are firstly whether for the purpose of s. 33 an agriculturist debtor must be an agriculturist at the date of the loan as well as at the date when the suit is brought; and secondly whether the appellant was assessed to an amount of income-tax for the years 1927-28 and 1928-29, which debarred him from taking advantage of the Agri. Relief Act as an agriculturist.

The Munsif found that the appellant was an agriculturist both when the loan was advanced and also when the suit was brought, though he held that it was not necessary that he should have been an agriculturist when the loan was advanced.

The Civil Judge on the other hand held that it was necessary that the appellant should have been an agriculturist at the time when the loan was advanced, and that he was not an agriculturist at that time because in the years stated he was assessed to an amount of income-tax which exceeded the local rate payable on the land held by him. The Civil Judge accordingly set aside the Munsif's order decreeing the appellant's suit and dismissed it with costs.

The Civil Judge thought that it would be very anomalous if a debtor who was taking advantage of the provisions of s. 33 was not an agriculturist at the date when the money was lent. He pointed out that under the provisions of Chap. V of the Act a creditor has to maintain regular accounts in respect of loan transactions and that under s. 34 penalties are imposed upon the creditor who fails to maintain such accounts. If it was not necessary for a debtor to be an agriculturist at the time of the transaction the creditor would be in a difficult position. He might advance money to a person who was not at the time of the loan an agriculturist and in that case he would not be required to maintain regular accounts under s. 32. But the debtor might subsequently at any time become an agriculturist and then the maintenance of regular accounts would at once become necessary.

I agree with the Court below that difficulties might ensue on any other view being taken, but I think, quite apart from this aspect of the matter that it is implied in the Act that the debtor must be an agriculturist at both dates. It is true that there is an express provision to this effect only in Chaps. II and III of the Act. In s. 8 (Chap. II) it is provided that no person shall be deemed to be an agriculturist for the purposes of this chapter unless he was an agriculturist both at the time of the advance of the loan as well as at the

date of the suit. In s. 24 (Chap. III) it is provided that no application under ss. 11 and 12 shall be filed unless the applicant is an agriculturist at both these dates. It has been argued that the absence of any such provision in Chaps. IV and V suggests that the Legislature did not intend that the same principle should be applied to cases falling under these chapters. Chapter IV relates to rates of interest and Chap. V to maintenance of accounts. It has been held by the Allahabad High Court in *Bireshwar Das Bapuli* v. *Uma Kant Panday*, (I. L. R. (1937) All. 514) (1), and by this Court in *Phool Chand* v. *Shyam Behari Misra*, (1939 O. W. N. 752) (2), that for the purpose of s. 30 the loan must have been taken by a person who was an agriculturist at the time of the loan. This in my opinion is also clear from the reference to the word "loan" in that section and in ss. 28 and 29 which also fall in Chap. IV. According to the definition in s. 2 "loan" means an advance to an agriculturist. The word "loan" is not specifically used in s. 33, but the section provides that an agriculturist debtor may sue for an account of money lent or advanced to, or paid for, him by any person, and this implies a loan transaction. There is no reason, therefore, why the same principle should not be applied in the case of s. 33 as in the case of s. 30.

The other question for consideration is whether the appellant should be held debarred from the benefits of the Agri. Relief Act by reason of the fact that he was assessed to an amount of income-tax at the time of the loan which would preclude his being deemed to be an agriculturist, when actually there is some reason to think that he was not assessed to income-tax in his personal capacity, but only in the capacity of manager of the estate of his sister-in-law and minor son. It is not disputed that the appellant was assessed to such income-tax and paid the income-tax assessed in the years 1927-28 and 1928-29, and that if such assessment and payment were made in his personal capacity he would be debarred by the definition of "agriculturist". It is contended, however, that he paid this income-tax not in respect of his personal liability, but in respect of the liability of the estate of which he was manager. This contention is based on an order passed by the Income-tax Officer on the appellant's application in 1935. Admittedly this application was made in view of the suit brought the following year under s. 33 of the Agri. Relief Act, it being realised that for the purpose of this Act it was necessary to show that the income-tax had not been paid by the appellant in his personal capacity. The order of the Income-tax Officer shows that some enquiry was made and that some property was recorded in the names of the sister-in-law and minor son under the guardianship of the appellant. It was ordered that the appellant's name should be removed from the general index register and notice should be issued to the lady and minor son. The Civil Judge considered the argument advanced before him that this order of the Income-tax Officer cancelled all previous assessments on the appellant in his personal capacity. He considered also the argument advanced on the other side that s. 35 of the Income Tax Act fixes a period of one year for rectification of mistakes in assessment. He was of opinion that there had been no rectification of the mistake made in the year 1927-29 and that there could be no rectification of the mistake. The order of the Income-tax Officer merely showed how the appellant was to be dealt with in future. The Civil Judge also thought that it was not conclusively proved that the income which had been returned by the appellant did not relate to him personally, as a witness whom he himself produced admitted that he carried on money-lending business.

Learned Counsel for the appellant argued first of all from the provisions of ss. 22 and 38 of the Income Tax Act of 1922 under which notices were issued by the Income-tax Officer. Under s. 38 (2) the Income-tax Officer may require any person whom he has reason to believe to be a trustee, guardian, or agent to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent and of their addresses. He suggests that the Income-tax Officer must have known of the appellant's position as he sent him a notice under this section. I do not think that such an inference can be drawn or that it would show that the appellant was actually assessed to income-tax not in his personal but in a fiduciary capacity. Admittedly he did not furnish the Income-tax Officer with any return under s. 38 (2). He merely furnished a return of his income, and admittedly did not indicate in any manner that the income was not his personal

(1) I L R (1937) All 514; 168 Ind. Cas. 655; A I R 1937 All. 297; 1937 A L J 363; 9 R A 661; 1937 R D 249; 1937 A L R 391.

(2) 1939 O W N 752; 183 Ind. Cas. 517; 1939 O L R 526 (2); 12 R O 38; 1939 R D 465.

income. The Income-tax Officer in these circumstances naturally concluded that the income was his personal income and assessed him accordingly. There can be no doubt whatever, therefore, that whether the income was derived from his personal property or from other property, the appellant was personally assessed to income-tax on it. Apart from this, as the Civil Judge pointed out, it is not conclusively proved that the income declared could not have related to the appellant. A portion of the income declared by him represented interest on War Bonds of a value of Rs. 6,000. Learned Counsel could not say whether this property was his own or that of his sister-in-law and minor son. It is also clear from the mortgage on which the suit was brought that he was engaged in his personal capacity in transactions of some magnitude. The mortgage-deed in respect of which accounts were sought under s. 33 was executed by the appellant for Rs. 20,000 on June 21, 1923. I am not altogether satisfied on these facts that the appellant acted in good faith in making a return solely on his own account, and subsequently several years later claiming that he had made it in another capacity.

I see no reason, therefore, to dissent from the view taken by the learned Civil Judge and I accordingly dismiss this appeal with costs.

S. *Appeal dismissed.*

RANGOON HIGH COURT

First Appeals Nos. 99, 100 and 101 of 1939 and 68, 69 and 70 of 1939

November 30, 1939

ROBERTS, C. J. AND DUNKLEY, J.

OFFICIAL TRUSTEE—APPELLANT

versus

MRS. RAEBURN AND OTHERS—RESPONDENTS

Government of Burma Act 1935, *s.* 124 (1)—*Whether refers to artificial persons—Official Trustee under s.* 6 *or s.* 7 (1) (a) *Official Trustees Act (II of* 1913) *whether servant of Crown, Limitation Act (IX of* 1908), *s.* 6—*Civil Procedure Code (Act V of* 1908), *O. VIII, r.* 2—*Apparent contradictions between—Provisions of, explained—Claim for account on footing of trustee's wilful default—Claim, whether governed by s.* 10, *Limitation Act—Art* 120 *of the Act, if applies—Claim for account of corpus of trust funds vested in trustee, if falls within ambit of s.* 10—*Trust—Investment—Duty of trustee—Appointment of surveyor or valuer by trustee, if proper—Tests in such cases—Trustee mixing up trust funds relating to separate and distinct trusts—Whether guilty of breach of trust—Trusts Act (II of* 1882), *s.* 20 (e)—"*Value of property*" *how calculated—Advance on security of immovable property—Trustee must consider value of security itself and should not be guided by character or solvency of borrower—Costs—Matters arising in several suits substantially same—All cases heard together—One set of costs for all cases together.*

A corporation cannot be a servant of the Crown, although the members of the corporation may well be. Section 124 Govt. of Burma Act refers to natural persons only and not to artificial persons. Under s. 6, Official Trustees Act, the Official Trustee is a corporation sole with a perpetual succession and therefore is not a servant of the Crown. Nor is an Official Trustee acting under s. 7 (1) (*a*), Official Trustees Act, as an ordinary trustee, a servant of the Crown. [p. 63, col. 2; p. 64, col. 1.]

Seemingly contradictory provisions of s. 3, Limi. Act and O. VIII, r. 2, Civil P. C., are easily reconcilable. Section 3 makes the question of limitation a material question although not raised by the parties; but a Court is not bound to raise and decide a question of fact of its own motion. Hence where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound under the provisions of s. 3 to raise the question *suo motu* and decide it. 155 Ind. Cas. 205 (1), relied on. [p. 64, col. 1.]

But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. VIII, r. 2, to raise such question in his written statement; if he fails to do so thereafter it is within the discretion of the Court to allow the question to be raised or not. *Venkata Narasimha Naidu* v. *Bashyakarla Naidu* (2), and 154 Ind. Cas. 153 (3), relied on. [p. 64, col. 2.]

Section 10, Lim. Act has no application to a claim for an account of moneys which ought, but for the default of the trustee, to have come into his hands, but in actual fact never became vested in him. It does apply to a claim for an account on the footing of wilful default. Such a claim is liable to be barred by limitation, and Art. 120, Sch. I is the Article applicable. Hence the claim for an account of the corpus of the trust funds which became vested in the trustee falls within the ambit of s. 10, and is not barred by limitation; but a claim for an account of the interest which the trustee ought to have earned for the trust funds, but failed to earn is governed by Art. 120. [p. 65, col. 1]

[Case-law relied on]

It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. If a surveyor or valuer is appointed for the purpose of enabling a trustee to obtain a true valuation, the only question is whether in all the circumstances of the case the trustee has appointed a person whose advice he can with prudence take into account in arriving at his decision. [p. 66, col. 2.]

Where a trustee in respect of separate and distinct trusts mixes up the trusts funds he is guilty of breach of trust.

For the purposes of s. 20, Trusts Act, the value of the property does not mean what would be obtained at a forced sale of it, the risk of a forced sale, though an element to be taken into consideration in deciding whether the security is one upon which a trustee might wisely advance money, is something which does not and cannot affect the actual value of the property at the time of the advance. [p. 67, col. 2.]

A person making an advance upon his own account upon the security of immovable property may no doubt be influenced to do so partly by the value

of the security itself and partly by his estimate of the solvency and character of borrower. But a trustee may not blend these considerations together. He must not allow the character or solvency of the borrower to weigh with him so as to make his advance, in effect, an advance not upon the security offered, but upon a consideration of other matters which seems to make it safe not to rely upon the security alone. *Fry* v. *Tapson* (10), distinguished. *Learoyd* v. *Whiteley* (9), *Ingle* v. *Partridge* (11), and *In re Somerset: Somerset* v. *Earl Poulett* (12), relied on." [p. 68, col. 1.]

Where the matters arising in several suits are substantially the same and all the suits are heard together, the Court should allow one set of costs for the three cases together in fixing the special Advocate's fee. [p. 71, col. 1.]

F. As. from the judgments of the High Court in Civil Reg. Suits Nos. 265, 266 and 267 of 1937.

Mr. *U Thein Maung*, Advocate-General, for the Appellant.

Mr. *C. N. Paget*, for the Respondents.

Judgment.—These appeals arise out of three suits against the Official Trustee of Burma, brought by Mrs. Diana Raeburn, her son David H. Raeburn, and her daughter Rachel Raeburn. The three suits were heard together, one set of evidence only was recorded, and they were decided by a preliminary judgment (which decided the question of limitation), dated November 7, 1938, and a final judgment, dated March 30, 1939. Consequently, we are able to dispose of these appeals in a single judgment. The suits, which had a protracted hearing in the Court below, involved a multiplicity of points; side issues were raised of varying degrees of relevance, not to say importance. It appears to us to be important to resist with care any temptation to undue prolixity, since we have reached the conclusion that the broad question of whether the Official Trustee has committed breaches of trust and whether in consequence thereof he ought to be removed and ought to make good to the beneficiaries the loss occasioned to them is susceptible of a comparatively ready answer. Since the documents in the file are so voluminous and the judgment delivered in the Court below was so exhaustive, it is, in our opinion, desirable to restate the main issues and our conclusions upon them as concisely as may be.

The Official Trustee, under the provisions of s. 7 (1) (*a*), Official Trustees Act, 1913, undertook the duties of an ordinary trustee in respect of four separate and distinct trusts. The earliest trust was a marriage settlement in favour of Mrs. Diana Raeburn. It was created on September 13, 1906. The original trustees were Albert Meyer and S. E. Solomon and the trust fund was Rs. 17,800. Under the deed of trust the income of this sum was to be accumulated for five years, and thereafter the income of the accumulated fund was to be paid to Mr. Raeburn for her life for her sole and absolute use and benefit, and there was a remainder over in favour of her children. The trustees were empowered to invest the trust fund and accumulated income

"either in purchase or mortgage of immovable property in the towns of Calcutta or Rangoon or in Govt. paper or any authorized securities of the Govt. of India or to place the same with a Chetty or Chetties on their furnishing such securities as to the Trustees in their unfettered discretion seems adequate and reasonable."

By the year 1923 the amount of this trust fund and the accumulated income had risen to Rs. 26,500, and S. E. Solomon being dead the surviving trustee, Albert Meyer by a deed dated September 28, 1923, appointed the Official Trustee to be the sole trustee of this fund in his stead. The powers of investment conferred on the Official Trustee by this deed were the same as those conferred on the original trustees. By a deed dated February 1, 1921, Mrs. Raeburn appointed the Official Trustee as sole trustee of a trust created for the benefit of David H. Raeburn, the amount of the fund being Rs. 14,750. The income of the fund was to be paid by the trustee to Mrs. Raeburn for David's maintenance and education until he attained the age of 21 years, and the trustee was further authorized to pay out of the capital a sum not exceeding Rs. 5,000 to Mrs. Raeburn for the completion of David's education in Europe. After he reached the age of 21 years the income of the trust fund was to be paid to David for his life. There was a remainder over in favour of his heirs. The powers of investment conferred on the Official Trustee were :

"to invest the same in the purchase of or upon mortgage of immovable property or in such other manner as the Trustee is by law allowed."

By another deed of the same date (February 1, 1921), Mrs. Raeburn appointed the Official Trustee as sole trustee of a trust created for the benefit of Rachel Raeburn, the amount of the fund being Rs. 28,750. Out of this fund a sum of Rs. 5,000 was to be paid to Rachel on the day on which her engagement to marry was publicly announced, and subject to this payment the income of the fund was to be paid to Mrs.

Raeburn for the maintenance and education of Rachel until the latter attained the age of 21 years, and thereafter the income was to be paid to Rachel for life, with remainder over to her children or failing children, to her heirs. The powers of investment were exactly the same as in David's trust deed. A further trust in favour of Rachel was created by a deed executed on May 8, 1922. The appointers were two persons named S. Zillka and N. Sadka. The sole trustee appointed was the Official Trustee of Burma. The trust fund was a sum of Rs. 6,000. The income of the fund was to be paid to Rachel for life, with remainder over to her children or, failing children, to a school at Baghdad. The powers of investment conferred on the Official Trustee were the same as those in the two deeds of February 1, 1921. The Official Trustee accepted all these four trusts, under the provisions of s. 8 (1) (*a*), Official Trustees Act, and the trust funds were in the case of all four trusts, duly handed over to and received by him.

Now David B. Raeburn was born on March 4, 1909, and Rachel Raeburn was born on November 1, 1907. These are important dates, and it is significant, as evidence of the negligent manner in which the Official Trustee has performed his duties, that he failed to inform himself of them, and although he was bound by three of the trusts to pay the income thereof direct to these two persons after they attained the age of 21 years, he continued to pay the income of all four trusts to Mrs. Raeburn long after the children had come of age. The amended plaints in the three suits are in similar terms. The reliefs claimed are the removal of the Official Trustee and the appointment of some other competent person as trustee in his place, and an account of all sums due and payable by the Official Trustee to the different trusts. Various breaches of trust on the part of the Official Trustee are alleged. The principal are :

(1) Mixing up together of the trust funds of all four trusts, and failure to keep proper and separate accounts of the trust funds; (2) payment to Mrs. Raeburn of the sum of Rs. 5,000 for David's education, due under David's trust, out of the capital of Rachel's trust fund; (3) failure to invest the trust fund and earn an income therefrom between August 1928 and February 1929; (4) improper investment on contributory mortgages; (5) improper investments in December 1928, amounting to negligence and breach of trust, on mortgage by deposit of title deeds of two properties known as No. 82, Hermitage Road, Rangoon, and "Manorama," No. 20-22, Golden Valley, Rangoon; and (6) negligence by allowing the interest on these two mortgages to fall into arrears and by not taking the necessary steps within a reasonable time to recover the amount due thereon.

In Rachel's suit it is further alleged that the Official Trustee committed breach of trust by not obtaining her consent in writing to these investments on mortgage, as required by the provisions of the proviso to s. 20, Trusts Act, 1882. In each plaint the cause of action is said to have

"arisen in the month of August 1928, and thereafter from time to time as the various breaches of trust set out herein occurred."

The plaints were filed on September 3, 1937. For the defendant-appellant two objections in bar of the suits have been taken. It is urged that the suits are incompetent on the ground that the consent of the Governor to the institution thereof has not been obtained, as required by the provisions of s. 124, Govt. of Burma Act, 1935. Secondly, it is urged that the suits are barred by limitation in respect of all breaches of trust which are alleged to have occurred prior to September 3, 1931. Dealing first with the defence based on the provisions of s. 124, Govt. of Burma Act, 1935, the part of the section on which reliance is placed in sub-s. (1). This subsection is in the following terms :

"No proceedings civil or criminal shall be instituted in Burma against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the commencement of this Act, except with the consent of the Governor in his discretion."

In order to attract the provisions of this section, the suit must be brought against a person in respect of an act done or purporting to be done in the execution of his duty as a servant of the Crown. Now, under s. 6, Official Trustees Act, the Official Trustee is a corporation sole with a perpetual succession. It is urged that by s. 19, Interpretation Act, 1889, the word 'person' includes a corporation, but this interpretation is subject to the context and subject-matter of the statute, and we cannot understand how a corporation can be a servant of the Crown, although the members of the corporation may well be.

Section 124 appears among a number of ss. 123 and 125 to 129, which deal with the special rights of persons who are servants of the Crown and plainly refer to natural persons only and not to artificial persons. The intention that s. 124 shall also refer only to natural persons therefore clearly appears. Moreover, the acts of the Official Trustee of which complaint is made were not done or purported to be done "in the execution of his duty as a servant of the Crown," for in administering these trusts the Official Trustee was acting as an ordinary trustee under s. 7 (1) (*a*), Official Trustees Act, and not as a servant of the Crown. These considerations suffice to dispose of this point against the appellant. Turning now to the question of limitation admittedly, this question is not raised in the pleadings, and was not mentioned on behalf of the defendant appellant until the 25th day of the hearing of the suits, when all the evidence had been recorded and the arguments of Counsel had begun. For the plaintiffs-respondents it is urged that the point ought not to have been allowed to be raised at that stage, and reliance is placed on the provisions of O. VIII, r. 2, Civil P. C. which, so far as it is material reads as follows:

"The defendant must raise by his pleading all matters which show the suit not to be maintainable .....as, for instance.....limitation..."

The defendant-appellant, on the other hand, relies on the provisions of s. 3, Lim. Act, which runs as follows:

"Subject to the provisions contained in ss. 4 to 25 (inclusive), every suit instituted ..after the period of limitation prescribed therefor by Sch. I shall be dismissed, although limitation has not been set up as a defence."

These at first sight seemingly contradictory provisions are easily reconcilable. Section 3 makes the question of limitation a material question although not raised by the parties; but a Court is not bound to raise and decide a question of fact of its own motion. Hence where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound under the provisions of s. 3 to raise the question *suo motu* and decide it: *Maqbul Ahmad* v. *Onkar Pratab Narain Singh* (1), at p. 250. But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. VIII, r. 2, to raise such question in his written statement; if he fails to do so thereafter it is within the discretion of the Court to allow the question to be raised or not: *Venkata Narasimha Naidu* v. *Bashyakarlu Naidu* (2), at p. 378. The law was briefly stated in this sense in *M. S. Chettyar Firm* v. *S. E. Bholat* (3), at p. 46. Now, in these suits the question of limitation was raised by the facts alleged in the plaints themselves, and the Court was therefore bound, under the provisions of s. 3, Lim. Act, to decide the question on the facts stated in the plaints, at whatever stage of the hearing it was raised, or even if it was not raised at all by the parties themselves.

Section 3 lays down that every suit instituted after the period of limitation prescribed therefor by Sch. I shall be dismissed, with a saving clause in regard to the provisions of the succeeding sections of the Act. Hence the normal periods of limitation are those prescribed by Sch. I, and ss. 4 to 27 provide exceptions to or qualifications of the ordinary provisions of the law. Consequently, it is necessary, first, to decide what Article of Sch. I, Lim. Act, is applicable to these suits and to apply it, and then to see whether ss. 4 to 25 of the Act contain any exception or qualification which modifies the ordinary law in its application to these cases. It is common ground that the Article applicable is Art. 120, and this prescribes a period of limitation of six years and lays down that time begins to run when the right to sue accrues. Now the plaints set out that the cause of action arose in August 1928, and on certain subsequent dates, and the plaints were filed on September 3, 1937. Hence, under Art. 120 all rights of action based upon alleged breaches of trust occurring prior to September 3, 1931, were *prima facie* barred by limitation. Two such breaches of trust are alleged in the plaint, namely (1) failure to invest the trust funds between August 1928, and February 1929, and (2) improper investments on mortgage in December 1928. The suits, so far as they are based on these alleged breaches of trust, were therefore *prima facie* barred by limitation; and, as we have said, the facts necessary for this decision are not out in the plaints themselves, and the Court was therefore bound by the provisions of s. 3 to decide the

(1) A I R 1935 P C 85; 155 Ind. Cas. 205; 62 I A 80; 57 All 242 (250); (1935) O W N 527; (1935) M W N 438; 7 R P C 191; 41 L W 619; (1935) A L J 578; 39 C W N 640; 68 M L J 665; 61 C L J 267; 37 P L R 395; 37 Bom L R 533 (P C).

(2) 25 M 367 (378); 29 I A 76; 8 Sar 258 (P C).

(3) A I R 1934 Rang 329; 154 Ind. Cas. 153; 13 R 43 (46); 7 R Rang 269.

question of limitation, although it was not raised in the written statements of the defendant-appellant. Section 10, Lim. Act, however provides an exception to the ordinary law in the case of breach of trust by an express trustee. This section, so far as it is material, reads as follows :

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose ..for the purpose of following in his ..hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

Consequently, the provisions of s. 10 are applicable to an express trust, such as the trusts which form the subject-matter of these suits; and in our opinion, the provisions of the section are plain and scarcely open to misconstruction. The section says in terms that when a suit is brought by a beneficiary against a trustee of an express trust for an account of property which has become vested in the trustee, or the proceeds of such property, the suit shall never become barred by lapse of time. But the section has no application to a claim for an account of moneys which ought, but for the default of the trustee, to have come into his hands, but in actual fact never became vested in him. It does not apply to a claim for an account on the footing of wilful default. Such a claim is liable to be barred by limitation, and Art. 120 Sch. I is the Article applicable : *New Fleming Spinning & Weaving Co , Ltd.* v. *Kessowji Naik* (4), at p. 399, *Sayad Hussein Miyan* v. *Collector of Kaira* (5) at pp. 264, 267; *Tholasingam Chetty* v. *Vedachella Aiyah* (6), at p. 323; *Shirinbai Dinshaw* v. *Navroji Pestonji* (7), at pp. 953 to 955. Hence the claim for an account of the corpus of the trust funds which became vested in the defendant-appellant falls within the ambit of s. 10, and is not barred by limitation ; but the claim for an account of the interest which the appellant ought to have earned for the trust funds, but failed to earn, between August 1928, and February 1929 is time-barred under Art. 120. The fact that this latter claim is time-barred is however of no practical importance, for, as we shall presently point out, we agree with the learned trial Judge that the appellant committed breaches of trust in respect of the trust funds, and that the proper way of taking an account of the loss which the beneficiaries have thereby sustained, under s 23, Trusts Act, is to take the account on the footing of what the trust funds would have earned if they had been properly invested immediately after, or within a reasonable time after, the funds came into the appellant's hands for re-investment.

Dealing now with the alleged breaches of trust, the plaintiffs allege that the Official Trustee mixed up the funds with each other and failed to maintain separate accounts. They say that from August 13, 1928, there was undue delay on the part of the Official Trustee in re-investing trust funds. What happened to the trust funds has been summarized and set out by the learned trial Judge in a document designated by him, Table I. Prior to August 1928, all the trust moneys save Rs. 500 from Mrs. Raeburn's trust and Rs. 6,000 from Rachel Raeburn's second trust had been lent to one Hamadanee on the security of immovable property; that is to say, the whole of the trust money of Rachel Raeburn's first trust, amounting to Rs. 28,750, the whole of the trust money of David Raeburn's trust amounting to Rs. 14,750, and Rs. 26,000 (out of a total of Rs. 26,500) of Mrs. Raeburn's trust fund. These loans by way of cash and securities thus amounted in the aggregate to Rs. 69,500, and this amount was repaid by Hamadanee on August 13, 1928. Before this investment was paid off, notably in the autumn of 1927, Mrs. Raeburn wanted Rs. 5,000 for the completion of David Raeburn's education and the Official Trustee advanced this sum out of the Rs. 6,000 of Rachel Raeburn's second trust fund. There is no doubt at all that the trust funds were improperly mixed up with one another, and that Rachel's second trust fund was utilized to discharge a liability properly payable out of David's trust On the other hand, the moneys were not invested upon contributory mortgages, since what the trustee did was not to join with other persons, and "to rob the trustee of the control which is an essential part of the propriety of the security," as was the case in *Webb* v. *Jonas* (8). The trustee's rights were not mixed up with those of strangers, but at the same time it is clear that as between the beneficiaries there was a failure to keep separate accounts. It has not been suggested that any loss was sus-

(4) 9 B 373 (399).
(5) 21 B 257 (264), (267).
(6) 41 M 319 (323); 42 Ind. Cas. 544; A I R 1918 Mad 624; (1917) M W N 651; 6 L W 523; 22 M L T 388.
(7) 37 Bom L R 946 (953 to 955); 160 Ind. Cas. 612; A I R 1936 Bom 30; 8 R B 267.
(8) (1888) 39 Ch D 660; 57 L J Ch 671; 58 L T 882; 36 W R 666.

tained by the beneficiaries by reason of these breaches of trust.

Out of the moneys repaid by Hamadanee, two investments were ultimately made by the Official Trustee: (1) Rs. 15,000 lent to U Po Thaung at 10½ per cent. on the security of No. 82, Hermitage Road, Rangoon, on December 15, 1928, and (2) Rs. 41,000 lent to U Lun at 9 per cent. on the security of No. 20/22, Golden Valley, Rangoon, on December 20. As regards these, complaint is made that the investments were in breach of trust. U Po Thaung died in July 1931, since when no interest was paid; the defendant appellant did not file a mortgage suit till April 1932: the house fell into a ruinous condition; and the Official Trustee ultimately agreed to take over the property at the value of Rs. 5,000 only. As for the Golden Valley property, known as Manorama, the interest began to fall into arrears in 1931. No mortgage suit was brought until September 1935, and the property was ultimately bought in for Rs. 24,000. David Raeburn attained his majority on March 4, 1930; he complains that he never had any information from the Official Trustee, and Rachel Raeburn, who came of age on November 1, 1928, makes a similar complaint. The Official Trustee contends that Mrs. Raeburn was "all along acquainted with all the facts." He does not appear to have specifically pleaded that Mrs. Raeburn was appointed by either of her children as their agent after they had attained majority. He denies that any consent to investments by Rachel Raeburn was required by reason of the proviso to s. 20, Trusts Act, or at all. He does not contend that he gave either David or Rachel any information with regard to the trust porperty. It is to be observed that the two investments complained of were each made after Rachel Raeburn had attained her majority.

Now, were these investments properly made, having regard to the trust instruments and to all the circumstances of the case? The learned trial Judge has most carefully reviewed (pp. 21-26 of his judgment) the authorities in which the decree of prudence to be expected from a trustee has been discussed. The advances were made in December 1928, and for ourselves we should have hesitated to view the property nearly ten years later in order to decide whether Mr. Hormasji who in 1928 was carrying out the duties of Official Trustee, made prudent investments or not. He was obliged to make his decision not upon the data which might decide a private individual, however, prudent, to advance these moneys but upon the footing that he was doing so as a trustee. So far as Mrs. Raeburn's trust fund is concerned, his powers of investment were expressed in different terms from the powers which he had in relation to the other trusts, but he was entitled by the terms of all the trust instruments to invest in mortgages of immovable property. Adopting the words of Lord Watson in *Learoyd* v. *Whiteley* (9), at p. 733:

"It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard."

Now, in England, by s. 8, Trustee Act, 1925, re-enacting an earlier statute, a trustee is protected if he lends money on the security of any property on which he can properly lend, provided he acts upon the report of a person reasonably believed by him to be an able and practical surveyor or value instructed and employed independently of any owner of the property, and that the amount of the loan does not exceed two-thirds of the value as stated, and that the loan was made under the surveyor's or valuer's advice in the report. This statute is not the law in Burma. If a surveyor or valuer if appointed for the purpose of enabling a trustee to obtain a true valuation, the only question in this country is whether in all the circumstances of the case the trustee has appointed a person whose advice he can with prudence take into account in arriving at his decision. In respect of the Hermitage Road property, Mr. Hormasji said that he obtained a certificate from a well known firm in Rangoon, Messrs. Balthazar & Sons; it was signed by Mr. Joakim, the Managing Director, who was in Europe at the time of the trial and was not called as a witness. Mr. Hormasji said (p. 390):

"I used the certificate, for what it was worth, to check my own idea of the value of the property. I applied my mind to it."

In respect of the Golden Valley property he said (p. 395):

"I obtained a valuation certificate from T. David. I employed T. David by reason of his having been Secretary of the Golden Valley Estate Company Ltd., for a large number of years and because he would have special knowledge of the value of land in that locality. And as regards the building I knew Mr. David for a long time as a builder and contractor and his values were about the best that could be had in Rangoon."

(9) (1887) 12 A C 727 (733); 57 L J Ch 390; 58 L T 93; 36 W R 721.

He was then asked if he relied solely on Mr. David's certificate and he said :

"No. I inspected the property and applied my own mind to the question and I considered the property was an exceptionally good one and that it was quite safe to advance Rs. 41,000 from a trustee's point of view, having regard to the valuation with which I agreed after anxious consideration."

Messrs. Balthazar's valuation of No. 82, Hermitage Road, was Rs. 29,500 of which Rs. 7,000 was for the land and the remainder for the building, and Mr. David's valuation of the Golden Valley property was Rs. 72,000 of which Rs. 30,000 was for the land and the remainder for the building. Not only did Mr. Hormasji personally inspect both properties, but he took with him Mrs. Raeburn; she asked the Court to believe (p. 82) that she did not know the object of her visit of inspection to Hermitage Road, but there is a good deal of evidence to show that she was extremely anxious, not so much to get the trust moneys invested, but to get them invested in securities by way of mortgage on immovable property and not in Govt. paper, having regard to the much higher rate of interest which this course would ensure. Thus in a letter of April 4, 1926, to be found in Ex. D, dealing with an earlier investment, she wrote :

"I do not want it invested in Govt. paper, the reason being that the income derived from it being insufficient."

Mr. Hormasji says that this was her attitude throughout. She says herself (p. 15): "I asked Mr Hormasji to invest it in immovable properties." And in one or two cases she suggested possible investments of this character to which Mr. Hormasji was unwilling to agree. Mr. Hormasji says she was anxious that the advance on No. 82, Hermitage Road, should be made, and he made a note to that effect in his diary on December 14, 1928. There seems to be little doubt that Mr. Hormasji was sympathetic to her point of view. He had at that time abandoned the idea of investing in Govt. paper and was extremely anxious that the trust money should be advanced upon the security of immovable property with the least possible delay, in order to meet Mrs. Raeburn's wishes. There is evidence that it was Mr. Hormasji who asked a gentleman named Mr. Minus for Balthazar's valuation and that Mrs. Raeburn herself paid for it : Mr. Paget admits that she must be mistaken in thinking that she did not do so in the face of the books produced from Messrs. Balthazars themselves. In our opinion, it cannot be said that this was a valuation obtained from the mortgagor ; Mr. Minus was a mere go between ; the Official Trustee asked for this valuation and saw that he got it. Some objection has been made to the choice of Mr. David as valuer of the Golden Valley property since he was secretary of a company whose interest it was to keep up the value of properties in this neighbourhood; but no suggestion has ever been made against the integrity of either Mr. David or Messrs. Balthazar.

We find ourselves unable to accede to the view expressed in the Court below (p. 38 of the judgment) that for the purposes of s. 20, Trusts Act, the value of the property means what would be obtained at a forced sale of it ; it is almost a truism to say that one of the disadvantages of a forced sale is that the real value of the property sold is very often not reached; but the risk of a forced sale, though an element to be taken into consideration in deciding whether the security is one upon which a trustee might wisely advance money, is something which does not and cannot affect the actual value of the property at the time of the advance. In the present trusts the Official Trustee was empowered to invest on mortgages of immovable property or in such other manner as he was by law allowed. The law allowed him to invest in first mortgages by reason of s. 20 (*e*), Trusts Act, with a proviso therein as to the excess of the value over the mortgage money; but in our opinion, the settlor had given him unfettered powers to invest in mortgages of immovable property by mentioning them without proviso as to the value of the property. On any other reading of the trust instruments the words "on mortgages of immovable property" would appear to be redundant. At the same time, the proviso in the Act may afford a criterion of what is a reasonable and prudent course to adopt. The case in *Fry* v. *Tapson* (10), was cited to us. That was a case in which the trustees, at the suggestion of solicitors, accepted a valuation from a surveyor who was agent of the mortgagor and acted on that alone ; the facts are thus quite dissimilar from the facts here, and the principles which must guide us in this matter are those expressed in *Ingle* v. *Partridge* (11) and *Learoyd* v. *Whiteley* (9). We regret that from Mr. Hormasji's own evidence we are obliged to find that his decision was reached as

(10) (1885) 28 Ch D 268; 54 L J Ch 224; 51 L T 326; 33 W R 113.

(11) (1865) 34 Beav 411.

the result of taking into account matters which he should, as a trustee, have ignored in estimating the soundness of the security; and also as the result of having failed to take into account other considerations which ought to have been present to his mind.

A person making an advance upon his own account upon the security of immovable property may no doubt be influenced to do so partly by the value of the security itself and partly by his estimate of the solvency and character of borrower. These two factors may blend in his mind, as it were in helping him to arrive at a conclusion; and if the solvency and character of the borrower is a factor to which he lends some weight he may be disposed to overlook other tests which he would have made as to the value of the security itself if that factor stood alone. Once having arrived at a decision to make the desired advance, he feels he has acted with prudence and care and is prepared to justify his action accordingly. Such, we think, is Mr. Hormasji's position. But a trustee may not blend these considerations together. He must not allow the character or solvency of the borrower to weigh with him so as to make his advance, in effect, an advance not upon the security offered, but upon a consideration of other matters which seem to make it safe not to rely upon the security alone. We respectfully agree in this connection with the views expressed by Kekewich, J., and upheld by the Court of Appeal in *In re Somerset*; *Somerset* v *Earl Poulett* (12), at pp. 247, 248. In neither of the two cases in which these advances were made would the rent to be obtained from the property cover the interest to be paid on the mortgage. The rent of No. 82, Hermitage Road, has been estimated at Rs. 100 per month and the learned Advocate-General did not suggest that it would exceed that figure. Mr. Rennick (called for the plaintiffs) put it at Rs. 70. But the interest on Rs. 15,000 advanced at 10½ per cent. would be Rs. 1,575 per annum.

As regards Golden Valley the highest rent suggested was Rs. 270 per month. The interest on Rs. 41,000 at 9 per cent. is Rs. 3,690 or Rs. 307-7-8 per month. Now Mr. Hormasjf in giving evidence named Rs. 100 as a fair rent for the Hermitage Road property. He was then asked (p. 465): "But even that could not have been sufficient to cover the interest on that loan." His answer was:

"That is why I took care to see that the man had other means. The man was getting a pension of Rs. 450 or so. He was an Executive Engineer in the Public Works Department."

At that time the Corporation assessment was only Rs. 80, but the Official Trustee never inquired. It is perfectly true that he insisted that he was satisfied that the property was, in his opinion, reinforced by that expressed in the valuation certificate, a good security for an advance of Rs. 15,000. But his answer shows that in considering whether it was safe to make the advance he was not taking into account the rental value, but substituting for it a factor which (though it might have been of weight in determining whether he would make an advance on his own account) should have been rigorously excluded from his mind when considering the value of the security from the point of view of a trustee. There was evidence which impressed the learned trial Judge that this property was of rather an unusual character in that it was a new house built by a pensioned official for his own occupation in a rather remote spot down a long lane, not easily reached by vehicles, and not possessing much attraction to the average prospective tenant. Mr. Paget argues with some force that the Official Trustee should have taken into account the possible death of the pensioner and the consequent cessation of his pension and the risk of not getting a tenant for the property. In fact, he did die about two and a half years later, and no tenant could be obtained. And we are obliged to say that in our opinion the Official Trustee did not act with reasonable prudence in this matter and was guilty of a breach of trust. In connection with the Golden Valley property, Mr. Hormasji appears to have allowed similar considerations to be present to his mind before reaching the decision to advance Rs. 41,000. On p. 456 he was asked if he ascertained what the assessment was. His reply was:

"No. Because the owner was living there and the property itself was worth sufficient to lead me to advance Rs. 41,000 on it. It left an ample margin and the man had means of paying interest regularly. So I may not have paid any attention to the assessment."

When pressed that the sums due as interest could never be got out of the rent, he said he had enquired and ascertained that U Lun had a good income from paddy lands and that he was the owner of a newspaper and a press. The learned

(12) (1894) 1 Ch 231 (247, 248); 63 L J Ch 41; 7 R 34; 69 L T 744; 42 W R 145.

Judge then asked if witness took U Lun's personal position into consideration and he replied :

"Only with regard to the possibility of his paying interest regularly. It was imoprtant, from my point of view, that the beneficiary should receive interest regularly and I satisfied myself that there would be no difficulty in getting the interest. Quite apart from that, the property was worth more than was sufficient to guarantee the recovery of the money advanced on it."

We are in agreement with the learned trial Judge that this was an improper investment for a trustee to make. There is a further consideration with regard to these two advances. It is to be noted that if the valuation of Rs. 29,500 in respect of the Hermitage Road property was correct one would hardly expect the trustee to agree that a rent of Rs. 1,200 per annum would be a fair one for the property. It would give a bare four per cent. and at that time securities in Govt. loans were yielding a greater return than 4 per cent. In the same way, the valuation of Rs. 72,000 for the Golden Valley property, if Rs. 250 a month was a "decent assessment," to use Mr. Hormasji's words, would only yield a similar return. The fact that the rents which he now recognizes to be fair are only 4 per cent. on the valuations which he received should certainly have made him suspicious of the latter. The Official Trustee was being offered 10½ per cent. and 9 per cent. respectively for his advances. It must not be forgotten that the advances were made at a time when several prospective securities had been deemed inadequate; Mrs. Raeburn was pressing, and the Official Trustee himself must have been anxious to surmount any difficulties which were capable of being surmounted. We think he allowed himself to believe he was justified in accepting these securities when greater prudence would have caused him to decline them. We find no evidence in support of the contention that Mrs. Raeburn was in any way empowered to give the consent which should have been obtained from her daughter Rachel Raeburn before either of these advances were made, having regard to the proviso to s. 20, Trusts Act. Inasmuch as the Official Trustee mixed up the trust funds indiscriminately, and that part of the advances so made, and indeed a large part of them, were made out of the fund of Rachel Raeburn's first trust, we agree that this constitutes a further breach of trust on his part. David Raeburn however was a minor at the time of these advances and we cannot accept the view that his consent was required by anything in s. 20 of the Act, or that his mother's consent should have been obtained expressly on his behalf. As regards Mrs. Reaburn, she gave her own consent, but this in no way protects the Official Trustee, having regard to the fact that we hold that the investments ought not to have been made at all.

With great respect to the learned trial Judge, the test made by him in arriving at what would have been a fair advance on these securities seems to us to be based on precarious data. He has capitalized the rental at eight per cent. but the figure is an arbitrary one and the evidence on the matter was very scanty. Mr. Cowasjee suggested six per cent.; whether net or gross is not directly apparent from his evidence, and Mr. Hormasji was disinclined to view the matter from this standpoint at all. In our opinion, it is enough to say here that on the Official Trustee's own showing he did not act as a prudent trustee should do, but took into account personal considerations when estimating the capacity of the borrower to pay interest, and having done that he failed to apply his mind to the question of whether a tenant could reasonably be obtained for these properties in the event of the mortgagors ceasing to occupy them, and whether, if so, the rent would cover the mortgage interest. He allowed himself to be influenced by the standards which are generally present to a lender making an advance upon his own account, rather than by the stricter considerations which should have been present to his mind as a trustee. We repeat that in our view both these investments were clearly made in breach of trust.

But the appellant has relied on the doctrine of acquiescence. It has been said on his behalf, although somewhat tentatively, that (following the wording of s. 23, Trusts Act) the beneficiaries, being competent to contract, have concurred in the breaches of trust or subsequently acquiesced therein, with full knowledge of the facts of the case and of their rights as against the trustee. We are only concerned, in regard to this point, with the breaches of trust by improper investments in December 1928 for all the loss to the beneficiaries was thereby sustained. At that time David was a minor, and therefore he could not concur in these investments, and there is no evidence that Rachel was even aware

of them. As regards Mrs. Raeburn, there is evidence that she was taken to inspect the properties before money was lent on them and that she concurred in the investments; but clearly, she did not have full knowledge of the facts, for she was not informed that the rent which could be obtained from these properties was insufficient to pay the interest which she expected to get on the loans: the Official Trustee himself did not care to make the very obvious enquiry which would have made him aware of this fact. The same consideration applies to subseqent acquiescence. There is no evidence on which it could be held that either David or Rachel acquiesced. It is said that their mother acted as their agent in this matter, but such evidence as there is, shows that she assumed the character of agent without their knowledge or consent and she was certainly not authorized by them to acquiesce in any breach of trust. Furthermore, so far as subsequent acquiescence by Mrs. Raeburn is concerned, it is clear, as we have said, that whatever she may have done she did with incomplete knowledge of the facts.

As regards the relief to which the respondents are entitled, it has been suggested on behalf of the appellant that, as we have found that the breaches of trust consisted in advancing sums in excess of what ought to have been advanced on what otherwise were proper securities, we ought to order the account to be taken on the footing that the securities shall be deemed authorized investments for the smaller sums which might properly have been lent and the appellant held liable to make good only the sums advanced in excess thereof with interest. This is an application of s. 9 of the English Trustee Act, 1925, and there is no similar provision in the Trusts Act of 1882, which is the law in this country. Section 23 of the Trusts Act enacts that where the trustee commits a breach of trust he is liable to make good the loss which the trust property or the beneficiary has thereby sustained. We therefore have to estimate the loss to the trust funds or the beneficiaries by these improper investments, and in connection with this matter the cardinal facts are that the trust funds have almost entirely disappeared and the beneficiaries have not for several years past received any income from them. We are in entire agreement with the reasons which the learned trial Judge has set out at such length in his judgment (pp. 85 to 96) for holding that the best and most practical method of estimating these losses is by treating these investments as though they had never been made. The appellant can hardly complain that he is thereby compelled to take over the two properties, for, it is still asserted on his behalf that the properties are even now worth more than the sums which were respectively lent on them. Consequently, we respectfully agree with the learned trial Judge in ordering that the account shall be taken on the footing that the appellant shall take over the securities and shall replace the corpus of the trust funds and shall pay interest thereon to the respondents from a reasonable date after the funds came into his hands for re-investment at the rate which the funds would have earned if they had been invested in Govt. securities, less the amounts which the respondents have actually received. The learned Judge has made all these elaborate calculations himself, and if his calculations had been a matter in dispute we should have felt that the task involved in adjudicating on this question of accounts was beyond our powers, and should have been constrained to refer the matter to the Official Referee of the Court for his decision. But we are happy to be informed that the parties accept the correctness of the learned Judge's calculations, except in the following particulars: (1) A sum of Rs. 364-11-0 to be deducted from the sum of Rs. 1465-2-4 mentioned on p. 100 of the judgment. (2) On p. 97 of the judgment, the correct figure for David's trust is Rupees 2,847-13-2 and not Rs. 3,578 0-6, and the correct figure for Rachel's first trust is Rs. 8,397-6-9 and not Rs. 7,667-3-5. (3) On p. 106 of the judgment, an additional sum of Rs. 1,463-8-0 has been paid by the appellant to Mrs. Raeburn, in addition to the sum of Rs. 1,817-5-0 mentioned in the judgment, and the appellant must be given credit as against Mrs. Raeburn for this additional sum.

Learned Counsel for all parties agree to these corrections in the calculations made by the learned trial Judge, and therefore they must now be made in view of the observations made by the learned Judge (p. 96 of the judgment). The decrees will be amended accordingly. We are in agreement with the learned trial Judge that the Official Trustee should be removed from the trusts. Two of the beneficiaries are resident in Europe and Mrs. Raeburn has

declared that she also desires to reside there. No good reason can be found for continuing to have these trust funds administered by the Official Trustee in Rangoon, and in the light of what has happened it would obviously be impossible for the beneficiaries to have in future any confidence in his administration of the trusts. In our opinion, the costs of the application for the appointment of a new trustee ought to be determined at the time of the application. We share the learned Judge's view that these are trusts which might suitably be administered by the Public Trustee in England. Accordingly the appeals fail and the judgments and decrees of the trial Court are confirmed, subject to the amendments of the decrees mentioned above. But the costs of the suits, ordered by the learned trial Judge in his two judgments and his order of August 19, 1938, will be varied in the light of our present judgment, and on this subject it is necessary to enter into some detail.

With regard to costs, the learned Judge first allowed costs *ad valorem* on the amount actually recovered, and then in addition he allowed (in our opinion rightly) a special Advocate's fee. In our opinion, since the matters arising out of the three trusts were substantially the same and all the suits were heard together, he should. however, have allowed one set of costs for the three cases together in fixing the special Advocate's fee. The costs actually fixed on this score were prodigious. In respect of 24 full working days the special fee was fixed at 46 gold *mohurs* a day, based on 16 gold *mohurs* in Mrs. Raeburn's suit, 18 in Miss Rachel Raeburn's and 12 in David Raeburn's. For the two days August 17, and August 19, the learned Judge allowed 75 gold *mohurs*, and a further 15 gold *mohurs* for hearing judgment on a point of limitation on November 7, 60 gold *mohurs* were allowed for the hearing on November 9, 21 gold *mohurs* for July 7, and 24 gold *mohurs* for hearing final judgment. In our opinion, this scale cannot be justified, We fix the Advocate's special fee for the plaintiffs at 20 gold *mohurs* per day for 25 full days. This includes the 24 days mentioned by the learned trial Judge and also November 9; four half days at ten gold *mohurs* each must be added; they are July 7, August 17, August 19, and November 22. This makes 27 days, and judgment on limitation is part of the hearing and may be reckoned at half a day. The total is thus 550 gold *mohurs*, which is Rs. 9,350, and with the sum of Rs. 2132 *ad valorem* costs makes the total Advocate's fee Rs. 11,482. We think this is simple. With regard to the special fee for the defendants, we think this should be fixed now in case it should prove necessary to fix it as the result of any subsequent appeal. From the Judge's notes and from reading the evidence it is apparent that much time was wasted by Mr. Munshi, and in our opinion the special fee for the defendants should not exceed a fee of 20 gold *mohurs* for 24 days. This makes Rs. 8,160, or Rs. 10,292 including the *ad valorem* fee. There must be no special fee for the junior, but the *ad valorem* fee for the junior must be allowed at the usual two-thirds rate.

Then a very large sum was awarded to Mrs. Raeburn under the head of subsistence allowance. In our opinion, there was no satisfactory evidence upon which the finding of fact that she was normally resident in Europe at the time of filing the suit could be based. It is true that there is a letter written in September 1927, in which her London solicitors express to the Official Trustee the view that "she is now almost entirely resident in Europe," but within three months of that date she came to Burma and remained here for four years and five months. She had lived permanently in Rangoon till some time after her husband's death in 1913. She visited England with her children in 1915-16 and was in England from 1919-21. After re-visiting Burma for a short period she again returned to Rangoon from Europe in November 1922 and lived here just over two years. Then she was in England for nearly three years and in Burma from November 1927 to April 1932. She returned to Europe and for a time took the lease of premises in England, and returned to Burma in February 1936, a year before the present suits were filed. In 1936 she filed a suit in Burma which was quite independent of the present suit and was against her brother (see her own evidence, p. 92). It is admitted that she is still in Burma at the end of 1939 seven months after final judgment was delivered in the lower Court. She has no residence now in Europe; her children are there, it is true, but it certainly cannot be said that she came over here to be a witness in a suit not filed till 12 months after her arrival. No question of giving evidence can have been present to her mind when she last left Europe for Burma, and she is not within the rules of procedure of the Original Side

of this Court which permits of the grant of subsistence and travelling allowance to a party only when she is called as a witness except to the extent that she actually gave evidence on four days prior to the vacation in 1938 and was required by the trial Judge to be present on a day after the vacation. Under rr. 139 and 140 A of the Original Side Rules of Procedure, she is thus entitled to payment for five days, her allowance being that of a female witness calculated at Rs. 10 per diem or Rs. 50 in all.

The learned Advocate for the respondents agreed that there was nothing to justify the special rate allowed of Rs. 16 a day: he asked for subsistence allowance at the lower rate over the vacation, but the witness was resident in Rangoon at that time and was not being detained by the Court in any way. Moreover, with respect we do not think that there was any need for the learned Judge to decide that she must remain over the vacation merely because he wished to defer his judgment on the point of limitation, or to mulct the appellants in the resultant costs. His order was made *suo motu* and not on the application of any party. Any further questions could have been put to her before the vacation subject to the issue on limitation being left over. We order Rs. 50 and no more to be paid to Mrs. Raeburn as her subsistence allowance as a witness and nothing as her travelling allowance. The allowances granted to her amounting to Rs. 5,712 are we consider, extravagantly out of proportion to the realities of the situation. She is not entitled in the circumstances to an allowance to cover the cost of her subsistence as from April 1, 1938. She was allowed 80 days' subsistence allowance by the order of August 19, 1938 (at p. 6) and a further 145 days in the final judgment (at p. 225) apart from her expenses for the double journey between London and Rangoon. It is to be observed that, she gave evidence on no more than four days and complained in an affidavit that she was harassed by needless cross-examination, a complaint with which we are in some sympathy. We are by no means sure that if she had been ordinarily resident in Europe (which in our opinion she was not) her evidence might not well have been taken on commission. The main dispute in the suits has been as to the propriety of the two investments in respect of the Hermitage Road and Golden Valley properties and on these issues Mrs. Raeburn in the nature of things could have comparatively little to say. This lady has been awarded the expenses of all her board and lodging (and more besides) for over nine months when the passages are taken into consideration. She cannot be allowed to live for such a period at the expense of the Official Trustee merely because she came here from Europe in 1936.

Mr. Friedlander was regarded as an expert witness for the plaintiff. On his account a qualifying fee of Rs 100 and an allowance for the actual period of three days during which he was in the witness-box at the rate of Rs. 16 per day are allowed. What is described as an all-in fee of Rs. 350 must be deleted. If he was required to assist Counsel for the plaintiffs, allowance for such assistance is made in calculating the Advocate's costs. In our opinion, the question of principle was involved with regard to the orders for costs. In the result the costs awarded have been reduced by a very large sum. The costs of the appeals must be reviewed by the Taxing Master and such part of them as is attributable to the appeals against costs must be awarded in favour of the appellant, the remainder being awarded to the respondents. We fix a special Advocate's fee to the leader of 25 gold *mohurs* a day in the combined appeals in addition to the *ad valorem* costs, regard being had to the periods of time in which the question of costs was argued before us.

D. *Appeals dismissed.*

LAHORE HIGH COURT

Civil Reference No. 24 of 1939

June 14, 1940

DIN MOHAMMAD, J.

DAULAT RAM—APPELLANT

versus

MUNICIPAL COMMITTEE, LAHORE—RESPONDENT

Punjab Municipal Act (III of 1911), ss. 62 (12), 61—S. 62 (12), if precludes enquiry into question whether tax is legal or otherwise—Only tax actually being levied is saved and not tax that could be levied—Tax on Salt—Municipality, if can impose it—Words and Phrases—"Tax" and "Cess"—Interpretation of statute—Statutes imposing pecuniary burdens—Strict construction.

All that sub-s (12) of s 62, Punjab Municipal Act lays down is that a notification of the imposition of a tax under the Municipal Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act and does not preclude an enquiry into the question whether the tax is legal or otherwise.

It is the tax that was actually being levied that is saved under s. 61 and not a tax that could be levied under the old Municipal Act.

The combined effect of ss. 100, 140, sub-s. (1) and

the Federal Legislative List Item No. 47 is that salt is a matter which is within the jurisdiction of the Federal Legislature alone and cannot therefore by virtue of sub-s. (1) of s. 100 be dealt with in any manner by a Provincial Legislature. Consequently, a Municipal Committee cannot legally impose a tax on salt.

"Cess" means, specially in relation to India, "a tax levied for a specific object. "Tax" in legal parlance also means nothing more than money which individuals are compelled to pay for public pusposes. It is impossible, therefore, to distinguish "tax" from "cess" or "duty."

Statutes which impose pecuniary burdens, are always construed strictly and a construction which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject will be adopted.

C. Ref. case referred by the Deputy Commissioner, Lahore, dated December 14, 1939.

Rai Bahadur *Badri Dass*, Messrs. *V. N. Sethi* and *K. L Gauba*, for the Appellant.

Mr. *Hamid Ullah Siddique*, for the Municipal Committee.

Order.—This reference has been made by the Deputy Commissioner, Lahore, under sub-s. (2) of s. 84, Punjab Municipal Act. The facts are these. Under s. 238, Punjab Municipal Act, 1911, the Municipal Committee of Lahore was declared to be superseded and Mr. Macnabb was appointed by the Provincial Govt. as Administrator invested with all powers and duties of the Committee. On April 28, 1938, a notification was issued in the *Govt. Gazette Punjab* in the following terms :

"In pursuance of the provisions of sub-s. (19) of s. 62, Punjab Municipal Act, 1911, it is hereby notified that, with the previous sanction of the Governor of the Punjab, the Administrator of the Municipality of Lahore has with effect from August 1, 1938, imposed the following tax....."

A schedule was attached to this notification describing the articles of food and drink which were so taxed, and these articles included 'salt'. On September 30, 1939, Lala Daulat Ram Kapur, Secretary, Central Rate Payers Association, Lahore, informed the Secretary of the Municipal Committee of his intention to import two maunds of salt into the limits of the Municipal Committee, Lahore, on October 3, 1939 and brought it to his notice at the same time that the tax imposed upon salt by means of the notification referred to above was illegal. It was further requested that the *mohurrir* in charge of the barrier be instructed not to demand any tax from him on that account. On October 2, the Secretary, Municipal Committee, informed Mr. Kapur that as 'salt' was included in the term 'goods' as used in Item No. 49 of list No. II of Sch. VII to the Govt. of India Act, 1935, the tax was legal and could be recovered. On October 3, 1939 two maunds of salt were imported and Mr. Kapur paid the tax under protest. He however made an appeal to the Administrator of the Committee under the provisions of rule V.63, Municipal Account Code, 1930, for a refund of the tax. The Administrator, on October 9, 1939, rejected the appeal on the same ground as was stated by the Secretary of the Municipal Committee. Thereupon, the importer preferred an appeal to the Deputy Commissioner, Lahore, under s. 84, Punjab Municipal Act, and that officer has under sub-s. (2) of that section referred the matter to this Court as stated above.

Counsel for the Administrator has urged that the imposition of this tax cannot be questioned by virtue of sub-s. (12) of s. 62, Punjab Municipal Act. This objection does not merit any serious consideration, inasmuch as all that sub-s. (12) lays down is that a notification of the imposition of a tax under the Municipal Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act and does not preclude an enquiry into the question whether the tax is legal or otherwise. Counsel further urges that the power of the Administrator to levy this tax is saved by sub-s. (2) of s. 143, Govt. of India Act, inasmuch as the words "were being lawfully levied" as used in that sub-section refer both to the taxes which were being actually levied and those that could be levied. Here also he is mistaken. Apart from the apparent unsoundness of the view advanced by him, the matter is settled by the Govt. of India (Adaptation of Indian Laws) Order, 1937, by which a new provision was added to s. 61, Municipal Act, which reads as follows :

"Nothing in this section shall authorize the imposition of any tax which the Provincial Legislature has no power to impose in the Province under the Govt. of India Act, 1935 ; Provided that a Committee which immediately before the commencement of Part III of the said Act was lawfully leavying any such tax under this section as then in force, may continue to levy that tax until provision to the contrary is made by the Central Legislature."

Evidently, therefore, it was the tax that was actually being levied that was saved and not a tax that could be levied under the old Municipal Act. The only question that falls for determination is whether tax

on salt was legally imposed by the Administrator of the Committee. It is contended on behalf of the Administrator that under sub-s. (2) of s. 61, Punjab Municipal Act, he is empowered with the previous sanction of the Provincial Govt. to impose any tax which a Provincial Legislature has power to impose in the Province under the Govt. of India Act, 1935. In the Provincial Legislative List there is an Item No. 49 which relates to 'cesses' on the entry of goods into a local area for consumption, use or sale therein. A Provincial Legislature is, therefore, empowered to levy such cesses and inasmuch as the tax imposed by the Administrator on salt is covered by this item, it was within the authority of the Administrator to impose a tax on salt with the previous sanction of the Provincial Govt.

Had the matter stood there, it would not have admitted of any doubt as to the competency of the Administrator to impose the tax complained of, but there are other provisions in the Govt. of India Act which have to be considered in this connection. Sub-section (1) of s. 100 says that notwithstanding anything in the next two succeeding sub-sections, that is (2) and (3), the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in list I in Sch. VII of this Act. In sub-s. (2) of the same section, it is stated that notwithstanding anything in the next succeeding sub section, that is sub-s. (3), the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have powers to make laws with respect to any of the matters enumerated in List III in the said schedule. In sub-s. (3) it is said that subject to the two preceding sub-sections that is 1 and 2, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said schedule. List I is called in the Federal Legislative List, List II, the Provincial Legislative List and List III, the Concurrent Legislative List.

By sub-s. (1) of s. 140, it is enacted that duties on salt shall be levied and collected by the Federation and provision is further made therein to pay to the provinces out of the revenues of the Federation sums equivalent to the whole or any part of the net proceeds of that duty, if so provided by an Act of the Federal Legislature. Referring now to the Federal Legislative List, we find that 'salt' is enumerated there at Item No. 47. The combined effect of ss. 100, 140, sub-s. (1) and the Federal Legislative List Item No. 47 is that salt is a matter which is within the jurisdiction of the Federal Legislature alone and cannot therefore by virtue of sub-s. (1) of s. 100 be dealt with in any manner by a Provincial Legislature. It is, on the other hand, expressly excluded from its jurisdiction and it is this limitation imposed on its powers that is repeated in sub-s. (3) of s. 61, Municipal Act. Lists I and II are mutually exclusive and although the word "goods" as used in Item No. 49 and defined in s. 311, Govt. of India Act, includes all materials, commodoties, and articles, it had to be read subject to what has already been included in List I. Consequently, it cannot include those goods which are placed within the jurisdiction of the Federal Legislature alone. If salt is taken to be included in List II, a Federal Legislature will have no jurisdiction to make any law in respect thereof by virtue of sub-s. (3) of s. 100 and this would lead to the anamolous result that an item which by sub-s. (1) of s. 140 and List I of Sch. VII, is specially placed within the jurisdiction of the Federal Legislature, will at the same time be considered to have been excluded from its jurisdiction by being included in List II.

It is argued that 'cess' is something different from 'tax' or 'duty' and consequently, in spite of what is contained in sub-s. (1) of s. 100 and Item No. 47 of the Federal Legislative List, the Administrator could impose what was being levied from the importer; but, in my view, this argument is equally unsound. "Cess" as defined in Murray's Oxford Dictionary means specially in relation to India "a tax levied for a specific object." It is no doubt said that sometimes it meant a rate levied by local authority and for local purposes; but, as explained there, it is now superseded in general English use by the word "rate". Similarly, the word "duty" is defined in the same Dictionary as "a payment to the public revenue levied upon the import, export, manufacture, or sale of certain commodities". "Tax" in legal parlance also means nothing more than money which individuals are compelled to pay for public purprses. It is imposible, therefore, to distinguish "tax" from "cess" or "duty". No doubt, the draftsman has used three different terms in different parts of the Govt. of India Act, but I consider that by using these different terms he did not

intend to convey different ideas thereby; otherwise, it might support a highly improbable suggestion that three different levies could be made on articles like salt in the form of 'cess', 'duty' and 'tax' respectively. It is noteworthy that even in the notification issued by the Provincial Govt. the word 'tax' is used and not 'cess'. Reference in this connection may also be made to the definition of the words 'taxation' and 'tax' as given in s. 311, Govt. of India Act. 'Taxation' includes the imposition of any tax or impost whether general or local or special and 'tax' is to be construed accordingly. Statutes which impose pecuniary burdens, as stated in Maxwell's Interpretation of Statutes at p. 250, are always construed strictly and a construction which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject will be adopted. I am of opinion, therefore, that in imposing a tax on salt, the Administrator did transgress the bounds of law and I answer the reference accordingly. The Administrator will pay the costs of the importer, Lala Daulat Ram Kapur, in this Court. Under s. 295, Govt. of India Act, 1935, I certify that the case involves a substantial question of law as to the interpretation of that Act.

D. *Reference answered.*

NAGPUR HIGH COURT

Letters Patent Appeal No. 6 of 1937
April 10, 1940
GRILLS AND POLLOCK, JJ.

BRIJMOHANSING—PLAINTIFF—APPELLANT
versus
TULSIRAM—DEFENDANT—RESPONDENT

C. P. Land Revenue Act (II of 1917), ss. 188 (1) (a), 187 (3), 189 (1) (d) and (a)—Lambardar-gumashta, if can collect that proportion of rent which would constitute revenue payable—Lambardar-gumashta's authority, extent of—Guardian of minor lambardar, whether can exercise powers of lambardar in relation to proprietary body—S. 189 (1) (d), applicability to sadar-lambardar—Proprietary interest in patti lost by lambardar-gumashta—Whether ground for his removal—Interpretation of Statutes—Side-headings to sections.

Sub-s. (1) (a) of s. 188, C. P. Land Revenue Act, does not empower the *lambardar-gumashta* to collect that proportion of the rents which would constitute the revenue payable. [p. 78, col. 1.]

The phrase in sub-s. (3) of s. 187, C. P. Land Revenue Act "the duties of the office" is sufficiently wide to cover both the phrases "the duties imposed" and "the powers conferred" in sub-s. (1) of that section. The *lambardar-gumashta's* activities are not limited to the duties imposed under s. 188 (1) and he has authority to exercise any of the powers mentioned in sub-s. (2). It is the same person who performs both the functions, whether he be a *lambardar* or a *lambardar-gumashta* appointed because of the *lambardar's* disability. The granting of leases is within those powers as much as is the collecting of rents or the acceptance of surrenders • 192 Ind. Cas. 291 (1), relied on. [p. 78, cols. 1 & 2.]

The guardian of a minor cannot exercise the powers of a *lambardar* in relation to the proprietary body. The power of a *lambardar* to act through a guardian is nowhere recognized in the Land Revenue Act; the only provision for the exercise of the powers of a *lambardar* who is under a disability is through a duly appointed *lambardar-gumashta*. [*ibid.*]

A *sadar-lambardar* is also a *lambardar* and is not merely a channel for the payment of revenue from other *lambardars*, and consequently s. 189 (1) (*d*) can also apply to a *sadar-lambardar*. [p. 79, col. 1]

Section 189, C. P. Land Revenue Act is not mandatory but permissive, and if a *lambardar-gumastha* has been appointed who has a proprietary interest in the *patti* and subsequently loses that interest, it is open to the Deputy Commissioner to remove him on that ground. [*ibid.*]

The Courts are not entitled to look at the side-headings to sections of a statute in interpreting the statute. The Legislature is not responsible for the side-headings. [p. 78, col. 1.]

L. P. A. from the appellate decree of the Court of Stone, C. J. dated March 12, 1937, in Second Appeal No. 121 of 1934, reversing the decree of the Court of the Additional District Judge, Bhandara, dated December 18, 1933.

Mr. *R. N. Padhye*, for the Appellant.

Mr. *V. V. Kelkar*, for the Respondent.

Judgment—This is a Letters Patent Appeal against a judgment of the Honourable the Chief Justice.

In *Mauza* Khirbodi in the Bhandara District one Sonya, an occupancy tenant, wished to transfer his holding to the defendant Tulsiram, and he accomplished this by the well-known device of arranging a surrender of the holding and a lease by the proprietary body to the intended transferee on the same day, the consent of the requisite authority being taken. The authority in this case was Govind Singh, the duly appointed *lambardar-gumashta*, and the defendant paid consideration both to the transferor Sonya and to Gobind Singh for his consent. Govind Singh is now dead, and another *lambardar-gumashta* has been appointed. The plaintiff Brijmohan Singh is the *lambardar* and a minor and his mother *Mst.* Chandnabai is his guardian. The minor *lambardar* brought a suit through

his guardian to eject the defendant as a trespasser on the ground that Govind Singh had no authority to grant him a lease and that he had trespassed on the land without the consent of the *lambardar*. The defendant pleaded that Govind Singh as the *lambardar-gumashta* had full authority to approve the transfer, which necessitated the granting of the lease. The plaintiff admitted that Govind Singh was managing the village on his behalf, but contended that he had authority only to collect rents and look after the general management of the village and accept surrenders, but no authority to enter into any transaction by way of lease. The trial Court found that the transaction between the two tenants amounted to a sale with the consent of Govind Singh and that even if the granting of a lease was outside the scope of the latter's powers as *lambardar-gumashta*, he had the implied consent of the plaintiff's guardian. The trial Court had no doubt that Govind Singh as *lambardar-gumashta* was empowered to consent to the transfer, and the plaintiff's suit was dismissed. This decision was reversed in the lower Appellate Court where the learned Judge considered that the only question arising for decision was whether Govind Singh could in his capacity as *lambardar-gumashta*, lease out the land to the defendant and recognize him as a tenant and whether the defendant was a tenant or a trespasser. The learned Judge considered that as there was no pleading on the question of any implied authority given to Govind Singh by the plaintiff's guardian, the contention of an implied authority by her could not be used to defeat the plaintiff's claim. The Court concluded that a *lambardar-gumashta* had no power to grant a lease, since s. 187 (3) of the Land Revenue Act, which relates to the appointment of *lambardar-gumashtas*, only authorizes the appointment of a *lambardar-gumashta* to carry out the duties imposed on *lambardars* by s. 188 (1) of the Land Revenue Act and does not authorize a *lambardar-gumashta* to assume the powers of a *lambardar* in contradistinction to his enumerated duties. These powers, the Court held, rested with the *lambardar* unless the *lambardar-gumashta* was specially empowered by the *lambardar* to perform such duties as he delegated to him. The plaintiff-appellant's claim for ejectment of the defendant was accordingly decreed. In second appeal this decision was reversed after a finding had been recorded in the lower Appellate Court on an issue on remand that during the period that Govind Singh acted as manager it was part of his powers as such to make alienations and that no one but he made alienations. It is to be noted that the presiding Judge who recorded his finding on this remanded issue was not the Judge who had decided the appeal. The issue was necessitated by the fact that this Court found it difficult to reconcile the findings given in appeal with the undisturbed finding of fact in the trial Court that Govind Singh leased out the lands in the ordinary course of village management. The learned Chief Justice held that if a *lambardar* is incapable of exercising his powers by reason of, *inter alia* his minority and if he cannot act through an agent, these powers cannot be carried out at all; they cannot be carried out through a guardian, since the guardian is not entitled to represent the minor's co-sharers, and no one is provided by statute to act on behalf of the *lambardar* in such a case except the *lambardar-gumashta*. The contention that a *lambardar-gumashta* is appointed solely for the purpose of performing the duties imposed on the *lambardar* by s. 188 (1) of the Land Revenue Act and not to exercise the *lambardar's* powers was met by the conclusion that when the plaintiff was appointed *lambardar*, Govind Singh was not appointed as *lambardar gumashta* but merely as a *gumashta*, or agent, and that Govind Singh was in fact appointed as an agent of the proprietary body to act on their behalf. The judgment proceeds:

> "In my opinion, it must be taken that all the co-sharers were seeking an agent capable of acting and, failing agreement, were leaving it to the Revenue Court to say who that agent should be. I cannot believe that they were merely endeavouring to arrange for somebody to pay Govt. Revenue, leaving the estate without anybody to manage it."

It was then held that as Govind Singh had been appointed an agent in a matter where all the co-sharers were represented and had in fact been performing all the duties and exercising all the powers of a *lambardar* over a number of years, granting leases without objection from the adult co-sharers, it would be idle to say that his only powers were those referred to in s. 187 (3) of the Land Revenue Act.

The first argument advanced before us in this appeal is that the second appeal has been decided without consideration of the provisions of the Land Revenue Act and that Govind Singh was appointed *lambardar-gumashta* in due conformity with the Act. Following on this it is contended that

the powers of a *lambardar-gumashta* are circumscribed by the provisions of the Act and that he is limited to nothing more than executing the duties enumerated in s. 188 (1). With the greatest respect we have no doubt that Govind Singh was duly appointed a *lambardar-gumashta* and not specifically as a general agent, and this is not contested on behalf of the defendant-respondent. If the *lambardar* is a minor and no *lamdardar-gumashta* is appointed, then there is no one who is under any statutory obligation to carry out the duties of his office. It is no doubt unfortunate that the Tahsildar, in his order (Ex. D 3), which it is admitted is an order appointing Govind Singh as *lambardar-gumashta*, has concluded with the words

"I, therefore, appoint minor Brijmohan guardian *Mst.* Chandanabai mother as *lambardar* and Govind Singh as *gumashta* on no remuneration."

This does not, however, mean that Govind Singh was appointed as an ordinary agent, but it is a specific appointment as *lambardar-gumashta* under s. 187 (3) of the Land Revenue Act. The Tahsildar was dealing with an application to appoint not only a *lambardar* but a *lambarar-gumashta* as the proposed *lambardar* was a minor. This is clear from Ex. D-5, a copy of a statement by *Mst.* Chandnabai's Counsel in making the application. In the course of the application he says: "As he (Brijmohan Singh) is a minor, Govind Singh be appointed a *gumasta lambardar*." In Ex. D-3 itself the Tahsildar quotes the rules for the appointment of a *lambardar-gumashta* and states that the conditions are satisfied in the case of Govind Singh. Knowing that he was dealing with an application for the appointment of a *lambardar-gumashta*, he has in parts of the order referred to him as *gumasata* in terms of the colloquial abbreviation which is common in Revenue Courts when they are in no doubt as to the question with which they are dealing. Exhibit P-2, which was filed by the plaintiff, is a copy of an extract from the *Lambardari* Register filed for the purpose of showing that Brijmohan Singh is the *lambardar*. In the column where the details of the *gumashta*, if any, appointed under r. IV, are entered, it is recorded that Govind Singh is appointed as *lambardar-gumashta*, and the authority quoted is the order set out in Ex. D-3. A Revenue Officer has no authority to decide the question of a private appointment of an agent when the proprietary body cannot agree as to who that agent shall be. The case then, must be decided on the question as to the extent of the powers of a duly appointed *lambardar-gumashta*.

Section 187 (3) runs :

"If the *lambardar* is a minor or unfit to perform the duties of the office through any infirmity of body or mind, or is a female who is unable to perform such duties, such Revenue Officer shall appoint a *lambardar-gumashta* for the purpose".

Sub-section (1) of the same section runs :

"Subject to rules made under s 227, there shall be appointed one or more *lambardars* for each *mahal* or *patti* to perform the duties imposed, and exercise the powers conferred on the *lambardar* by this Act."

It is contended that while a *lambardar* is appointed not only to perform the duties imposed but to exercise the powers conferred, a *lambardar-gumashta* is appointed only to perform the duties of the office. Section 188 of the Land Revenue Act runs as follows :

"(1) It shall be the duty of every *lambardar*—

(*a*) to collect and pay into the Govt. treasury, or if a *sadar-lambardar* has been appointed, to the *sadar-lambardar* so much of the land-revenue as may, under s. 187, sub-s. (5), be payable through him ;

(*b*) to collect and pay to the *mukaddam*, or into the Govt. treasury, as the Deputy Commissioner may direct, all sums of money payable through him either solely or jointly with other *lambardars*, by the proprietors of the *mahal* or *patti* for which he is appointed, on account of the remuneration of the *mukaddam* or village-watchman, or on account of any expenses which the *mukaddam* is authorized to recover from the *lambardars* of his village ;

(*c*) to assist the *mukaddam* in obtaining all particulars which he is bound to report under this Act or any other enactment for the time being in force.

(2) The *lambardar* shall, in the *mahal* or *patti* for which he is appointed,

(*a*) be deemed to be the landlord within the meaning of the Central Prov. Ten. Act, 1898 ;

(*b*) exercise the powers of the proprietors in matters relating to the village *abadi* and the enjoyment of their rights and privileges by tenants and others over the waste land of the village, including the grazing of the cattle thereon ;

(*c*) collect the village profits and render an account of the same to the proprietors within six months of the close of the agricultural year; and

(*d*) if necessary, institute suits and take other proceedings relating to the exercise of the aforesaid powers and against trespassers on the common property."

It is argued that sub-ss. (1) and (2) of s. 188 draw a sharp distinction between the duties and the powers of a *lambardar* and that a *lambardar-gumashta's* authority is confined to carrying out the duties enumerated in sub-s. (1) and that he has no authority to exercise any of the powers set out in sub-s. (2). Now, in our opinion, it is impossible for a *lambardar-gumashta* to carry out the duties imposed on him under sub-s. (1) without exercising the

authority which is conferred by certain parts of sub-s. (2). He cannot, for instance, collect and pay into the Govt treasury or to the *sadar-lambardar* the Govt. revenue unless he has power to collect the rents or to collect the village profits. We cannot accede to the argument that sub-s. (1) (*a*) empowers the *lambardar-gumashta* to collect that proportion of the rents which would constitute the revenue payable. Even if this were correct, the revenue payable to Govt. is not assessed on rental collections alone but also on the *siwai* income of the village which, *ex-hypothesi* on the argument advanced, the *lambardar-gumashta* is prohibited from collecting as this is one of the powers enumerated in sub-s. (2) (*c*). It is also to be noted that the collection of rents and the general management of the village, in which it is now argued that the *lambardar-gumashta* cannot interfere, was admitted in the pleadings as being part of Govind Singh's duties. It has been emphasized that the side-heading to sub-s. (1) is "Duties of *lambardars*" and that to sub-s. (2) is "Powers of *lambardars*". It is a well-known rule of interpretation that the Courts are not entitled to look at the side-headings to sections of a statute in interpreting the statute. The Legislature is not responsible for the side-headings, and indeed sub-s. (2) is not confined to powers alone. The distinction which it is sought to make between sub-ss. (1) and (3) of s. 187, is really based on the unacceptable proposition that regard can be had to the side-headings of s. 188, and in our judgment the phrase in sub-s. (3), of s. 187, "the duties of the office" is sufficiently wide to cover both the phrases "the duties imposed' and "the powers conferred" in sub-s. (1) of that section. Where the *lambardar-gumashta's* activities limited to the duties imposed under s 188 (1), the anomalous position might arise that a *lambardar* under the disability of minority might refuse to collect rents or village profits and yet the *lambardar-gumashta* would remain liable for the collection of the land revenue which is assessed at a proportion of the village profits. Again, if the *lambardar* retains these powers, he can only exercise them through some agency. It is contended that a minor acts through his guardian. It cannot, however, for a moment be supposed that the guardian of a minor can exercise the powers of a *lambardar* in relation to the proprietary body. The power of a *lambardar* to act through a guardian is nowhere recognised in the Land Revenue Act, the only provision for the exercise of the powers of a *lambardar* who is under a disability is through a duly appointed *lambardar gumashta*. An illustrative example of the impossibility of any contrary position may be afforded. A *lambardar* may be a female provided she is not unable to perform the duties of her office; a *purdanashin* woman would be such a female. A *purdanashin* woman, however, may be the guardian of her minor son, and if a minor *lambardar* is entitled to act in revenue matters through his guardian, the position would then be reached that a woman who is by statute unable to be appointed a *lambardar* herself can exercise all the powers of a *lambardar* on behalf of her minor son. The only other position between these two alternatives, namely, that a minor *lambardar* can exercise powers as *lambardar* through his guardian and that the powers are delegated to a *lambardar-gumashta*, assuming that the *lambardar gumashta's* powers are limited to those exercisable under s. 188 (1), is that these powers shall be put into commission among the proprietary body and that a minor *lambardar* cannot act as the agent of the proprietary body. The position would then be reached that in so far as sub-s. (1) of s. 188 is concerned, the Revenue Officer is empowered to appoint an agent for a *lambardar* under a disability, but for the purposes of powers enumerated in sub-s. (2) the proprietary body has no agency at all. The position would be chaotic, and the proposition is as unacceptable as is that of the guardian of a minor *lambardar* exercising the requisite authority on behalf of the other co-sharers.

The true position is, as we have held in *Nilkanth* v. *Vishwanath* 192 Ind. Cas. 291 (1), that the powers are necessarily given to the person who is to perform the duties, and the apparent distinction between the two, to which colour is given by the unfortunate side-headings to the section, is that sub-s. (1) deals with the functions of a *lambardar vis a-vis* the Govt. and sub-s. (2) with his functions *vis-a-vis* the proprietary body. But it is the same person who performs both the functions, whether he be a *lambardar* or a *lambardar gumashta* appointed because of the *lambardar's* disability. The granting of leases is within

(1) 192 Ind. Cas. 291; 1940 N L J 480; A I R 1940 Nag. 370; 13 R N 231.

those powers as much as is the collecting of rents or the acceptance of surrenders.

Section 189 (1) of the Land Revenue Act deals with the removal of *sadar-lambardars*, *lambardars* or *lambardar-gumashtas*, and four sets of circumstances on which the Deputy Commissioner may act are recorded. It is contended that not all of these four circumstances can apply in respect of the three persons specified. The circumstances are:

"(*a*) on his ceasing to have a proprietary interest in the *mahal* or *patti*; or
(*b*) for bad character or gross misconduct; or
(*c*) for neglect or improper discharge of the duties imposed on him under this Act or under any other enactment for the time being in force; or
(*d*) for negligent or improper exercise of his powers under sub-s. (2) of s. 188."

It is contended, for instance, that (*d*) obviously does not apply to *sadar lambardars* and that therefore it should be held that as (*c*) and (*d*) refer respectively to sub-s. (1) and (2) of s. 188 (*d*) cannot apply to a *lambardar-gumashta* either. This, however, does not follow, since the premise is faulty. A *sadar lambardar* is also a *lambardar* and is not merely a channel for the payment of revenue from other *lambardars*, and consequently (*d*) can also apply to a *sadar-lambardar*. It is also urged that (*a*) does not apply to a *lambardar gumashta*, since by the rules it is not essential for him to have a proprietary interest in the *mahal* or *patti*, but that it is only considered desirable that he should do so. Here again the argument is faulty. The section is not mandatory but permissive, and if a *lambardar-gumashta* has been appointed who has a proprietary interest in the *patti* and subsequently loses that interest, it is open to the Deputy Commissioner to remove him on that ground. In fact the apparent distinction between (*c*) and (*d*) in sub-s. (1) of s. 189 is merely the distinction we have already pointed out between sub-s. (1) and (2) of s. 188, and the Deputy Commissioner can remove a *sadar-lambardar*, a *lambardar* or a *lambardar-gumashta* either because he ceases to have a proprietary interest, or on account of his bad character, or gross misconduct, or because he is neglectful in the discharge of his duties (1) *vis-a-vis* the Govt. and (2) *vis a-vis* the proprietary body. Were the circumstances on which a removal from office could be founded not general to all the persons specified in the sub-section, that sub-section would have been differently drafted. The argument advanced has no force.

The conclusion, then, is that the judgment of the learned Chief Justice must be upheld, and in consenting to the transfer between Sonya and the defendant by means of accepting a surrender and contemporaneously granting lease, Govind Singh, the *lambardar-gumashta*, was acting within his statutory powers. The appeal is accordingly dismissed with costs. Pleader's fee Rs. 45.

S. *Appeal dismissed.*

BOMBAY HIGH COURT

Second Appeal No. 157 of 1938
July 18, 1940

BEAUMONT, C. J. AND N. J. WADIA, J.

RAMCHANDRA KRISHNAJI CHANDOLE AND ANOTHER—APPELLANTS

versus

VITHU GOVIND PANHALE AND OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 53—Suit under—Decree held cancelled deed and not merely declared it void between creditors and parties to deed—Limitation Act (IX of 1908), Art. 182—Deed void ab initio—Limitation is not stopped.

A decree was passed in a suit to set aside a deed of assignment, brought by the creditors under s. 53, that the deed of assignment was bogus and fraudulent and declaring it as cancelled and of no effect against the creditors:

Held, that the Court intended to cancel the assignment and not merely to declare it void in part leaving it effective as between the assignors and the assignee and ineffective only against the creditors.

[Proper form of decree in such cases stated.]

The *darkhasts* filed by the assignee are ineffective to prevent limitation running, only if the assignment was void *ab initio* If the effect of the decree is merely to cancel the assignment as from the date of the suit it prevents running of limitation.

S. A. from the decision of the Assistant Judge, Sholapur, in Appeal No. 80 of 1936.

Mr. *P. K. Padhye* for Mr. *K. A. Padhye*, for the Appellants.

Mr. *M. G. Chitale*, for the Respondents.

Beaumont, C. J.—This is an appeal from an order of the Assistant Judge of Sholapur which raises question of law. The material facts are that on June 23, 1924, one Krishnaji, the father of the present appellants, obtained a mortgage instalment decree, and his successors are still trying to enforce it. In 1926, and again in 1927, *darkhasts* were filed by Krishnaji or his heirs, which would have the effect of keeping the decree alive. On January 23,

1930, the guardian of the present appellants, who are the heirs of Krishnaji, assigned the decree to one Bawadhankar by deed, and in 1930, and again in 1934, the assignee filed *darkhasts*, which, if effective, would again have the effect of keeping the decree alive. In 1932, a creditor of Krishnaji filed a suit against the present appellants and their assignee for a declaration that the assignment to Bawadhankar was void against creditors, and on June 30, 1934, an order was made in favour of the plaintiff. The exact terms of the order I will refer to presently. Thereafter the present appellants filed this *darkhast* on the basis that the assignment to Bawadhankar had been set aside and therefore the right to execute the decree had revested in them. The trial Court directed the *darkhast* to proceed, but in appeal the learned Judge reversed that finding and declared that the appellants had no right to institute the present execution proceedings. He took the view, that although s. 53, T. P. Act, refers only to immovable property, and the Court has to deal in this case with a decree, still a suit to set aside an assignment of a decree must be dealt with by Courts on principles analogous to those governing suits under s. 53, and that an assignment void under s. 53, is only void as against the creditors of the assignor, and is effective as between the assignor and the assignee. He held therefore, that the assignment was still effective as against the assignors and therefore they could not enforce the decree, the subject-matter of the assignment.

The question must really turn on the meaning and effect of the order made by the Court in the suit to set aside the assignment. Now, there are, at any rate, two possible forms of order which may be made in a suit to set aside a settlement brought by creditors under s. 53, T. P. Act. The forms will be found in Seton's Judgments and Orders, Edn., 7, pp. 2280 and 2281. The first form provides for a declaration that the indenture of settlement is fraudulent and void as against creditors, and an order that the defendant do deliver up the indenture to the plaintiff to be cancelled, Under an order in that form the impeached document is cancelled. The other form provides for a declaration that the identure of settlement is void as against the plaintiff and other creditors of the defendant, and an order that the trustees of the settlement do join and concur in all acts and things necessary for making the property comprised in the said indenture available for satisfying the claims of the plaintiff and of other creditors of the settlor, as shall be directed by the Judge, at chamber in case the parties differ. Under a decree in that form the settlement is not cancelled; it remains in force and the rights of the creditors are enforced under it. Now, the decree which was made in the present case is a good illustration of the loose and inefficient manner in which decrees in the mofussil are, habitually, I am afraid I must say, drawn up. The decree was in these terms:

"It is hereby declared that the deed of assignment dated January 23, 1930, and the deed of correction dated June 19, 1930, passed by the mother of defendants Nos. 1 and 2 in the name of defendant No. 3 are bogus and fraudulent and they are hereby declared cancelled and of no effect against the plaintiff and other creditors of defendants Nos. 1 and 2."

It would be difficult to find any form of words better calculated to raise doubts as to what decree the learned Judge really intended to make. Did he intend to cancel the assignment altogether or only as against the creditors? He first of all declares that it is bogus and fraudulent. Well, if it is bogus, it never had any effect at all, and it would be unnecessary to cancel it. But the rest of his judgment shows that he did not intend to hold that it was bogus in the sense of not having any effect at all in law. Then he says, "It is hereby declared cancelled and of no effect against the creditors." Well, you cannot cancel a document in part. You may declare a document to be invalid in part and give effect to it on that basis; but if a document is cancelled, it must cease to have any effect. Reading the whole order, I think the learned Judge intended to declare that the settlement was cancelled, and that is confirmed by the provision which follows in the order, namely, that the decrees mentioned in the assignment, which include the suit decree, may be attached by creditors of the assignors against the assignors. It is difficult to see how the decrees could be attached against the assignors unless they had become revested in the assignors. So that, taking the decree as a whole, I feel no doubt that the learned Judge intended to cancel the assignment and not merely to declare it void in part leaving it effective as between the assignors and the assignee and ineffective only against the creditors. If that is so, the assignors, the present appellants, can enforce the decree. It is suggested further that the *darkhasts* filed by the assignee were ineffective to prevent limitation running, but that would only be so if the

assignment was void *ab initio*, and as I have already said the effect of the decree is merely to cancel the assignment as from the date of the suit. I think therefore that the appellants are entitled to execute the decree. The appeal, therefore, will be allowed with costs in this and the lower Appellate Court.

N. J. Wadia, J.—I agree.

s. *Appeal allowed.*

MADRAS HIGH COURT

Civil Revision Petiton No. 1248 of 1936
February 22, 1939
VARADACHARIAR, J.

KOKA AUDINARAYANA RAO NAIDU—PETITIONER

versus

BHAVARAJU LAKSHMINARAYANA RAO—RESPONDENT

Principal and agent—Suit against agent for accounts—Agent residing elsewhere—Cause of action, if arises where principal resides—Contract Act (IX of 1872), s. 213—Demand should be made on agent at his place of business.

The principle that the debtor is bound to seek out his creditor and pay his debt) is not applicable in India for the purpose of determining the local jurisdiction of a particular Court. Even assuming that this English rule either in terms or by analogy could be applied in this country, it cannot be extended to a case, where the contract itself is not one of loan but one of agency. Where, therefore, a principal sues the agent for accounts it cannot be said that the cause of action arises at the place where principal resides. 80 Ind. Cas. 661 (1), relied on, 102 Ind. Cas. 610 (2), explained.

Section 213, Contract Act imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. [p. 82, col. 1.]

C. R. P. to revise decree of the District Court, Ganjam in C. M. A. No. 66 of 1935.

Mr. *B. Jagannadha Das*, for the Petitioner.

Messrs. *Ch. Raghava Rao* and *M. Sriramamurthi*, for the Respondent.

Order. — This civil revision petition arises out of a suit for accounts filed by a principal against his agent. Both the Courts have held that no part of the cause of action arose within the limits of the Chicacole Munsif's Court's jurisdiction and the plaint has been returned for presentation to the proper Court, as the conditions of cls. (*a*) and (*b*) of s. 20, Civil P. C., are not satisfied in the present case. The learned Counsel for the petitioner contends that either as a matter of law or even as an inference of fact as to the intended place of performance of the contract, I should hold that the cause of action arose in whole or in part within the Chicacole Court's jurisdiction. I am unable to accede to this contention. As pointed out by the learned District Judge, the reasoning in *Tika Ram* v. *Daulat Ram* (1) where a very similar question arose, is clearly in favour of the view taken by the Courts below.

Mr. Jagannadha Das, the learned Counsel for the petitioner, has mainly relied on the decision of the Judicial Committee in *Soniram Jeetmul* v. *R D. Tata & Co. Ltd.* (2). I am not able to accept his interpretation of that judgment. It is difficult to read that decision as laying down that as a rule of law, the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in this country, even for the purpose of determining the local jurisdiction of particular Court. Their Lordships have taken care to indicate at the end of the judgment that their decision was based upon the inference drawn from the terms of the contract itself or from the necessities of the case. In an earlier part of the judgment, they referred to the fact that the business transactions out of which the outstanding debts arose in that case took place in Rangoon, where a branch of the plaintiff's firm was situate, and from this circumstance and from the nature of the contract, they seem to have drawn the inference that the parties must have intended by necessary implication that the moneys were to be paid in Rangoon. Even assuming that the English rule either in terms or by analogy could be applied in this country. I am unable to extend it to a case like the present, which did not arise out of the relationship of debtor and creditor. Where the contract itself is one of loan, it might be possible to presume that payment must have been intended to be made at the creditor's place. But here the contract was one of agency and it is not disputed that though the principal was resident at Chicacole, the agent who was a resident of Coconada was to attend to business to be done at Coconada.

It seems to be necessary to emphasize

(1) 46 A 485; 80 Ind. Cas. 661; A I R 1924 All. 530; 22 A L J 591; L R 6 A 9 Civ.

(2) 5 R 451; 102 Ind. Cas. 610; A I R 1927 P C 156; 53 M L J 25; 45 C L J 633; 29 Bom. L R 1027; (1927) M W N 520; 4 O W N 676; 25 A L J 690; 39 M L T 72; 31 C W N 998; 26 L W 720; 54 I A 235 (P C).

the distinction between the contract itself and legal obligations or liabilities incidental to the contract of principal and agent; within the meaning of s. 182, Contract Act, the agent was employed to do acts for the principal at Coconada. The legitimate inference therefore is that the contract was to be performed at Coconada. It is only as one of the legal incidents arising out of the relationship of principal and agent that s. 213 provides that an agent is bound to render proper accounts to the principal. This cannot be read as if there was an express contract between the parties to render accounts so as to support the inference that the intention must have been to render the account at the principal's place. It is also noteworthy that the section imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. Every consideration of convenience is also in favour of that view because the books relating to the business of the agency and all material information in connection therewith might naturally be expected to be available at the place of business of the agency.

Mr. Jagannadha Das contended that if on the taking of accounts it should be found that money was payable by the agent to the principal, the relationship of debtor and creditor would arise between the agent and the principal. But it is equally conceivable that on the taking of accounts it might be found that money would be payable by the principal to the agent. It does not therefore seem to me right to base any inference as to the intended place of performance on the possible result of the taking of accounts. It is the nature of the main contract that must determine the intended or presumed place of performance. The suit itself has been rightly framed as a suit for accounts and it is on that basis that the question of jurisdiction must be determined. I am of opinion that the Courts below were right in the view they took that no part of the cause of action arose at the principal's place of residence, in the circumstances of the case. The revision petition fails and is dismissed with costs.

N. D. *Petition dismissed.*

CALCUTTA HIGH COURT

Appeal No. 224 of 1936
July 31, 1940
NASIM ALI AND NARSING RAU, JJ.

RAJNANDINI —PLAINTIFF— APPELLANT

versus

ASWINI KUMAR CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Caste—Baidya—Whether Ambhastha—Dattakamimangoha, s. 2, cls. (84) *and* 8*—Ambhastha, whether comes under "Murdavhishikta and others"—"So forth" in cl.* 8*, includes marriage—Marriage between Baidya girl and Kayestha, validity—Custom (Assam)—Pre emption—Hindus of District Sylhet, are governed by Muslim law—Appeal—Evidence—Question as to which set of witnesses to be believed—Finding of trial Court on question, value of—Question of fact depending on reliance to be placed on testimony of witnesses—Findings of trial Court, value of.*

Persons belonging to the caste of Baidyas are not Ambhasthas.

An Ambhastha does not come under "Murdhavishikta and others" mentioned in s. 2, cl. 84, of Dattakamimangoha.

The words "so forth" in s. 2, cl. 1 include marriage. *Haridas Chatterjee* v. *Monmotho Nath* (2), relied on

A marriage by a Baidya girl with a Kayestha is valid according to local custom.

By custom the Hindus of the District of Sylhet are entitled to the benefit of the Muslim law of pre-emption. In order to entitle the plaintiff to a decree for pre-emption he has to prove that he made two *talabs talab-i-mawasibat* the 'first demand' and *talab-i-isad* the 'second demand' in accordance with the Muslim law of pre-emption. [p. 88, col. 1.]

Where the only question is, which set of witnesses is to be believed the findings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of Appeal. [p. 86, col. 1.]

In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judge who tried the case and saw the witnesses is entitled to great weight. [*ibid.*]

A. from an original decree of the Sub-Judge, Second Court, Sylhet, dated June 26, 1936.

Dr. *S. C. Basak* and Mr. *Paresh L. Shome*, for the Appellant.

Messrs. *Gunada Charan Sen*, *Nripendra Chandra Das* and *Hamidul Haq*, for the Respondents.

Nasim Ali, J.—Prasanna Kumar Das of villaga Ilashpur in the district of Sylhet was a Kayestha by caste. He married Swarnamoyee the sister of Sashi Mohan Das of village Rabidas (Lalkailash) in the said district, a Baidya by caste. He had no son. His only daughter Rajnandini (plaintiff in the present suit) was married to one Mohendra Nath Das. The latter was a *griha jamata* (resident son-in-law). His daughter had no male issue during his

life-time. Prasanna Kumar was owner of considerable movable and immovable properties. He made his last will on September 1, 1919. The material terms of this will are these:

"*Clause* 1.—My...son-in-law Sriman Mohendra Nath Perkayestha shall become the owner in absolute right, of 4 annas share of the 16 annas of my movable and immovable properties.

Clause 2.—My only daughter *Smt.* Raj Nandini shall become the owner in possession, in absolute right of 4 annas share of the 16 annas of my movable and immovable properties.

Clause 3.—Having had no male issue, for the purpose of preserving my family line I became desirous of taking a son in adoption and have brought in Sriman Aswini Kumar Das (defendant No. 1 in the present suit) son of Srijut Sashi Nath Choudhury, of *mauja* Rabidas, Pargana Dulali, to my ancestral dwelling house. On account of ill-health, I have not been able up to this day to perform the rites of *poshajag* (sacrificial rights of adoption) duly and according to the Shastras (scriptures) in connexion with the taking of a son in adoption. If the said rites remain unperformed owing to my sudden death, then I empower my wife *Smt.* Swarnamoyee Chaoudhurani to take in adoption on performing the rites or *poshajag* (sacrificial rites of adoption) after my death.

Clause 4.—After my death, whenever the rites of *poshajag* (sacrificial rites of adoption) will be performed by my wife from that very time the said Aswini Kumar Das shall become the owner in possession in absolute right, of the remaining 10 annas share of my movable and immovable properties. In default thereof, my wife shall remain in possession of the said 10 annas share in the right of enjoyment (for life).

Clause 6.—If after my death, the said Aswini Kumar be taken in adoption then until he completes the age of 22 years, my son-in-law Sriman Mohendra Nath Das and my widow *Smt.* Swarnamoyee Chaudhurani shall be the executors in respect of the management of the aforesaid 10 annas (share) of my movable and immovable properties"

Prasanna Kumar died on September 3, 1919. On October 8, 1920, Swarnamoyee and Mohendra applied for probate of the will. A son (Kaliprosad) was born to Rajnandini on November 12, 1920. Probate was granted to Swarnamoyee and Mohendra on April 1, 1921. On January 25, 1923, Swarnamoyee, Mohendra and Rajnandini jointly executed a registered Patta (Ex. 9) in favour of one Jafar Mridha for catching fish from certain beels appertaining to the estate of Prosanna Kumar for a term of six years stating therein that they were owners of the said beels in *maliki* right. On September 23, 1924 Swarnamoyee died.

In 1930, negotiations started between Rajnandini and Aswini Kumar (defendant No. 1) for an amicable settlement of the dispute between them relating to the title of the 10 annas share of the properties left by Prosanna Kumar. Certain drafts (Ex. 7, Ex. 7-A, Ex. 7-B, Ex. 7-C, Ex. 7-D and Ex. 8) were prepared. The terms of settlement contained in these drafts were these: "Aswini Kumar will give up his claims to the disputed 10 annas share on receipt of a certain amount. A portion of this amount would be paid in cash and for the balance Mohendra would sell to Aswini certain properties belonging to him."

While these negotiations were going on defendant No. 1 sold to defendants Nos. 2 to 5, 10 annas share of the properties which is the subject-matter of the present suit on July 31, 1931 by a registered deed of sale (Ex. A-1). In this *kobala* it is stated that out of the consideration the vendor received Rs. 8,500 in cash on the date of the execution of the *kobala*, and that the balance would be paid in two instalments later on. On December 10, 1931, defendant No. 1 sold to Rajnandini and Mohendra for a consideration of Rs. 22,000 and on the purchasers agreeing to the vendor remaining the owner and possessor of two annas share of the lands of Bolagunj Bazar his entire interest and share in the properties left by Prosanna Kumar excepting the properties sold by defendant No. 1 to defendants Nos. 2 to 5. Out of the consideration money of Rs. 23,000, Rs. 14,000 was set off against the price of certain properties belonging to Mohendra and sold by him on that day to defendant No. 1, Rs. 2,000 was paid by the purchasers in cash before the *kobala* and Rs. 5,000 was paid in cash on the date of the execution of the *kobala*. For the balance *viz.* Rs. 2,000 Mohendra executed a bond in favour of defendant No 1. On August 15, 1932, Rajnandini raised the present suit in the Court of the Subordinate Judge at Sylhet.

The material allegations in the plaint are these: (1) Swarnamoyee had never any intention of taking defendant No. 1 in adoption. Immediately after her husband's death she gave out that she would not take defendant No. 1 in adoption; and sent away defendant No. 1 to his father's house. Since then defendant No. 1 is living in his father's house. (2) Swarnamoyee died without taking defendant No. 1 in adoption. (3) The father of defendant No. 1 is a very litigious man and is heavily involved in debts. Being led away by greed and with the evil motive of getting hold of the 10 annas share of the properties left by Prasanna Kumar he himself and his son defendant No. 1 on his advice began to give out and proclaim to the people that defendant No. 1 was the adopted son of Prasanna

Kumar. They came to the plaintiff and her husband and requested them to come to a settlement and also threatened them with various sorts of litigation if no amicable settlement were arrived at. Considering that in case of litigation the plaintiff would be put to unnecessary loss and on the other hand in the event of winning in litigation there would be no possibility of realising the cost in Court from defendant No. 1 who is without any means and considering that the defendant No. 1 and his father were very near relations of the plaintiff, the plaintiff in consultation with her husband agreed to come to an amicable settlement. Accordingly in June 1931 an amicable settlement was arrived at between both parties to the effect that defendant No. 1 would give up 10 annas share of the properties left by Prasanna Kumar in favour of the plaintiff and her husband by a deed of release and in lieu thereof the plaintiff and her husband would give defendant No. 1 some lands and some money in cash. In accordance with these terms the draft of a *nadan patra* and a *kobala* were made. Defendant No. 1 however on the advice of his father subsequently broke his promise and sold the properties mentioned in the schedule of the plaint to defendants Nos. 2 to 5 by a *kobala* on July 31, 1931.

Plaintiff came to know of this *kobala* on *Sraran* 20, 1338 *B. S.* (August 5, 1931) from her officer Ram Dulal Purkayestha and immediately on coming to know of the same performed *talab-i-mahasibat* according to the Muslim Law of pre-emption and instructed her officer Ram Dulal to duly observe the requirements of *talab-i-isad* on her behalf on going without delay to the house of defendants Nos. 2 to 5 and on the lands sold. Accordingly, the said officer without any delay went to the house of defendants Nos. 2 to 5 with witnesses and in their presence duly performed *talab-i-isad* on her behalf. The Muslim law of pre-emption has been prevalent from time immemorial in the district of Sylhet amongst the Hindus and Muslims. Even assuming that defendant No. 1 had any share in the plaint lands the plaintiff being a co-sharer in respect of the remaining share of the said lands she is entitled to claim the right of pre-emption. The defendants in collusion with one another, fraudulently stated Rs. 20,000 as the consideration money in the *kobala* contrary to the real state of things. Plaintiff has come to learn on enquiry that the price was fixed only at Rs. 12,000 and that Rs. 500 only was paid by defendants Nos. 2 to 5 to defendant No. 1 on the date of the execution of the *kobala*.

After selling the plaint lands to defendants Nos. 2 to 5, defendant No. 1 was about to sell the other properties left by Prasanna Kumar. Considering that the plaintiff and her husband would be ruined by being involved in various sorts of litigations if strangers purchased the other properties plaintiff and her husband on the advice of their relations and well-wishers purchased all the other movable and immovable properties left by Prasanna Kumar excepting the plaint lands from the defendant No. 1 on fixing the price thereof at Rs. 23,000. On these allegations plaintiff prays that a decree may be passed; (*a*) for declaration of the plaintiff's title to the aforesaid 10 annas share of the land etc. of the schedule, obtained by her by virtue of inheritance from her father, the late Prasanna Kumar Choudhury and for confirmation of the plaintiff's possession therein; (*b*) for a declaration that defendant No. 1 is not the adopted son of the late Prasanna Kumar Chowdhury and that defendant No. 1 has no title or interest in the lands described below and that defendants Nos. 2, 3, 4 and 5 have no title and right to possession in respect of the aforesaid land (*c*) if, owing to the misfortune of the plaintiff, she is, for any reason, found, in the just decision of the Court, not entitled to the reliefs prayed for in items (*a*) and (*b*), above, then for declaration of the plaintiff's right of pre-emption in respect of the 10 annas share of the lands in claim and mentioned in the schedule below and for giving a decree to the plaintiff according to law, on directing payment by the plaintiff to defendants Nos. 2, 3, 4 and 5 of the real consideration money of their purchase.

On November 28, 1932, defendants Nos. 2 to 5 filed their written statement stating *inter alia*: (1) The father and the mother of defendant No. 1 gave over defendant No. 1 to the hands of Prasanna Kumar and his wife Swarnamoyee as adopted son. Prasnnna Kumar took defendant No. 1 to his own house, brought him up as his own adopted son and made arrangements for his education and decided that the name of the boy should be Prafulla Kumar Das. (2) Plaintiff's husband being very much aggrieved on account of Prasanna's taking defendant No. 1 as an adopted son tried his best to prevent the performance of the necessary ceremonies. (3) After the death of Prasanna Kumar, Swarnamoyee made

arrangements for the performance of the ceremonies in accordance with the directions in the will on a certain day. Mohendra however did not allow the ceremony to take place on that date. (4) In view of the directions in the will of her husband Swarnamoyee was firmly determined to perform the necessary ceremonies on a subsequent day and actually performed the necessary ceremonies, took defendant No. 1 as the adopted son of her late husband and changed the name of the boy as settled by her husband. (5) Defendant No. 1 thereafter came to be known to the public by his new name as an adopted son of Prasanna Kumar. (6) After the death of Swarnamoyee, plaintiff and her husband began to ill-treat defendant No. 1. Thereupon defendant No. 1 had to leave Prasanna's house. (7) After defendant No. 1 attained majority he asked Mohendra to deliver to him all his movable and immovable properties and render proper accounts of the period of his executorship. Mohendra, however, did nothing. Defendant No. 1 being helpless offered to sell the disputed property to defendants Nos. 2 to 5 for a consideration of Rs. 20,000. Defendants Nos. 2 to 5 accepted this offer and purchased the property for Rs. 20,000. Out of this consideration only Rs. 9,000 still remain unpaid. (8) Plaintiff or her husband did not observe any of the formalities of pre-emption.

On January 16, 1933 defendant No. 1 filed his written statement. His defence in substance is the same as that of defendents Nos. 2 to 5. He stated *inter alia* that after the death of Prasanna, Swarnamoyee on the strength of the permission given by Prasanna took him in adoption in the month of *Chaitra* 1328, duly and according to the Shastras on performing the rites of *poshajag*, changed his former name into Prafulla Kumar and since then he is known to the public as the adopted son of Prasanna Kumar. He also stated that defendants Nos. 2 to 5 paid him only Rs. 500 as the consideration of the *kobala* executed by him on the date of the *kobala* and that subsequently he was paid Rs. 2,500 only by defendants Nos. 2 to 5. He further stated that if the plaintiff be found to be entitled to the relief of pre-emption he was entitled to get Rs. 17,000 (the balance of the consideration) out of the money to be paid by the plaintiff for pre-empting the disputed lands. On these pleadings fourteen issues were raised in the suit of which the following are only material for the purposes of this appeal : (1) Is defendant No. 1 the validly adopted son of late Prasanna Kumar Chowdhury ? (2) Has the plaintiff observed the legal formalities as required by the law of pre-emption ? (3) What was the consideratian of the *kobala* which defendant No. 1 executed in favour of defendants Nos. 2 to 5 on July 31, 1931 ; What was the amount paid on the date of the execution of the *kobala* by defendants Nos. 2 to 5 to defendant No. 1 ? The Subordinate Judge has answered issue No. 1 in the affirmative and issue No. 2 in the negative. As regards issue No. 3 his finding is that although Rs. 20,000 was mentioned as the consideration of the *kobala* only Rs. 12,000 was fixed as the actual consideration and that only Rs. 500 was paid by defendants Nos. 2 to 5 to defendant No. 1 on the date of the execution of the *kobala*. On these findings the Subordinate Judge has dismissed the suit. Hence this appeal by the plaintiff.

The first point for determination in this appeal is whether defendant No. 1 was adopted by Swarnamoyee on *Chaitra* 30, 1328 (April 13, 1922) on the authority given to her by her husband. The finding of the Subordinate Judge that Swarnamoyee performed the adoption ceremony on *Chaitra* 30, 1328 *B. S.* (April 13, 1922) is based mainly upon the evidence of D. W. No. 2, D. W. No. 17, D. W. No. 11, D. W. No. 14 and D. W. No. 16. D. W. No. 2 is an old *mukhtear* of good position. His evidence is that he was invited by Swarnamoyee to the adoption ceremony but he could not attend. He is the brother of the sister's husband of Sashi Babu (the father of defendant No 1) and it is natural that he would be invited. D. W. No. 17 is a retried Govt. Officer. He also says that he got an invitation from Swarnamoyee to the adoption ceremony but he did not attend the invitation. He is the maternal uncle of Sashi Babu. It is natural that he would be invited. D. W. No. 11 is a Srotriya Brahmin and Tarka Nidhi. His evidence is that he was present at the adoption ceremony in the house of Ban Behari Goswami at Kurua and that Swarnamoyee took defendant No. 1 in adoption after performing the necessary ceremonies. He is an independent witness. The evidence of D. W. No. 14 is to the same effect. His evidence is that Swarnamoyee took defendant No. 1 in adoption in the house of Ban Behari Goswami in Kurua and that the name of the boy was altered at the time of the ceremony. He is an independent witness and is a learned *pandit*. D. W. No. 16, an old Pleader of the Sylhet Bar

says that there was an adoption ceremony in the house of Ban Behari Goswami at Kurua; that he met Swarnamoyee at that ceremony and the father of defendant No 1 gave defendant No. 1 in adoption to Swarnamoyee. He is the brother of the father-in-law of Sashi Mohan, the father of defendant No. 1.

The Subordinate Judge who heard and saw these witnesses has believed their evidence. In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses the view of the Judge who tried the case and saw the witnesses is entitled to great weight. (His Lordship discussed the evidence relating to the adoption of defendant No. 1 and proceeded). Where the only question is which set of witnesses is to be believed the findings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of Appeal. (His Lordship resumed the discussion of the evidence relating to the adoption of defendant No. 1 and concluded that defendant No. 1 was adopted as a son by Swarnamoyee.) The next point for determination is whether the adoption of defendant No. 1 is valid according to Hindu Law. The contention of the plaintiff is that Prasanna Kumar was a Sudra and defendant No. 1 is a Vaishya and consequently the adoption of defendant No. 1 by Swarnamoyee as a son of Prasanna Kumar is invalid according to Hindu Law. Prasanna Kumar was admittedly a Kayastha and, therefore, a Sudra. There is no allegation in the plaint that defendant No. 1 is a Vaishya. There is no evidence also in this case to show that the natural father of defendant No. 1 is a Vaishya or claims to be a Vaishya. The contention of the plaintiff, however, is this: all Baidyas are Vaishyas. The natural father of defendant No. 1 is a Baidya, defendant No. 1 is therefore a Vaishya. In support of this contention reliance was placed upon a passage in the judgment in *Ram Lal Sukul* v. *Akshya Charan* (1). In that case a question arose as to whether a marriage between a Baidya and a Kayestha was valid. In that case a Kaysatha woman married a Baidya. The subordinate Judge who tried that case quoted the following text from 'Bishnu':

"That the Vaidyas in ancient times were like their fathers in spiritual energy by meditations and Yoga (communion). They were inferior to Brahmins and Kshatriyas and carried on work (Vedic ceremonial) like the Vaishyas. By gradual and gradual neglect of the work a Vaidya has become degenerated in the Kali Yuga wholly with a Sudra just as the Kshatrias and Vaishyas."

We have not been able to trace this text. When the matter came up in appeal in this Court, this Court observed:

"In regard to the title of Chandra Kanta Sen it cannot be disputed that his mother a Kayastha and therefore Sudra married his father a Vaishya. The ancient Hindu Law did not regard such marriages with the condemnation expressed by later authorities which have been accepted by our Courts so as to make children born from such unequal marriages illegitimate.

But however the law may be there is ample evidence set out in the judgment of the Sub-Judge on which it must be held that such marriages as in the present case are recognised by local custom in the District of Tipperah and that there is no instance on which their validity has been questioned."

The learned Judges in that case did not discuss the question whether a Vaidya is a Vaishya. They assumed in that case that a Baidya was a Vaishya and held that a marriage between a Vaidya and a Vaishya was valid under the local custom in Tipperah. This case is no authority for the proposition that a Vaidya of Sylhet district is also a Vaishya. Further, in the absence of any evidence this case does not establish that the natural father of defendant No. 1 is a Vaishya. The surname of a Vaidya is 'Dhana' (Sankha Sanghita Chap. II, V. 4) or Gupta (Cullocka's Commentary on Manu). But the natural father of defendant No. 1 is neither a 'Dhana' nor a Gupta (sometimes he has used after his name Das Gupta). Originally there were four pure castes amongst the Hindus—Brahmana, Kshatriya, Vaisyha and Shudra. Later on intermarriages having taken place amongst the four primitive or pure castes there became several mixed castes.

"The sons by women one degree lower than their husbands are name in order the Murddhabhishikta Mohishya and Karana. They are respectively begotten by a Brahamana on a wife of the Kshatriya caste, by a Kshatriya on a Vaishya wife, and by a Vaishya on a Shudra wife. (*Vide* Cullukabhatta's Commentary on Manu Ch. X, V. 8.)

The sons born of women two or three degrees lower than their husbands are as follows: From a Brahmana on a wife of the Vaishya class, is born a son called Ambashtha, on a Shudra wife, a Nishada named also Parasave. (Manu Ch. X, V. 8.)"

Plaintiff's contention is that a Baidya is an 'Ambhastha, that as his mother is a Vaishya he is a Vaishya and that he cannot be adopted by a Shudra. The contention raises three questions: (1) whether a Baidya is an 'Ambhastha'; (2) whether an 'Ambhastha' is a Vaishya and (2) what is the rule of Hindu Law as regards the adoption of an 'Ambhastha.'

Babu Shyama Charan Bidyabhusan while quoting Manu Ch. XX, V. 8, in Chapter on

(1) 7 C W N 619.

'Castes and Classes of the Hindus' in his Babhostha Dorpon has added the words "or Baidya" after the word "Ambhastha."

Risley in his book on the 'Tribes and Castes of Bengal' has stated :

"The name Vaidya does not occur in Manu but the Ambasthas are there said to be the offspring of a Brahman father and a Vaishya mother, and their profession to be the practice of medicine. According to this account the Vaidyas are *anulomai* (born with the hair or grain, *i. e.*, in due order), the father being of higher caste than the mother. Another tradition describes them as begotten on a Brahman woman by one of the Aswini Kumars, the light bringing and healing twinhorsemen of Vedic mythology; and then oddly enough, goes on to say that they were reckoned as Surdas because their mother was of superior rank to their father, and their generation was consequently *pratilomaja*, "against the hair" or in the inverse order according to the succession of the castes. It would appear from this that the Aswini Kumaras were classed as Kshatriyas, and that, according to Brahmanical ideas, even the Gods were not equal mates for a Brahman maiden.

An expended version of the pedigree given by Manu is found in the Skanda Purana. This legend tells how Galava Muni, a pupil or son of Viswamitra, being greatly distressed by thirst while on a pilgrimage, was given a draught of water by a Vaisya girl named Birbhadra. The grateful sage blessed the maiden that she should soon have a son. Birbhadra demurred to this boon, on the ground that she was unmarried; but the rash oath, so characteristic of Indian mythology, could not be recalled, or could Galava himself put matters straight by marrying the virgin whose kindness had involved her in so strange a difficulty. For so it is explained, she had saved his life by the draught of water, and therefore he looked upon her in the light of a mother. A miracle was clearly in request. By the word of power of a Vedic mantra a wisp of *kusa* grass (Poa Cynosuroides) was transformed into a male child, variously known as Dhanvantari, Amrita Acharya, and Ambastha. He was the first of the Vaidyas, because he had no father, and therefore belonged to the family of his mother (Ambe). A number of analogous myths have been collected by a Bachofen in his two letters on "pueri juncini," and his method of interpretation, if applied to the present case, would lead to the conclusion that the tradition given in the Skanda Purana records an instance of female kinship : see Vol. I, pp. 46, 47."

Babu Golap Chandra Sarker in his Treatise on Hindu Law (Edn. 7, p. 149) has observed :

"The explanation of the mixed classes by supposing them to be the issue of inter-marriage appears to be a play of imagination ; where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an intermarriage or illicit connection between a man of one tribe and a woman of the other. Thus, the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Brahmana father and a Vaisya mother : a physician resembles a Brahmana in his general culture and learning, and also a Vaisya, inasmuch as, he does, in a manner, trade with his learning, and so the class is fancied to be mixed of the said two tribes, the wrose quality being supposed to be derived from the mother and the better from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress; for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy."

No other authority was placed before us to show the orign of Baidyas. This being the position it is very difficult to say that Baidyas are Ambhasthas as mentioned in Manu's text quoted above. No authority was cited before us in support of the view that an Ambastha is a Vaisya. Assuming that a Baidya is an Ambastha, what is the rule of Hindu Law relating to his adoption ?

"He is called a son given whom his father or mother affectionately gives as a son being alike, etc." : Manu 9-168. The word 'alike' in Manu's tax according to Medhatithi means "alike by qualities suitable to the family." This interpretation, however, has not been accepted in Dattakachandrika and Dattakamimangsha. In these two books the word has been interpreted as "alike by tribe" :

"The adoption of a son by any Brahmin must be made from amongst shopindos or kinsmen connected by an oblation of food or on failure of these an Asopindo or one not so connected otherwise let him not adopt. Of Kshatriyas in their own class positively ..... of Vaishyas from amongst those of the Vaishya class, of Sudras from amongst those of the Sudra class; of all and the tribe likewise (in their own) classes only and not otherwise. (Saunaka.)"

By the terms 'Kshatriya and the rest' in the above text of Saunaka the inclusion of Murdhavishikta and others regulated by the same rule as the Kshatriya and the rest is meant: for a text of Sankha expresses:

"One procreated on a female Kshatriya by a Brahman is a Kshatriya even: on a Vaishya woman by a Kshatriya is a Vaishya even; by a Vaishya on a female Sudra is even a Sudra. (Dattaka Mimangsha s. 2, cl. 84)."

An Ambhastha therefore does not come under "Murdhavishikta and others" mentioned in s. 2, cl. 84 of Dattakamimangsha. The rule of prohibition contained in Manu's text and Saunak's text quoted above does not therefore apply to an 'Ambhastha'. The rule laid down in Saunaka applies to a Sudra and therefore to a Kayastha. Shama Charan Sarkar Bidyabhusan after reviewing the authorities has observed:

"There is therefore a preponderance of authority to evince that the Kayasthas whether of Bengal or of any other country were Kshatriyas. But since several centuries passed the Kayasthas (at least those of Bengal) have been degenerated and degraded to Sudradom not only by using after their

proper names the surname "Das" peculiar to the Sudras giving up their own which is "Barma", but principally by omitting to perform the regenerating ceremony Upanayana hallowed by the Gayatri; (*See* Edn. 3 of Babhostha Darpan p. 670.)'

Here apparently the learned author was referring to verse 4, Chap. II of Sankha Sanghita where it is stated that a Shudra is called 'Das' and a Kshatriya is called 'Barma':

"The Baidyas are now divided into the following four sub-castes: (1) Rarhi, (2) Banga, (3) Barendra, and (4) Panchakoti, according to the parts of Bengal in which their ancestors resided. All of these are endogamous. A fifth endogamous group which, however, bears no distinctive name, comprises those Baidya families of the districts of Sylhet, Chittagong and Tipperah who intermarry with Kayashta and Sunris, the chidren in each case following the caste of the father. This parctice appears to be the only modern instance of intermarriage between members of different castes. It is said to have arisen from the reluctance of the Baidayas farther west to give their daughters to men who had settled in the country east of the Brahmaputra. Failing women of their own caste, the latter were compelled not only to marry the daughters of Kayasthas, but to give their own daughters in return . . . . The evidence of inscriptions shows that a dynasty of Baidya Kings ruled over at least a portion of Bengal from 1010 to 1200 A. D. To the most famous of these, Ballal Sen, is ascribed the separation of the Baidyas into two divisions, one of which were the sacred thread and observed 15 days as the prescribed period of mourning, while with the other investiture with the thread was optional and mourning lasted for a month... There has been some controvercy between Baidyas and Kayasthas regarding their relative rank... Putting aside the manifest futility of the discussion, we may fairly sum it up by saying that in point of general culture there is probably little to choose between the two castes, and that the Baidyas have distinctly the best of the technical claim to precedence. On the other hand, it would, I think, strike most observers that the Kayasthas are the more pliant and adaptive of the two, and have thereby drawn to themselves a larger share of official preferment than the more conservative Baidyas. (Risley Vol. 1, pp. 47 to 50)."

Swarnamoyee, the sister of the father of defendant No. 1, was married to Prasanna Kumar who was admittedly a Kayastha and therefore a Sudra. This marriage admittedly is valid according to local custom. Saunaka while propounding the form of the adoption says: "Having taken him by both hands . . . the boy bearing the reflection of a son." The word 'reflection of a son' in the above text of Saunaka has been interpreted in Dattakachandrika (s. 2, cl. 8) as the 'resemblance of a son' or in other words 'the capability to have been begotten by the adopter through appointment and so forth.' The words 'so forth' include marriage, *Haridas Chatterjee* v. *Monmotho Nath* (2) at p. 330. Defendant No. 1 could have been legally begotten by Prasanna through marriage with the mother of defendant No. 1, as such marriage would have been valid and legal. In cl. 3 of the will of Prasanna Kumar defendant No. 1 is described as 'Aswini Kumar Das.' The declaration (Ex. Q) which was made by the father of defendant No. 1 at the time of the adoption shows that he is a 'Das' and his wife a 'Dassi.' The father of defendant No. 1 signed the declaration as "Sashi Mohan Das." In the notice (Ex. G) which was published in the Sylhet Chronicle the name of defendant No. 1 was given as 'Aswini Kumar Das.' There cannot be any doubt therefore that the father of defendant No. 1 uses the surname 'Das' after his name (though he sometimes adds Gupta after Das). There is no evidence in this case that Uponoyana ceremony (investiture with sacred thread) which regenerates Brahmans, Khatriyas and Vaishyas and without which they become degraded with Gayatri (a sacred verse which is considered to be the essence of the Vedas which is imparted or taught to every youth of the three superior classes upon receiving his investiture with the sacred thread) is performed in the family of the natural father of defandant No 1. There is also no evidence that the period of mourning in Sashi Mohan's family lasts for fifteen days.

It view of these facts and circumstances I am of opinion that even if the ancestors of Sashi Mohan were Ambasthas or Vaisyas his family has been degenerated and degraded to Sudradom and that he is a Sudra. I therefore hold that the adoption of defendant No. 1 by Swarnamoyee was valid according to Hindu Law. It was contended on behalf of the defendants that by cl. (4) of Prasanna's will defendant No. 1 became entitled to 10 annas share of his property as soon as the adoption ceremony was performed by Swarnamoyee irrespective of the question whether the adoption is valid in law or not. There is much force in this contention. But as I have found that the adoption of defendant No. 1 is valid in law it is not necessary to express any opinion on this point. The last point for determination in this appeal is whether the plaintiff is entitled to pre-empt the disputed properties from defendants Nos. 2 to 5. By custom the Hindus of the District of Sylhet are entitled to the benefit of the Muslim Law of pre-emption. It order to entitle the plaintiff to a decree

(2) I L R (1937) 2 Cal. 265; 41 C W N 322, (330).

for pre-emption she has to prove that she made two *talabs-talabs i-masibatt* (hereinafter referred to as the 'first demand') and *talab i-isad* (hereinafter referred to as the 'second demand') in accordance with the Muslim Law of pre-emption. (His Lordship discussed the plaintiffs' evidence regarding the two *talabs* and proceeded.) Under the circumstances I am not prepared to hold that the Subordinate Judge was wrong in holding that the plaintiff did not perform the two demands as required by the Muslim Law of pre-emption.

In view of this finding the question of the price paid or agreed to be paid by defendants Nos. 2 to 5 to defendant No. 1 does not arise. But an issue was raised on this point in the trial Court. The Subordinate Judge has recorded a finding on this point. It is therefore necessary to determine this point. In the *kobala* the consideration was stated to be Rs. 20,000. There is a recital in the *kobala* that Rs. 8,500 was paid in cash on the date of the execution of the *kobala*. The trial Judge has found that only Rs. 500 was paid on the date of the execution. I agree with this finding of the trial Judge in view of the evidence in the case. I hold that the real price fixed for the sale was only Rs. 12,000. The result therefore is that this appeal fails and is dismissed with costs to respondents Nos. 2 to 5. No order is necessary on the application presented on February 1, 1937.

Narsing Rau, J.—I agree and would add only a few words as to the evidence on the question of adoption. P. W. No. 12 Babu Ramesh Ranjan Das, a senior pleader of Sylhet, has stated in his evidence that Swarnamoyee, when she came to Sylhet to swear an affidavit in connexion with the probate of her husband's will, this must have been sometime in 1921, the date of the grant being April 1, 1921, said to him in the course of conversation: "Now that a son has been born to my daughter, what would I do by adopting a son?" In my humble opinion there is no sufficient reason to disbelieve the witness on this point: Swarnamoyee may well have made such a remark. It was not unnatural that for some time after the birth of a son to her daughter in 1920 she should have been asking herself whether there was any longer any object in exercising the power of adoption given to her. But it does not at all follow that she did not ultimately in 1922 overcome her initial doubts and decide to adopt. There is evidence, which has been believed by the learned Subordinate Judge and which we have no ground for disbelieving, that she did in the end perform the necessary ceremonies and make or complete the adoption.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Second Appeal No. 470 of 1937
April 30, 1940
VENKATARAMANA RAO, J.

R. K. PRESANNA VENKATESA RAO —APPELLANT

versus

TRICHINOPOLY DISTRICT CO-OPERATIVE CENTRAL BANK, LTD. AND OTHERS—RESPONDENTS

Company—Payment of gratuity to ex-servant—By-laws not providing for such payment—General Body, if can sanction it—Mere fact that Board of management is delegated power to frame by-laws, whether takes away General Body's power to sanction gratuity.

The payment of gratuity to an ex-servant is a matter only relating to the administration and management of the affairs of a company and so long as the General Body acts within the ambit of the Articles of Association, any act done by them in regard to the management of the company will be *intra vires* and not *ultra vires*. Even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. The fact that the board of management is delegated the power to frame by-laws does not take away the power of the general body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the board of management. This power is always vested in the General Body and by the mere fact of delegation, it cannot be taken away. [p. 90, col. 2.]

S. A. against the decree of the Sub-Judge, Trichinopoly, in A. S. No. 49 of 1937.

Messrs. *K. Rajah Ayyar* and *S. V. B. Rao*, for the Appellant.

Messrs. *K. V. Krishnaswamy Iyer* and *T. S. Krishnaswami Ayyangar*, for the Respondents.

Judgment.—The question for decision in this second appeal is whether the award of the sum of Rs. 1295 paid as gratuity to defendant No. 2 by defendant No. 1 Bank in pursuance of a resolution of the General Body, dated November 23, 1935 is valid. The learned Judge in the Court below answered the question in the affirmative. The question is whether his view is sound. Mr. Rajah Iyer canvasses this view on two grounds: (1) The Ex-Secretary was per-

mitted to retire on March 17, 1935 on production of a medical certificate which stated that he was suffering from chronic bronchitis and would not be in a position to attend to his duties for a period of six months. Under the Gratuity Rules which govern the payment of gratuity, the Ex-Secretary would not be entitled to claim any money as and by way of gratuity; because the rules contemplated certain conditions on fulfilment of which alone an ex-servant of the Bank can claim gratuity. However the Board of Management seems to have granted the gratuity but exception was taken by the Deputy Registrar of Coopetative Societies and the Board of Management was requested to get the sanction of the General Body to the said payment. After the receipt of that letter from the said Registrar, the Board of Management seems to have amended the by-laws by providing that in cases where the Board comes to the conclusion that an officer will have to be permanently incapacitated, though not supported by a medical certificate, it might pay gratuity. On the strength of the amended by-law, the Board of Management wanted to grant the gratuity but, however, by way of abandunt caution, they wanted to put the matter before the General Body. They accordingly framed a resolution to the following effect:

"To sanction a sum of Rs. 1,295 as gratuity to the Ex-Secretary, Mr S. R. Subramania Iyer as recommended by the Board in their Resolution No. 19 dated October 2, 1935."

The intended resolution was circulated to the share-holders and a General Body meeting of the share-holders was held on December 7, 1935 wherein they passed a resolution sanctioning the payment of the said gratutity. It is contended by Mr. Rajah Iyer that the Board of Management had no power to give retrospective opeartion to the amended by-law and any payment of gratuity in pursuance of such an amended by-law would be illegal. Therefore when the General Body passed a resolution sanctioning the said sum of Rs. 1295, they were simply sanctioning an illegal resolution of of the Board of Management. It must therefore be held that the payment was *ultra vires*. I am not inclined to agree with this contention. It cannot be denied that even though the by-laws did not provided for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. In the particular case, how I construe the resolution of the General Body is this. They intended to pay the gratuity of Rs. 1,295 and treat the resolution communicated to them by the Board of Management as a recommendation to them. It is perfectly competent to them to grant the gratuity or to decline it.

There is a statement in the resolution circulated to the share-holders that it was recommended by the Board in Resolution No. 19, dated October 2, 1935. But that would not invalidate the payment sanctioned by the general body. At the meeting of the general body, the general body must have been appraised that according to the old by-laws, *i. e.*, before they were amended, the payment of gratuity to the ex Secretary was not proper, that objection was taken by the Registrar of Co-operative Societies and that therefore the sanction of the general body was sought. Considering all these facts, the general body chose to pass the resolution which it is perfectly competent to do and Mr. Rajah Iyer has not placed before me any authority to show that it was *ultra vires* of them to do so. The matter only relates to the administration and management of the affairs of a company and so long as the general body acts within the ambit of the articles of association, any act done by them in regard to the management of the Bank will be *intra vires* and not *ulra vires*. It is next contended by Mr. Raja Iyer that the power to frame by-laws in regard to the payment of gratuity was delegated to the board of management and once they passed by-laws both the board of management and the general body were bound by them. I am not prepared to agree with this contention. The fact that the board of management is delegated the power to frame by-laws does not take away the power of the general body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the board of management. This power is always vested in the general body and by the mere fact of delegation, it cannot be taken away. Mr. Rajah Iyer has again not placed before me any authority in support of his contention. Only these two contentions were advanced by Mr. Rajah Iyer and I am clearly of opinion that both the contentions are unsustainable. The appeal fails and is dismissed with costs (one set). Leave to appeal refused.

N.S. *Appeal dismissed.*

RANGOON HIGH COURT

Civil Regular No. 103 of 1940
August 23, 1940
SHARPE, J.

U LUN—PLAINTIFF
versus
U CHIT HLAING AND ANOTHER—DEFENDANTS

Government of Burma Act 1935, *ss.* 27, 32, 41, 28, 5 (3), 42—*Power of Speaker to declare whether seat has become vacant or not—Speaker so declaring, whether protected either by s.* 27 (1), *or by s.* 32 (2)—*Ordinance under s.* 41 *providing that it would cease to operate at expiration of six weeks from re-assembly of Legislature—Legislature re-assembling at* 11 *a. m., on February* 15—*Ordinance, when expires—Member appointed Second Lieutenant in Army, whether holds office of profit, when he has received no remuneration or his appointment ment is subject to His Majesty's approval—Scope of s.* 5 (3)—*It applies only as between Governor and Ministers regarding administrative matters—High Court, if can enquire, whether Ordinance promulgated under s.* 42 *is within Governor's powers—Ordinance providing that members of House of Representatives should not be disqualified, if they held commission in His Majesty's forces, if* ultra vires *of Governor's powers—Ordinance, when said to be promulgated—Ordinance providing that member whose seat has become vacant under Government of Burma Act shall nevertheless be restored to his former seat is void.*

One must look at the particular statute which bring into being the Legislature whose powers and privileges are under consideration. In order therefore, to appreciate the position of the Speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Govt. of Burma Act. He has no powers to declare whether a seat has become vacant or not. *Attorney-General* v. *Theobald* (3) and *Harding* v. *Commissioner of stamps for Queensland* (4), relied on. [p. 97, col. 1.]

Sub-s. (1) of s. 27, Govt. of Burma Act is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. The Speaker's declaration that a member's seat was vacant, although made by words spoken in the Chamber, does not come within the purview of the sub-section. In making such a declaration the Speaker does a great deal more than merely rule upon a point of order arising under the rules of procedure of the House. Consequently he is not protected either by s. 27 (1) or by s. 32 (2). [p. 98, col. 2; p 99, col 1.]

Where an Ordinance under s. 41 provided that the Ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature, if there be no resolution by the House disapproving it, and the Legislature re-assembled at 11 A. M., on February 15:

Held, that the Ordinance ceased to operate at midnight on March, 28 and 29, as the law takes no notice of the fractions of a day.

[Case-law referred to.]

A person who is oppointed a Second Lieutenant in the Army in Burma Reserve of Officers holds an office of profit under the Crown in Burma, even if he has in fact received no remuneration or has not joined any particular unit of the Army in Burma or his appointment is subject to the approval of His Majesty. [p 101, col. 1.]

The correct reading of s. 5 (3), Govt. of Burma Act, is this. If any question arises whether any matter (*a*) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (*b*) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment —then the decision of the Governor in his discretion is final. [p. 104, col. 1.]

Section 5 (3) only applies as between the Governor and the Ministers in regard to administrative matters. It has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of part IV ("Legislative") of the Govt. of Burma Act. [p. 105, col. 1.]

High Court is not precluded from enquiring whether an Ordinance promulgated by the Governor under s 42 is or is not within his powers. Sub-s. (4) of s. 42 makes it clear that the Court can go into the question whether any provision of an Ordinance promulgated under s. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature, would not have been valid. An Ordinance providing that members of the House of Representative should not be disqualified for being members of the House if they held commissions in His Majesty's forces is not matter of defence, but is concerned with something which is a matter entirely for the Ministers. The Governor has therefore no power to promulgate such an Ordinance when the Legislature is then in session. [p. 105, col. 1; p. 104, col. 1.]

"Promulgation" of an Ordinance without doubt connotes the fact of making the public aware of the existence of the new law. In Burma, as in India and elsewhere, promulgation of a new law takes place through the medium of the *Official Gazette*. It is wrong for the notifications which appear in the *Burma Gazette* when an Ordinance is first published therein to say, as they do: "The Governor has promulgated the following Ordinance"; they should say. "The Governor hereby promulgates the following Ordinance." Consequently an Ordinance is promulgated on the date on which it is published in the *Gazette*. [p. 105, col. 2; p. 108, col. 1.]

Having regard to the terms of s 24 (2) the only meaning which can be assigned to s. 25 (1) (*a*) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. An Act of the Legislature, or an Ordinance the effect of which is to provide that a member whose seat has become vacant under the Govt. of Burma Act shall nevertheless be restored to his former seat which is then vacant—such an Act amends the provision of the Govt. of Burma Act, and is beyond the powers of the Burma Legislature to enact or in the case of an Ordinance, beyond the powers of the Governor. [p. 106, col. 2.]

Messrs. *E. Hay*, *U E Maung* and *U Maung Maung*, for the Plaintiff.

Messrs. *Kyaw Din* and *P. K. Basu*, for Defendants Nos. 1 and 2, respectively.

Judgment.—In this and the other case which was heard at the same time extremely important questions of law arise and for

that reason very full arguments were addressed to me by the learned Advocates for the respective parties and I am very much obliged to them for their assistance. Among the matters into which I have had to enquire are the extent of the powers of the Speaker of the House of Representatives in Burma and whether, and to what extent, he is subject to the jurisdiction of this Court, and the extent of the legislative powers both of the Governor (by way of Ordinances) and of the Burma Legislature. With such important questions falling for my decision, it is a matter of regret to me that I have had since the hearing was concluded but a few days for the preparation of this judgment, and even on almost all those days I have been fully occupied disposing of important cases under the Ten. Act and the Tenancy Ordinance. To-day is Friday, and on Monday not only does the long vacation of this Court commence but the Legislature reassembles. Therefore it was most desirable that I should deliver these two judgments to-day. With a title more time at my disposal I would have been able to condense considerably what I am about to say. No evidence has been called before me by any party, as the facts are not in dispute. They are either admitted or ascertainable from agreed documents. I will set out the facts at once. I shall do so somewhat fully, as there is no oral evidence on the record. On September 18, 1939, at a time when the Legislature was not in session the Governor of Burma promulgated, under s. 41, Govt. of Burma Act, an Ordinance called the Burma Legislature (Removal of Disqualifications) Ordinance, 1939 (to which I shall hereafter refer as "the first Ordinance,") s. 2 of which provided that a person should not be disqualified nor should be deemed ever to have been disqualified for being chosen as and for being a member of either Chamber of the Legislature by reason only that as a member of any of His Majesty's Forces he was holding or had held any office of profit under the Crown. At the time of the promulgation of this, the first Ordinance, the plaintiff, U Lun, was the member of the House of Representatives of the Burma Legislature for the constituency of Insein North, having been chosen, at the General Election in November 1936, in accordance with the provisions in that behalf contained in Sch III to the Govt. of Burma Act, 1935. Neither then nor subsequently was he subject to any disqualification rendering his seat in the House of Representatives vacant, save that he was, in March last, appointed a Second Lieutenant in the Army in Burma Reserve of Officers, as I shall presently mention, if indeed that was a disqualification. Whether or not the holding of such appointment did disqualify the plaintiff is one of the important questions which fall to be decided in the present case.

By sub s. (2) (*a*) of s. 41, Govt. of Burma Act, the first Ordinance ceased to operate at the expiration of six weeks from the first reassembly of the Legislature after its promulgation, or, if a resolution disapproving it was passed by the House of Representatives and agreed to by the Senate, then upon the resolution being agreed to by the Senate. The first reassembly of the Legislature after the promulgation of the first Ordinance was at 11 A. M on February 15, 1940, the first Ordinance was duly laid before the Legislature, but no resolution disapproving it was passed by the House of Representatives(*a*). In the *Burma Gazette* for March 16, 1940 it was notified, under date March 13, that the plaintiff together with his fellow member of the House of Representatives, U Ba Maung, the plaintiff in the other case, and together with some nineteen other persons, were subject to His Majesty's approval, appointed to be Second Lieutenants in the Army in Burma Reserve of Officers, with effect, in the case of the plaintiff and U Ba Maung from March 11. Neither the plaintiff, U Lun, nor his fellow Member U Ba Maung, has ever proceeded to join any unit of the Army in Burma, for training or otherwise, nor has either of them drawn any pay or allowances. All the other 19 persons whose appointments as Second Lieutenants were notified in the *Burma Gazette* of April 13, joined a unit at Maymyo or elsewhere, and it is agreed that the reason for U Lun and U Ba Maung not doing so was that they might be left free to discharge their duties and responsibilities as members of the House of Representatives, and in fact they continued to do so. At about 12 noon on March 29, during the course of the sitting of the House of Representatives, defendant No. 2 who was the Karen member for Thaton West and also the Deputy Speaker of the House, rose in his place in the Chamber and addressed defendant No. 1, who was and is the Speaker of the House of Representatives, in the following

terms:

"(a). Burma Gazette, Part I, p. 311: Defence Department Notification No. 185.

Mr. Speaker, may I draw your attention that the Burma Legislature (Removal of Disqualifications) Ordinance, 1939, ceased to operate on March 28, 1940, and now we have two officers of the Army in Burma Reserve of Officers sitting in this House. If you refer to s. 25, Govt. of Burma Act, Sir, a person shall be disqualified for being chosen as, and for being, a member of either Chamber, if he holds any office of profit under the Crown in Burma. I understand that these two officers will be called for training for which they will be remunerated very soon as they have been appointed Second Lieutenants."

The Speaker enquired who the two members were, and defendant No. 2 gave the names of the plaintiff and of U Ba Maung, the member for Myitkyina, and added:

"Sir, if they are disqualified under s. 25, are they under s. 24 (a) entitled to sit in this House and vote? I am just drawing your attention to this matter."

The Speaker thereupon said that he thought that the question raised was a constitutional one and a very serious one too and suggested that the matter be considered after four o'clock. The Premier agreed, and added that he thought "the Advocate-General also should be present." The Speaker observed that, if a member is disqualified under s. 25, then under s. 26, he is liable to a fine of Rs. 500 in respect of each day he sits or votes, and he (the Speaker) added:

"Therefore, I say it is very essential that this question should be decided promptly and we shall take it up after four o'clock to-day."

Both the plaintiff and the other member named were present in the Chamber when defendant No. 2 so raised this point. When four o'clock came the Speaker addressed the Chamber in this way:

"Now we come to the point raised by U Hla Pe this morning whereupon the Premier said:

Sir, I have already supplied you with a copy of the Ordinance about which you may kindly inform the members."

to which the Speaker rejoined:

"I will read the Ordinance by his Excellency the Governor that has just been delievered to me. It reads thus:

and he read out a type-written document headed the Burma Legislature (Removal of Disqualifications) Ordinance (Ordinance No. V of 1940). This ordinance (to which I shall hereafter refers as "the second Ordinance,") was expressed to be made under s. 42, Govt. of Burma Act. The terms of s. 2 of the second Ordinance were identical with those of s. 2 of the first Ordinance. Having read out the document, the Speaker returned it to the Premier and then asked defendant No. 2 what he had got to say, whereupon the latter addressed him as follows:

"Sir, this Ordinance has just been promulgated, but when I drew your attention this morning there was no Ordinance in existence. The Ordinance first promulgated under s. 71, Govt. of Burma Act, ceased to operate on March 28. That is why I raised this point, Sir."

The Speaker then said:

"What has the Govt. got to say?"

to which the Premier replied:

"The Ordinance is quite clear, Sir. It operates with effect from March 28. We cannot go beyond the action which has been taken by His Excellency. We are precluded from doing so and it is outside our jurisdiction."

The Speaker then addressed the house at considerable length upon the matter and thereby initiated a discussion in which about a dozen members (including three or four Ministers) participated, several of them at even greater length than the Speaker, until, apparently by chance, there appeared the Advocate-General who suggested that he would like a little time to consider the matter. This was on a Friday afternoon and the Advocate-General asked if he could have time till Monday, the April 1. In the end this was agreed to.

The only other matters in connection with this long discussion in the Chamber that afternoon (March 29) which it is material to mention here are these: At one stage of the discussion defendant No. 2 interposed and called attention to a certain passage in Byrne's Law Dictionary under the heading "office of profit under the Crown." His interjection only occupies two or three lines in the official report and except for that one interjection on March 29, defendant No. 2 took no part whatsoever in the discussion either that day or on April 1. The other material matter to be mentioned in connection with March 29, is that almost at the end of that day the plaintiff, U Lun, said this:

"As a member charged as having been disqualified I think, I need give an explanation in this House,"

to which the Speaker replied:

"No, the time has not yet come for your statement. Only when you are leaving this House you can make a statement, because according to the rule a Minister who resigns will be permitted to make a statement, only when he tenders his resignation."

That attempt to intervene in his own defence is the only time upon which the plaintiff took any part in the discussion in the Chamber on this matter, except for a parting shot, as I may call it, which he made at the very close of the sitting on the 29th, when he remarked: "One thousand five hundred rupees or buy a vote." The

plaintiff never again attempted to speak in his own defence.

On March 30, the second Ordinance was published in a *Burma Gazette*, Extraordinary, of that date. When the matter was resumed in the Chamber on April 1, the proceedings were opened by a lengthy and no doubt carefully prepared speech, or, rather, legal address by the Advocate-General. When he had concluded, a number of other members spoke on this question, again about a dozen of them, and one of the Counsellors to the Governor also spoke. Several of the members spoke at great length, and some of those (including at least one Minister) who spoke on April 1, had already spoken on March 29, while one member who had spoken in English on the first day spoke in Burmese on the second. The discussion in the Chamber was again a prolonged one.

It is to be noted that at no time whatever when the question of the plaintiff's position as a member was under consideration—that is to say, at no time either on March 29, April 1, or April 2 — was any motion or resolution ever before the House. It was not for or against any resolution that all these members were speaking, and it is said by the learned Advocate on behalf of the Speaker that all that was happening for these two days of lengthy discussion was the putting by defendant No. 2 of a point of order; and that the subsequent ruling given by the Speaker was upon that point of order It is not unimportant, perhaps, to say this about the various speeches which were made on March 29 and April 1: there was certainly no agreement amongst the various members as to whether it was the Speaker or the House who was to be urged to accept this or that particular view of the law which was being presented by the respective members. It is, I think, fair to say that although the various members who spoke knew quite well what they were talking about, yet few of them had any clear idea as to whether it was the Speaker or the House who was to do something about the matter. Even the Speaker himself, if one reads the observations which he interposed from time to time during the two days' discussion, thought that the matter was one for the House to decide (see, for example, his remarks at the bottom of p. 1536, and especially his remarks at the bottom of p. 1514 of Vol. VII of the Official Report of the Proceedings of the House), yet in the end he decided it himself. When the many speeches had come to a close upon April 1, the Speaker said that, as this was an important matter, he would like to consider it very carefully that evening and would give his ruling the following morning.

An interesting thing happened on April 1, after the Speaker had said that he would postpone his decision. First of all the House considered three or four Bills which have nothing to do with this case, and then there came before the House the Burma Legislature (Removal of Disqualifications) Bill. 1940, as passed by the Senate. The Minister for Judicial Affairs moved that that Bill be taken into consideration. This was the Bill which was destined to receive the Governor's assent four days later and to become thereby the Burma Legislature (Removal of Disqualifications) Act—Burma Act XII of 1940. Section 2 of that Act is in precisely the same terms as the two sections 2 of the two Ordinances which I have already mentioned. The Burma Legislature (Removal of Disqualifications) Bill, 1940 (as passed by the Senate) was duly passed by the House of Representatives on April 1, but not until after a lengthy debate in which there took part both the plaintiff, U Lun, himself and also, and, I think, at greater length than any other member, the Speaker who addressed the Chamber not only in English for some time but also at length in Burmese, until Mr. Robertson, the representative of the Burma Chamber of Commerce, felt constrained to intervene in what he called the "rather embarrassing and difficult position" in which he found himself, with the object, not only of interrupting what had undoubtedly become a speech and a lengthy one—by the Speaker, but also of calling the Speaker's attention to the fact that by addressing the House in Burmese he (the Speaker)—as the Speaker himself was afterwards the first to admit—was not following the rules of the House which it was for him to enforce. Before, however, the House of Representatives passed the Burma Legislature (Removal of Disqualification) Bill, 1940 (as passed by the Senate) on April 1, a division was taken and amongst those who then voted were the plaintiff, U Lun, and also U Ba Maung, the two persons whose position as members was then under consideration by the Speaker. By their own votes they supported the attempt to maintain their own positions as members, and that at a time when the Speaker had their position as members under consideration.

The following morning, namely, April 2,

the Speaker proceeded to give what he called his "ruling on the matter that was discussed yesterday." He commenced by referring to the matter as a point of order. He dealt at moderate length with the legal points raised and towards the end of his ruling he said this :

"In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions.

Under s. 26, Govt. of Burma Act, they have become liable to pay a penalty of Rs. 500 per day of their sitting in this House from March 28, and I request the Govt. to take necessary action for such recovery from the said gentlemen.

It has been contended by the Govt. that the Speaker should not act as a Court under s. 27 (3) and in my view the chair can give a ruling on a point of order raised in the House under r. 46 (2) without fear or favour."

This is the "ruling" of which the plaintiff now complains. It is agreed by all parties that the plaintiff and also his fellow member U Ba Maung were both present in the Chamber as well in the afternoon as in the morning of March 29, and again on both April 1 and 2, although from a passage in the Speaker's address on March 29, it appears that they were absent for a part of the afternoon on that day. On April 5, the Governor gave his assent to the Burma Legislature (Removal of Disqualifications) Bill, 1940, to which I have already referred. In the *Burma Gazette* (Extraordinary) of April 6, the fact of the Governor's assent to that bill was published for general information, and it was also therein notified that the Governor had withdrawn the second Ordinance, as he had power to do under s. 42 (3) (*b*), Govt. of Burma Act. No proceedings have been taken against the plaintiff under s 26 of the Act. On April 24, the present suit was filed. By his plaint the plaintiff asks, first, as against both the defendants, for a declaration that he is (that is to say, that he was, at the time of the institution of the suit) a member of the House of Representatives and that his seat in the said House had not become vacant, and he also seeks, as against the Speaker only, both a declaration that the latter had no power to determine the matters disposed of by him in his "ruling" of April 2, 1940, and that the Speaker's declarations and findings are of no force or validity, and also an injunction restraining the Speaker from taking any steps pursuant to his declaration that the seat of the plaintiff had become vacant and from in any way interfering with the exercise by the plaintiff of his rights, duties, or privileges as a member of the House of Representatives. The contentions of the plaintiff, on the one hand and of the Speaker, on the other, can be stated quite shortly. I will deal later with the case in regard to defendant No. 2. The plaintiff says that he is, and at all material times has been, a member of the House of Representatives, that his seat has never become vacant; and, further, that in any event, whether his seat did become vacant or not, the Speaker had no power to decide whether it was vacant or not, and it was not for him (the Speaker) to declare it vacant. To this the Speaker replies, in the first place,

"that he is not subject to the jurisdiction of this Hon'ble Court or any other Court in respect of acts done by him in exercise of the powers vested in him as the Speaker of the House of Representatives under the law."

That is para. 11 (*sic*) of his written statement. This plea must, I think, be read in connection both with what he states in para. 2 of his written statement, namely, that he,

"apart from performing his duty as the Speaker of the House of Representatives to regulate the procedure or the conduct of business or maintaining order in the Legislature by enforcing the rule that only a member shall sit and vote in the House has neither denied nor is interested in denying the plaintiff's status"

and also with what he states in para 10 (*sic*) which is

"that he by virtue of his office as the Speaker of the House of Representatives properly constituted under the law is the sole authority to give a ruling on the point raised 'by his co-defendant' and his ruling is final and conclusive and cannot in any way be questioned in any Court of law."

Finally he says—in para. 12 (*sic*)—that in any event the plaintiff was not, at the time the ruling was given, a member of the House of Representatives, as no Act of the Legislature or Ordinance could legally make him a member once he had ceased to be one. Incidentally the Speaker admits, by para. 1 of his written statement that the plaintiff was a member at the date of the plaint. This is obviously an error in drafting, and the case has been fought on the basis that the two defendants had denied and not admitted such allegation. The words of para. 11 (*sic*) of his written statement are expressly designed to afford the Speaker the immunity given him by s. 32 (2), Govt. of Burma Act. It is clear that, if all that the Speaker did on April 1, was to exercise the powers vested in him for regulating procedure and the conduct of business and for maintaining order, then he is not subject to the jurisdiction of this Court in respect of the matter now complained of by the plaintiff. The first

question really is, on this part of the case whether the Speaker was not doing more than merely giving a ruling on a point of order. In my judgment he was doing more and a great deal more. It must be borne in mind that for two days he had been hearing arguments on the one side and on the other and the Advocate-General had given a carefully prepared address on the legal position. Reported decisions of various Indian High Courts had been cited to him, and, when all this had been done and after taking time to consider his decision, he delivered from the Speaker's chair a speech which was quite the equivalent of a judgment of a Court of law. I do not say that this speech of the Speaker (to borrow the words of Stephen, J., in *Bradlaugh* v. *Gossett* (1), at p. 285, when referring to the resolution of the House of Commons which gave rise to that case) is the judgment of a Court but it has much in common with such a judgment. The Speaker had concluded his speech in these terms:

"In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions."

I think that it would not be wrong to say that the Speaker sought to attract to himself something very little, if at all, removed from the status of a Court; and that is something directly opposed to the clear terms of s. 27 (3), Govt. of Burma Act. The fact that the Speaker concluded his speech by expressly stating that he was not acting as a Court but was only giving a ruling on a point of order does not to my mind in any way alter the true effect of the facts, which to my mind clearly show that, whether or not the Speaker was acting as a Court in this matter, he was certainly doing something more than merely regulating procedure or maintaining order. After all, in the extract from his written statement which I have just read, the Speaker is now definitely claiming to be the sole authority for deciding the question raised by defendant No. 2, which was whether the plaintiff's seat was vacant or not. I think it quite impossible to accept the contention put forward on behalf of the Speaker, that he was merely dealing with a point of order He was in my judgment claiming to have the right to declare whether any particular seat was vacant or not. I will now consider what the powers of the Speaker of the House of Representatives are and whether the right to declare when a seat in the House has or has not become vacant is one of them or not.

More than once during the course of his address to me Mr. Kyaw Din, on behalf of the Speaker, emphasised the fact that of course he was not contending in this case that the Speaker of the House of Representatives here in Burma has powers which are equal to those of the Speaker of the House of Commons in England. But it appears to me that in this particular matter the Speaker is claiming a great deal more than the Speaker of the House of Commons in England now claims, and something, indeed, to which no claim has been made by Mr. Speaker in England for at any rate some hundreds of years. It is important to distinguish between the Speaker of the House of Commons in England and the House of Commons itself. One of the privileges of the House of Commons in England is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament. It is to be noted however that what I have just mentioned is the privilege of the House of Commons and not that of the Speaker. When a vacancy occurs in the House of Commons from any cause which legally vacates a seat, a warrant is issued by the Speaker, but it is only issued by him in pursuance of an order of the House. In order to get over the difficulty which otherwise would have arisen when a vacancy occurred during a recess, when the immediate authority of the House of Commons would not have been available, it was necessary to pass the Recess Elections Act, 1784. Without the statutory power given to him by that Act even the Speaker of the House of Commons in England had no power to issue a writ for the purpose of filling a vacancy. In the present case there was never any order of the House of Representatives. As I have already stated, no resolution or motion was at any time before the House. The Speaker does not suggest for one moment that he has taken the sense of the House on the matter at all. He listened to the arguments on the one side and on the other, as a Judge might do. In the end he delivered his decision, or whatever you like to call it. It was his own, personal decision at which he, after due reflection, thought fit to arrive. It is in no sense the decision of the House of

(1) (1884) 12 Q B D 271; 53 L J Q B 209; 53 L T 620; 32 W R 552.

Representatives; it is solely the decision of the Speaker. Let me at this point read one short passage from the judgment of Privy Council (delivered by Sir James Colville) in *Doyle* v. *Falconer* (2), at p. 218, which, it seems to me, should be borne in mind in the present connection :

"The privileges of the House of Commons .. .. belong to it by virtue of the *lex et consuetuao Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot therefore be inferred from the possession of certain powers of the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the Crown."

In other words, one must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration : see also *Attorney-General* v. *Theobald* (3), per Pollock, B, at p. 559 and *Harding* v. *Commissioners of Stamps for Queensland* (4), per Lord Hobhouse at bottom of p. 775. In order therefore to appreciate the position of the Speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Govt. of Burma Act. The Speaker here is entirely the creature of that Statute : he is brought into being by s. 21 of that Act. A reading of that and the next succeeding section of the Act shows to my mind that the Speaker is what in ordinary parlance would be called a "Chairman." Section 29 of the Act provides for the making of rules, both by the House of Representatives and also by the Governor, for regulating, subject to the provisions of the Act, the procedure and the conduct of its business by the House of Representatives, and the Speaker is the particular individual charged with supervising the due conduct of the proceedings of the House of Representatives, for maintaining order therein, and for conducting and seeing that the business of the House is conducted in accordance with those rules. He is also, by Chap. XVI of the Rules of Procedure, made the medium of communication from the House of the Governor to one of the mediums of communciation from the Governor and the House. The Speaker of the House of Commons in England also has functions similar to the foregoing, but he has however in addition, other functions which are not bestowed upon the Speaker here. That there are strict limitations placed upon the powers of the Speaker of the House of Representatives is apparent from s. 27 (3), Govt. of Burma Act, which provides, as I have already indicated, that notwithstanding the right of freedom of speech in the Legislature and the other privileges accorded to members by the earlier provision of that section, nothing in the Act shall be construed as conferring, or empowering the Legislature to confer, on any officer of either Chamber (which, so far as this case is concerned, means the Speaker) the status of a Court, or any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner. A further instance of a limitation on the Speaker's powers is to be found in r. 42 of the Rules of Procedure for the House of Representatives, which provides that even if a question arises in the House whether a motion, amendment or question is or is not such as to require the prior sanction of the Governor, the Speaker cannot decide it, although he is presiding over the Chamber. I also call attention to the fact that it is not the Speaker, nor even the House, who can take proceedings under s. 26. I will at this point deal with a case upon which much reliance was placed by Mr. Kyaw Din, namely, *Manindra Chandra* v. *Provas Chandra* (5), a decision of Page, J. as he then was, which on appeal was upheld by Sanderson, C. J. and Richardson, J. The point of that decision can really, I think, be summed up in a single passage to be found in the judgment of Page, J. at the very top of p. 237* :

"..... where a question within the jurisdiction of a public officer entrusted with judicial powers has been *bona fide* entertained and decided by such officer, the Court will not interfere with his decision merely upon the ground that his decision was erroneous either with respect to facts or in point of law."

With that statement of the law I, with respect, entirely agree. The whole question in the present case is whether the Speaker was entrusted with the powers which he claims. If he seeks to rely upon the above decision of Page, J., he must admit that the powers which he exercised were judicial powers, but s. 27 (3), Govt. of Burma Act, denies him such powers. If he says, as in view of s. 27 (3) of the

(2) (1866) L R 1 P C 328; 4 Moo P C (N. S.) 203; 36 L J P C 33; 15 W R 366.

(3) (1890) 24 Q B D 557; 62 L T 768; 38 W R 507.

(4) (1898) A C 769; 67 L J P 144; 79 L T 42; 14 T L R 488.

(5) 51 C 279; 79 Ind. Cas. 1042; A I R 1934 Cal. 761; 39 C L J 58.

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Act, he must do that he was not exercing judicial powers, then the above decision has no application to the facts of the present case.

In my judgment it is quite clear that the Speaker in Burma has no powers beyond those which are conferred upon him by or under the Govt. of Burma Act. Can it be found anywhere in that Act that the Speaker is given the power to declare whether a seat has become vacant or not? I cannot find such a power anywhere in that Act. I invited Mr. Kyaw Din to point it out to me, and he had to admit that he could not do so. He argued however that there was a gap in this regard in the constitution of Burma as it now stands. He said that no provision has been made either by the Govt. of Burma Act or by His Majesty in Council for determining who shall have the right to declare when a seat becomes vacant (the special case provided for by s. 24 (3) has no application to the present suit) and that there is neither an Act of the Burma Legislature nor any rules made by the Governor under cl. 15 of Sch. III to the Act dealing with this matter. And so Mr. Kyaw Din argued that there being, so he says, this gap the Speaker is impliedly made the person or authority who is given the power to declare whether a seat in the House of Representatives is vacant or not. I am not prepared to accept that argument. Such powers as are conferred by the Act upon the Speaker in Burma are so few, and are limited in so many ways, that I cannot hold that he has any such implied power as that for which Mr. Kyaw Din contends. In my judgment he has only such powers as are expressly conferred upon him by or under the Govt. of Burma Act. The power to declare whether a seat is vacant or not is admittedly not expressly conferred upon the Speaker by or under the Act. It is, in my view, unnecessary for me to decide whether there is or is not this gap in the constitution of which Mr. Kyaw Din speaks. It is enough for me to hold, and I do hold, that at any rate the Speaker has no such power of declaring a vacancy as he undoubtedly claims to have.

It is, I think, worth while looking to see what powers the Imperial Parliament conferred upon the Legislatures in other parts of the Empire, in regard to the declaration of vacancies in their Lower House. In the case of Canada it thought fit to confer upon the House of Commons in that Dominion such privileges and powers as might from time to time be defined by Act of the Parliament of Canada, provided that they did not exceed those then enjoyed by the House of Commons in England: *see* s. 18, British North America Act, 1867. So that it was open to the Canadian Parliament to give the Candian House of Commons (not, be it noted, its Speaker) the right to declare when a vacancy arose. In Australia (and it is interesting to note that the "disqualification sections" of the Act dealing with Burma are very similar indeed in their wording to those of the Act dealing with Australia) the right of determining any question respecting the qualification of a member of the House of Representatives or respecting a vacancy therein, was (until the Parliament should otherwise provide) expressly given to the House (again not to the Speaker) in which the question might arise: *see* s. 47, Commonwealth of Australia Constitution Act, 1900. There is nothing in the Govt. of Burma Act which comes anywhere near the above-mentioned provisions of the Impeiral Statutes which brought into being those two Dominions. It is abundantly clear to me that the Speaker, the defendant in the present suit, is not invested with those powers to which he so plainly lays claim in para. 10 (*sic*) of his written statement.

One final point on this part of the case. The Speaker claims that he is not subject to the jurisdiction of any Court in regard to this matter, for the further reason that he is protected by s. 27 (1), Govt. of Burma Act. Mr. Kyaw Din raised this point in the course of his argument: it is not pleaded by the Speaker, although it is pleaded by his co-defendant. The point can be disposed of very briefly. The sub-section which I have just mentioned renders all members of the Burma Legislature immune from any proceedings in any Court in respect of anything said by them in the Legislature. In my judgment this sub-section is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House, I do not think that the Speaker's declaration that the plaintiff's seat was vacant, although the declaration was made by words spoken in the Chamber, comes within the purview of the sub-section. It must also be noted that s. 27 (1) opens with the words "subject to the provisions of this Act..." Section 27 (3), I have already pointed out, expressly declares that the Speaker is not to have "the status of a Court." So that if the Speaker purports within the Chamber

to act as a Court, he will not, in my view, be protected by the provisions of s. (1) in regard to what he then says.

In the result, on this part of the case, I have come to the conclusion that the Speaker on Aril 1, last, did a great deal more than merely rule upon a point of order arising under the rules of procedure of the House, that he wrongly, and in excess of his legal powers, assumed the right to declare whether a seat was vacant or not, and that in respect of that wrongful assumption of a power which was not vested in him he is amenable to the jurisdiction of this Court, and is not protected either by s. 32 (2), Govt. of Burma Act, or otheswise. I now turn to the second main part of the case, which involves a decision as to whether the plaintiff was, either on April 1, when the Speaker gave his decision, or on April 24, when the present suit was instituted, still a member of the House of Representatives.

The first question on this part of the case is whether the plaintiff was holding an office of profit under Crown in Burma at the time when the first Ordinance ceased to operate. There is even a contest between the parties as to when that was. The first Ordinance was promulgated under s. 41, Govt. of Burma Act. By sub-s. (2) (*a*) of that section the first Ordinance ceased to operate "at the expiration of six weeks from the reassembly of the Legislature," there having been no resolution dispaproving it passed by the House of Representatives. The plaintiff contends that, as the Legislature reassembled on February 15, the Ordinance ceased to operate at midnight on March 28-29 which is six weeks from midnight on Februay 15-16, while the Speaker contends that the Ordinance either ceased to operate at midnight on March 27-28 or, at latest, at 11 A. M. on March 28, the latter being six weeks from the precise moment at which the Legislature reassembled. Although it would be necessary to decide this matter if I were now dealing with a case under s. 26, Govt. of Burma Act—for in such a case it would be necessary to ascertain the exact number of days on which the plaintiff sat or voted when disqualified, if he ever was disqualified—yet to my mind and on the view which I take of the case it is immaterial for the purpose of the present suit to decide this point, because (1) the matter now in dispute was never raised in the Chamber until about noon on March 29; so that there was in any event a gap between the time when the first Ordinance ceased to operate and the raising of the present question; (2) the second Ordinance expressed to have come into force with effect from March 28, which means midnight on March 27-28, and so, if it is valid, then it covers even the widest gap suggested by the defendants in this case; and (3) if Act XII of 1940 is valid, that also covers any possible gap, as the Act is expressed to come into force on the date on which the first Ordinance ceased to operate. But, as my conclusion on the point can be stated quite briefly and as the point was fully argued before me I will give my decision upon it. Had it been necessary for me to decide this question, I should have held that the first Ordinance ceased to operate at midnight on March 28-29. This appears to me to follow from the judgment of Sir John Romilly, M R., in *Williams* v. *Nash* (6), at p. 94 and from such a case as in *Goldsmith's Co.* v. *The West Metropolitan, Ry. Co.* (7). It also follows if one applies the test, suggested by Lord Tenterden, C. J. in *Pellew* v. *East Wonford* (8), at p. 144, of reducing the time to one day—a test which was more than once adopted by Parke, B: *see Webb* v. *Fairminer* (9) and *Young* v. *Higgon* (10), and which was adopted again in 1891, in fact twice in that year once by Wills, J. in *Radcliffe* v. *Bartholomew* (11), at p. 163 and again by Day, J. in *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association* (12) at p. 405. The well known maxim that the law takes no notice of the fractions of a day—and, except where there are conflicting rights between subject and subject for the determination of which it is necessary to ascertain the actual priority, such is the universal rule—is to my mind enough to dispose of the Speaker's alternative contention that the period of six weeks must be calculated from the actual hour namely, 11'0 A. M. at which the Legislature reasembled on February 15: *In re Court*

(6) (1859) 28 Beav. 93 (94); 28 L J Ch. 886; 5 Jur. (N. S.) 696.
(7) (1904) 1 K B 1; 73 L J K B 931; 89 L T 428; 52 W R 21; 68 J P 41; 20 T L R 7.
(8) (1829) 9 B & C 134 (144); 4 M & Ry. 130; 7 L J (o. s.) M C 84.
(9) (1833) 3 W & M 4 73; 6 D P C 549; 7 L J Ex. 140.
(10) (1840) 6 M & W 49; 8 D P C 212; 9 L J M C 99 4 Jur. 125.
(11) (1892) 1 Q B 161 (163); 61 L J M C 65; 65 L T 677; 40 W R 63; 56 J P 262.
(12) (1891) 1 Q B 402 (405); 60 L J Q B 47; 63 L T 807; 55 J P 168.

Fees (13) and *Tomlinson* v. *Bullock* (14), and see per Lust, J. at p. 232, both also support this view.

It is said against the plaintiff that as he was appointed a Second Lieutenant in the Army in Burma Reserve of Officers with effect from March 11, he was from and after that date holding an office of profit under the Crown in Burma. Two things are said on his behalf: (1) that his appointment was made "subject to His Majesty's approval" and that His Majesty had not at any material time given his approval; and (2) that he (the plaintiff) has never been called upon to join any unit of the Army in Burma for training and has accordingly never drawn any pay or allowance. The whole position surrounding an "office of profit under the Crown" is as regards those holding commissions in His Majesty's Forces, an extremely difficult one. In England "the incapacity, if any, arises under s. 24, Succession to the Crown Act, 1707," to quote the words of the Attorney-General when bringing in a bill on September 2 last, on the eve of the present war; while on the following day in the House of the Lords the Lord Chancellor, moving the second reading of that bill referred to the "difficulty often in the minds of quite a number of lawyers" on this question.

The fact that the plaintiff before me has not in fact received any remuneration does not to my mind assist him, for the Stewardship of the Chiltern Hundreds in England in fact now brings no profit to the steward, yet for very many years appointments to that office have been made for the express purpose of enabling members who wish to retire from membership of the House of Commons to accept an office of profit from the Crown so that their seats can be legally vacated. Nor in my opinion does the plaintiff obtain assistance from the fact that he has not yet joined any particular unit of the Army in Burma. His position, I think, is analogous to that of a person in England who holds a commission in the territorial force or reserve of officers. But let me first of all take the old Militia, the law relating to which was consolidated in the Militia Act, 1882. That Act provided for the calling up for a short annual training, and also for the embodiment (in case of imminent national danger or of great emergency) and for the disembodiment of the Militia. Section 38 of that Act expressly provided that the acceptance of a commission as a militia officer should not vacate the seat of any member returned to serve in Parliament. If the mere acceptance of a commission in the militia, without being called up for training or without being embodied, did not amount to accepting an office of profit under the Crown, why was it necessary to include in the Militia Act, 1882, a section such s. 38?

The territorial force in England was brought into being by the Territorial and Reserve Forces Act, 1907. That Act also provided both for an annual training and for the embodiment of the force (if the army reserve was called out on permanent service) and for its subsequent disembodiment. Yet it was thought necessary to insert in that Act a provision—s. 23 (1)—that the acceptance of a commission as an officer of the territorial force should not vacate the seat of any member returned to serve in Parliament. If the contention of the plaintiff in the present suit were a sound one, it is strange that s. 23 (1) of this Act of 1907, should have been inserted to protect a person who merely accepted a commission, apart altogether from attending the annual training or being embodied. But perhaps the nearest thing to the Army in Burma Reserve of Officers is the Reserve of Officers in England. Here again it was thought desirable to provide in s. 36, Territorial and Reserve Forces Act, 1907, that the acceptance of a commission even only as an officer in the reserve of officers should not vacate the seat of any member returned to serve in Parliament. Why was that section incorporated? Both at the beginning of the last War (in November 1914), and again on the outbreak of the present War (in September last) an Act was passed to avoid the possibility of the seat of any member of the House of Commons in England being vacated by reason of his acceptance of a commission as an officer in his Majesty's Forces.

The only statutory provision which I can find which throws a favourable light upon the plaintiff's contention is the concluding sentence of s. 44, Commonwealth of Australia Act, 1900, which provided that a member of the Commonwealth House of Representatives should be disqualified by the receipt of pay, half pay or a pension as an officer or member of the Queen's navy or army, or by the receipt of pay as an

(13) 46 M 685; 76 Ind. Cas 721; A I R 1924 Mad. 257; 42 M L J 557; (1923) M W N 883 (S B.)

(14) (1879) 4 Q B D 230; 48 L J M C 95; 40 L T 59; 27 W R 552.

officer or member of the naval or military forces of the Commonwealth, if his services were not wholly employed by the Commonwealth. At that time the Imperial Parliament apparently thought the receipt of pay was the test. It is to be noted however that this section is not dealing with persons of commissioned rank but with all members of the forces. In view of all these enactments (other than the one dealing with Australia), and in view also of the fact that acceptance of the Stewardship of the Chiltern Hundreds vacates the seat of a member of the House of Commons notwithstanding the fact that the incumbent derives no actual profit from the office, I think it would be impossible for me to say that a person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers does not hold an office of profit under the Crown in Burma.

There is just one other point which was raised on behalf of the plaintiff in connection with this matter with which I must deal. It is said that the fact that the plaintiff's appointment was made "subject to His Majesty's approval" is sufficient to preserve the plaintiff's position as a member of the House of Representatives. It has been argued on his behalf that until His Majesty approves of his appointment the plaintiff cannot be said "to hold the office." I cannot accede to that argument. Take the case of all those other persons whose appointments as Second Lieutenants were announced in the *Burma Gazette* at the same time as the plaintiff's and who then proceeded to join a unit, either at Maymyo or elsewhere, without waiting for His Majesty to approve their appointments. Can it be said that they had no standing as Second Lieutenants, that they had none of the powers which ordinarily vest in Second Lieutenants, and that any man under their command or to whom it was necessary for them to issue orders could disobey them with impunity, on the ground that His Majesty had not approved their appointments? To me that seems an impossible proposition.

In all the circumstances which I have just been mentioning I feel constrained to hold that at the time the first Ordinance ceased to operate, be that at midnight on March 27-28, or twenty-four hours later, or at some time between the two, the plaintiff was holding an office of profit under the Crown in Burma. Section 25 (1) (*a*), Govt. of Burma Act, disqualifies for being a member of the House of Representatives *inter alia* a person who holds an office of profit under the Crown in Burma, other than an office declared by Act of the Legislature not to disqualify its holder. There was, when the first Ordinance ceased to operate, no Act of the Legislature in operation whereby a Second Lieutenant in the Army in Burma Reserve of Officers was declared not to be disqualified for being a member of the House of Representatives. Section 24 (2) (*a*) enacts that if a member becomes subject, *inter alia*, to any of the disqualifications mentioned in s. 25 (1) his seat shall thereupon become vacant. Therefore it is clear that the plaintiff's seat became vacant the moment the first Ordinance ceased to operate. The next question therefore is whether the second Ordinance restored the plaintiff to membership of the House. This question involves a consideration of four separate legal points. (1) Is this Court entitled to go into the question whether the Governor had power to promulgate the second Ordinance; (2) had the Governor in fact power to promulgate an Ordinance on this matter under s. 42, Govt. of Burma Act; (3) when was the second Ordinance promulgated and (4) if it was only promulgated on March 30, and if the Governor had such power as I have just mentioned, had he power to make the second Ordinance take effect retrospectively?

The Burma Legislature is created by s. 17 Govt. of Burma Act, and consists of His Majesty (represented by the Governor), the Senate, and the House of Represenatives. The extent of the legislative powers of the Burma Legislature are to be found in ss. 33 and 34 of that Act. But in Burma the power of legislation is not confined to the Legislature which is set up by s. 17. The Governor himself, in addition to being as His Majesty's representative, a part of the Legislature which is set up by s. 17, has also legislative powers of his own, which are set forth in ss. 40 to 43, Govt. of Burma Act. In the first place the Governor has certain legislative powers of his own in regard to what I will call "the special areas"—those areas, such as the Shan States, the Chin Hills District and the Somra tract, which are specified in Sch. II, to the Govt. of Burma Act—but I need not examine this particular legislative power of the Governor because the question of these special areas does not arise in this case. In regard to the remainder of the territories in Burma which are vested in His Majesty, the Governor is given legis-

lative powers of his own, which are quite distinct from the legislative powers given to the Burma Legislature. The Governor is given under ss. 41 and 42, Govt. of Burma Act, the power to promulgate Ordinances, and under s. 43, the power to enact what are called "Governor's Acts." These two powers are quite distinct. I need not consider the latter of them—an example of which is the Defence of Burma Act, 1940, which was considered by a Bench of this Court earlier this week in Criminal Revision No. 340-B of 1940 *S. K. Roy Chowdhury* v. *The King* (15), as no question about it arises in this case but the Governor's powers in regard to promulgating Ordinances require a somewhat careful examiniation.

The Ordinances which the Governor is given power to promulgate fall into two distinct classes, the one under s. 41 and the other under s. 42. In order to appreciate the Governor's legislative powers as conferred by these two sections it is necessary to understand his position in the constitution of Burma, so far as the executive is concerned as the extent of his legislative powers under part 4 of the Act is closely linked with his executive and administrative powers under part 2. The constitution of Burma is to be found in the Govt. of Burma Act, 1935, as amended two or three months ago by the India and Burma (Emergency Powers) Act, 1940. The recent amendments to the principal Act, which are designed to meet present war time conditions, do not however, affect this case.

By s. 2 (1), Govt. of Burma Act, all rights, authority and jurisdiction therefore belonging to His Majesty which appertain to Burma are exercisable by His Majesty except in so far as may be otherwise provided by or under that Act, or as may be otherwise directed by His Majesty. By s. 3 (1) of the Act the Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under that Act and such other powers of His Majesty as His Majesty may be pleased to assign to him. The executive functions of the Governor of Burma fall into two main classes : those which he is, by or under the Govt. of Burma Act, required to exercise in his discretion (which may be conveniently called his "discretionary function") and his remaining functions under the Act, which I will call his "non-discretionary functions". The discretionary functions of the Governor are, in the main, specified in s. 7 (1), Govt. of Burma Act. I say "in the main" because other discretionary functions are specified in other sections of the Act, as, for example, in s. 6 (5), which provides that the functions of the Governor with respect to the choosing and summoning and the dismissal of ministers shall be exercised by him in his discretion. The discretionary functions specified in s 7 (1) are defence, ecclesiastical affairs the affairs of what I have called above "the special areas", the control of monetary policy, currency and coinage, and with respect to external affairs. Section 7 (2) of the Act provides that, to assist the Governor in the exercise of these discretionary functions, he may appoint not more than three counsellors.

Now as regards the non-discretionary functions of the Governor : s. 5 (1) of the Act provides that there shall be a Council of not more than ten ministers to aid and advise the Governor in the exercise of his non-discretionary functions. Section 9 (1) of the Act enables His Majesty, on the recommendations of the Secretary of State and in pursuance of an address presented to His Majesty by both Houses of Parliament, to issue instructions to the Governor. Pursuant to an address so presented to him, His Majesty has in fact issued instructions to the Governor, which are incorporated in what is known as the instrument of instructions, cl. 8 of which specially enjoins the Governor to be guided by the advice of his Ministers in relation to his non-discretionary functions. The result is that in exercising his discretionary functions, the Govenor can, if he so decides, do everything himself—he need not appoint any Counsellors, and, even if he does, he need not follow his or their advice—but in exercising his non-discretionary functions the Governor must not only choose and summon a Council of Ministers but must be guided by their advice. As the Governor's functions with regard to defence, ecclesiastical affairs, monetary policy and the other matters mentioned in s. 7 (1) are his discretionary functions, it follows that these subjects are outside the sphere of the Council of Ministers. I have indicated the two main divisions of the Governor's executive authority, but s. 8, Govt. of Burma Act, remains to be considered. That section gives the Governor certain special responsibilities and if, in so far as, any special responsibility of the Governor is involved s. 8 (2) requires him in the exercise of his functions, to exercise his individual

(15) A I R 1941 Rang. 1; 192 Ind. Cas. 770; 42 Cr L J 335; 1941 Rang. 26.

judgment as to the action to be taken. The principal matters which are thus made the special responsibilities of the Governor—or perhaps I should say "some of the matter", for the Governor's special responsibility is equal as regards them all—are the prevention of any grave menace to the peace or tranquillity of Burma, the safeguarding of the financial stability and credit of the Govt. of Burma, the safeguarding of the legitimate interest of minorities, and restrictions on discrimination. In regard to these matters the Governor is given special responsibilities, and in regard to the exercise of his functions, so far as the special responsibilities are involved, he must exercise his individual judgment. There are certain other matters about which the Governor is required to exercise his individual judgment (*see*, for example, ss. 12 and 13 of the Act), but I need not detail these other matters in this judgment.

The great importance of these special responsibilities not only emerges from s. 8 (1) of the Act but is also specially emphasised by the proviso to s. 5 (1) which says that nothing in that sub-section, namely sub-s. 5 (1) of s. 5 (which is the sub-section which brings into being the Council of Ministers) shall be construed as preventing the Governor from exercising his individual judgment in any case where he is by or under the Act required so to do. The paramount importance of the Governor's special responsibilities is recognized by His Majesty in cl. 8 of the Instrument of Instructions which expressly lays it down that the Governor shall not be guided by the advice of his Ministers—in other words he must override their advice—if in his opinion so to be guided would be inconsistent with the fulfilment of any of his special responsibilities, in which case, so the Instrument of Instructions directs, the Governor shall, notwithstanding his Minister's advice act in such manner as to his individual judgment seems requisite for the due discharge of his special responsibilities. Again, although, in so far as the Governor is by or under the Govt. of Burma Act required to act in his discretion or exercise his individual judgment, he is under the general control of, and is required to comply with such particular directions, if any, as may from time to time be given to him by the Secretary of State, yet, by s. 10 (2) the Secretary of State is required, before giving any directions to the Governor, to satisfy himself that nothing in such directions requires the Governor to act in any manner inconsistent with any Instrument of Instructions; and, as the Instrument of Instructions as I have already pointed out.....preserves the Governor's special responsibilities, so equally, the superintendence of the Secretary of State over the Governor cannot encroach upon these special responsibilities which have been imposed upon him by the Imperial Parliament. This consideration of the Governor's executive functions is necessary for an appreciation of the true meaning and effect of ss. 41 and 42 to which I referred earlier in this judgment and to which I will now return.

Section 41, Govt. of Burma Act, gives the Governor power to promulgate ordinances only when the Legislature is not in session. At any time when the Legislature is not in session the Governor may, if satisfied that circumstances exist which render it necessary for him to take immediate action, promulgate such ordinances as the circumstances appear to him to require. There is no limitation regarding the subjects or matters about which the Governor may promulgate ordinances under s. 41, that is to say, when the Legislature is not in session. Now I turn to s. 42. That section gives the Governor power to promulgate ordinances at any time, that is to say, at any time whether the Legislature is or is not then in session, but the Governor's power to promulgate ordinances under s. 42, that is to say, when the Legislature is in session, is limited. He only has such power when he is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under the Govt. of Burma Act required in the exercise thereof to act in his discretion or to exercise his individual judgment. It is then, and then only, that he may promulgate such ordinances as in his opinion the circumstances of the case require. So that his power is limited, when the Legislature is in session, to promulgating ordinances, to put it in another way, either (*a*) in respect of matters outside the sphere of the Ministers, or (*b*) in respect of matters within that sphere but as ragards which the Governor's special responsibilities require him to override their advice, or (*c*) in respect of the other matters about which he is required by the Act to exercise his individual judgment. Sub-section (5) of s. 42 provides that the functions of the Governor under s. 42 are to be exercised by him in his discretion.

Now in this particular case the Governor promulgated the second Ordinance under s. 42. As the Legislature was then in session he had no power to promulgate an ordinance under s. 41. The question therefore is whether (*a*) the subject-matter of the second Ordinance was concerned with one of the discretionary functions of the Governor, or with one of his special responsibilities, or with one of the other matters about which he is required to exercise his individual judgment; or (*b*) whether, on the other hand, it was concerned with a matter which was one entirely for the Ministers. It is said on behalf of the plaintiff that the second Ordinance was concerned with a matter of defence, which is the first of the discretionary functions of the Governor which are mentioned in s. 7 (1), Govt. of Burma Act. That is the only ground put forward by the plaintiff for saying that the second Ordinance was within the legislative powers of the Governor, and it appears to me that that was the only ground which could be advanced in this particular case. If the subject-matter of the second Ordinance was a matter of defence, then the Governor had power to promulgate it.

Now what did the second Ordinance provide? It provided that members of the House of Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces. Can it be said that that was a matter of defence? I do not think that it can Even if there had been no second Ordinance, members of the House of Representatives would have been perfectly free to join His Majesty's forces and to be granted commissions therein. It may be that, if a member were granted a commission, he would thereupon lose his seat in the House of Representatives, but there is no legal bar which prevents him from joining His Majesty's force. He would perhaps be penalised for, but would not be prevented from, being granted a commission, if "penalised" is the right word to use; the penalty would merely be the loss of his seat. His Majesty is not prevented from utilizing his services in the defence of Burma, although his constituents lose the benefit of being represented hy him in the Legislature. The latter may be an unfortunate matter for the electors, but I do not think that it is a matter of defence. The electors can choose someone else. It is not, and, indeed, could not be, suggested that this matter was one concerning which the Governor had a special responsibility under s. 8, Govt. of Burma Act. The result, therefore, is that the subject-matter of the second Ordinance was in my judgment concerned with something which was a matter entirely for the Ministers. Accordingly, in my opinion, the Governor had no power to promulgate the second Ordinance, as the Legislature was then in session.

But it is said on behalf of the plaintiff that it is not for this Court to say whether the second Ordinance is valid or not—that this Court cannot go into that question—on the ground that if the Governor says in an Ordinance that he makes it under s. 42—as is in fact stated in the second Ordinance—that concludes the matter; if the Governor says he makes it under s. 42, that means that he has decided that its subject-matter properly brings it under s. 42, and this Court cannot enquire whether its subject-matter does or does not come within the purview of s. 42. It is contended on behalf of the plaintiff that the position is governed by s. 5 (3), Govt. of Burma Act. That sub section says that the decision of the Governor in his discretion shall be final if any question arises whether any matter is or is not a matter in respect of which the Governor is by or under that Act required to act in his discretion or to exercise his individual judgment. For the Speaker it has been suggested that this sub-s. (3) means that if any question arises whether any matter is (*a*) one about which the Governor is required to act in his discretion or (*b*) is one about which he is required to exercise his individual judgment, then the decision of the Governor in his discretion is final.

I do not think that that reading of the sub section is right. I think that the correct reading is this. If any question arises whether any matter (*a*) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (*b*) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment — then the decision of the Governor in his discretion is final. But whether that reading of mine is right or wrong, it appears to me that s. 5 (3) only applies in regard to questions arising as between the Governor and his Ministers. Suppose the Governor says to his Ministers that in his opinion a

particular matter about which it is necessary to take executive action (and which is admittedly not one of the Governor's special responsibilities) comes within the purview of his discretionary functions, and suppose the Ministers say that it is a non-discretionary function, and that accordingly the Governor must follow their advice. In such a case the decision of the Governor in his discretion would settle the question. That would be a case within s. 5 (3) of the Act. My interpretation of the Act is that that sub-section only applies as between the Governor and the Ministers in regard to administrative matters. For observe: In the first place it is a sub-section of the section (s. 5) which creates the Council of Ministers; next, s. 5 is a group of sections with the sub-heading "admnistration"; thirdly, that sub-heading itself comes under the main heading "the executive." which constitutes Part II of the Act. Section 5 (3) is quite distinct from, and in my opinion has nothing whatever to do with the Governor's legleslative powers which are specified in a sub-Part ("Legislative powers of Governor") of part IV (Legislative") of "the Govt. of Burma Act. In my judgment this Court is not precluded from enquiring whether an ordinance promulgated by the Governor under s. 42 is or is not within his powers. Sub-s. (4) of s. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under s. 4 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature, would not have been valid. So that, in the absence of any restraining provision in Part IV of the Act, I do not feel any difficulty about examining the provisions of an ordinance promulgated under s. 42 with a view to seeing whether or not it comes within the limited terms of s. 42 (2). In this connection the following words of Lord Selbourne, when delivering the judgment of the Judicial Committee of the Privy Council in *Emperor* v. *Burah* (16) at pp. 193 and 194, afford support for the view which I have taken of this matter:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe these powers .... The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question, and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively they are restricted."

The Burma Legislature has, according to my construction of the Govt. of Burma Act, been given the exclusive right, while the Legislature is in session, to legislate on certain matters, and the subject-matter of the second Ordinance is one of them. It is not, in my opinion, possible to say that this Court is exceeding its powers when it enquired into the question whether the subject-matter of a certain piece of legislation is one which lies within the exclusive legislative power of the Burma Legislature or whether it is one within the legislative powers of the Governor. I hold that this Court has jurisdiction to go into that question, and, having gone into that question, I have come to the conclusion, for the reasons which I have already given, that the second Ordinance was beyond the legislative powers of the Governor and so was void and of no effect. But the matter does not rest there, for, a further point is raised in connection with the second Ordinance, namely, that (even if I cannot go into the question whether the Govt. had power to promulgate it, or if I can go into that question and decide that he did have such power) yet, by reason of s. 42 (4), Govt. of Burma Act, the second Ordinance is void so far as, and because, it contains a provision which would not have been valid (for the reason that it infringed the terms of s. 33 or s. 34 of the Act) if it had been enacted in an Act of the Legislature—because, in other words, it had retrospective effect.

There is however, a preliminary point on this question which I must first decide. If the second Ordinance was promulgated on March 29, then it would be possible to say, on the authority in *Tomlinson* v. *Bullock* (14),—and see also *In re Court Fees* (13)—that the second Ordinance was not invalid as having retrospective effect merely because it was promulgated after the first Ordinance ceased to operate. But it is only possible to say that if the second Ordinance was promulgated on March 29; if it was promulgated after March 29, it would mean that it purported to have retrospective effect, and on that ground and to that extent its validity might be assailed. In my judgment the second Ordinance was not promulgated on March 29, but on March 30. "Promulgation" of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. In this country, as in India and elsewhere,

(16) 4 C. 172 (193, 194); 5 I A 178; 3 C L R 197, 3 Sar. 834 (P C.)

promulgation of a new law takes place through the medium of the *Official Gazette*. It is in my judgment wrong for the notifications which appear in the *Burma Gazette* when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; to my mind they should say "The Governor hereby promulgates the following ordinance." In the case of the second Ordinance it was not published in the *Burma Gazette* till March 30, and I hold that that was the day on which it was promulgated. I am not prepared to accept the suggestion that it was promulgated on March 29, when the Speaker read out to the House of Representatives the terms of a typed copy document handed to him by the Premier. I think that the official print of the second Ordinance published by the Govt. Press (which is the equivalent in this country of a King's Printer's copy of an Act of Parliament in England) is quite right in stating, as it does, that it was promulgated on March 30. As I hold that that was the date on which the second Ordinance was promulgated it must now be considered whether (even if the Governor had power to promulgate an ordinance under s. 42 on this subject), the second Ordinance is not invalid so far as it purports to have retrospective effect. This point, with which I am now about to deal, was in my opinion, if I may say so, particularly well argued by Mr. Basu. The material words of the second Ordinance are to be found in s. 2, which reads thus:

"A person shall not be disqualified nor shall be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legislature by reason only that as a member of any of His Majesty's forces he holds or has held any office of profit under the Crown."

The grounds for this further objection to the second Ordinance can, I think, be stated quite shortly. Section 24 (2) (*a*), Govt. of Burma Act, says in clear terms that if a member becomes subject to any disqualification mentioned in s. 25 (1) his seat shall thereupon become vacant. Section 25 (1) (*a*) says that a person shall be disqualified for being a member if he holds any office of profit under the Crown in Burma other than an office declared by Act of the Legislature not to disqualify its holder. The use of the past participle of the verb "declare" is important. Reading the two sub-sections together it is clear to me that the result is that, if the particular office of profit of which a member becomes the holder, has not already been declared not to disqualify its holder, then the seat thereupon becomes vacant. To my mind, nothing could be clearer. A vacant seat can only be filled in accordance with the provisions of s. 17 (3) of the Act. Section 34 (*b*) (*ii*) of the Act expressly deprives the Legislature of power, except in so far as expressly permitted by the Act, to make any law amending any provisions of the Act. An Act of the Legislature, the effect of which is to provide that a member whose seat has become vacant under the Govt. of Burma Act shall nevertheless be restored to his former seat, which is then vacant—such an Act to my mind amends the provision of the Govt. of Burma Act, and, as I cannot find any express provision in that Act permitting the Burma Legislature so to amend the Govt. of Burma Act, it is beyond the powers of the Burma Legislature to enact such an Act. Having regard to the terms of s. 24 (2) the only meaning which I can assign to s. 25 (1) (*a*) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. Now s. 42 (4) limits the legislative powers of the Governor under s. 42 to the same extent as s. 34 (*b*) limits the legislative powers of the Burma Legislature. If the Burma Legislature could not have made a law in the terms of the second Ordinance containing such terms, then the Governor could not promulgate an ordinance, and in this respect it matters not whether the ordinance is promulgated under s. 41 or under s. 42, for s. 41 (3) is in the same terms as s. 42 (4).

I must therefore hold that on any view of the matter, at any rate the provision of the second Ordinance which purported to restore the plaintiff to the seat which he occupied, up till the time when the first Ordinance ceased to operate, is void. I now come to the Burma Legislature (Removal of Disqualification) Act—Act XII of 1940. It is said on behalf of the Speaker that I need not consider that Act, because it only received the Governor's assent after the Speaker had given his decision. But the plaintiff is claiming, *inter alia*, a declaration that he was at the time he instituted this suit, which is after Act XII of 1940 came into force, a member of the House of Representatives. If Act XII of 1940 restored him to his original position as a member, then I shall have to consider whether or not to

grant him the declaration for which he asks. Therefore in my view I must necessarily deal with Act XII of 1940. The terms of s. 2 of that Act are identical with the terms of s. 2 of the second Ordinance. For reasons similar to those which I have just given for holding that the second Ordinance was invalid, under s. 42 (4), Govt. of Burma Act—for similar reasons which I need not restate, I hold that, in so far as Act XII of 1940 purported to restore the plaintiff to the seat which had already become vacant, it infringed the provisions of s. 34 (*b*) and at any rate to that extent was invalid. It is unnecessary for me to decide, and I do not decide, whether it is possible to say that the words "nor shall be deemed ever to have been disqualified" in s. 2 of Act XII of 1940 can be passed over so that the Act is valid as regards all its other provisions. On this point argument can, I think, be adduced on both sides.

The result is that in my judgment neither the second Ordinance or Act XII of 1940 restored the plaintiff to his membership of the House of Representatives. I hold that his seat became vacant when the first Ordinance ceased to operate and has been vacant ever since. He cannot, therefore, possibly have a declaration that he was a member when he instituted this suit, namely on April 25, last. As that is the only relief which he seeks as against defendant No. 2, I need say nothing about those points which were raised by Mr. Basu on behalf of defendant No. 2 which were additional to those raised on behalf of the Speaker and which were peculiar to the case of defendant No. 2. The suit against defendant No. 2 fails and as against him it is dismissed with costs. Bearing in mind the fact that the two cases were heard together, but also bearing in mind the importance of this case and the amount of work which has obviouly had to be done by the Advocates, I fix an Advocate's fee, for defendant No. 2, of twenty gold *mohurs* for the first day, twelve gold *mohurs* each for the second, third, fourth, fifth and seventh days, eight gold *mohurs* for the sixth day (which was not a full one) and three gold *mohurs* for to-day. I have not quite finished with the case against the Speaker, for the plaintiff also seeks as against him (*a*) a declaration that he (the Speaker) had no power to determine the matters disposed of by him in his "ruling," as it is called, of April 2, and that his findings are of no force or validity, and (*b*) an injunction to restrain the Speaker from *inter alia*, interfering with the exercise by the plaintiff of his rights, duties or privileges as a member of the House of Representatives. This last mentioned relief, the injunction, cannot possibly be granted as I hold that the plaintiff is no longer a member of the House of Representatives. With regard to the claim for the declaration which I have just mentioned it is true that I have held that the Speaker had not power to determine this matter and that his "ruling" is of no effect, but apart altogether from the question whether s. 42, Specific Relief Act, entitles me to grant the plaintiff this declaration in such terms as he seeks, about which I am not at all sure, I would not be prepared in the present case to exercise my discretion and grant the plaintiff such a declaration—for it is undoubtedly a matter of discretion under s. 42—even if I had the power to do so, for the simple reason that, as I have held that the plaintiff's seat did become vacant, it follows that I think that the Speaker's decision was a correct one as regards the plaintiff although he had no power to give that decision which is accordingly of no force or validity.

In these circumstances it would to my mind be of no use to the plaintiff for me to grant him such a declaration, and I would not be prepared to exercise my discretion and do so. As, for the reasons given, I am not prepared to grant the plaintiff any of the reliefs which he seeks from defendant No. 1, the suit must also be dismissed as against that defendant as well as against defendant No. 2. Mr. Kyaw Din has informed me, at the Bar, that the Govt. has been, and is, responsible for conducting the case on behalf of the Speaker and that he (Mr. Kyaw Din) is retained by the Govt. to act on behalf of the Speaker—and, incidentally, that the Advocate-General would himself have appeared before me to argue the case, had it not been that he felt that he might find himself in an embarrassing position having regard to the fact that he, the Advocate-General, had spoken fully on the subject in the House of Representatives—and Mr. Kyaw Din also informed me that he was instructed not to ask on behalf of the Speaker for cost against the plaintiff in the event of the suit being dismissed. There will accordingly be no order for costs in favour of defendant No. 1.

I have every sympathy with the plaintiff.

The whole trouble has been brought about by the Govt's. omission, for a reason not disclosed to me—and indeed it was not necessary that it should be—to see that the Burma Legislature (Removal of Disqualifications) Ordinance, 1940, as passed by the Senate, was not passed through its remaining stages before the first Ordinance ceased to operate. I cannot, however, allow my sympathy for the plaintiff to affect in any way my judgment on the legal issues which have fallen for my decision. The suit is dismissed.

D. *Suit dismissed.*

PATNA HIGH COURT

Appeal from Appellate Order No. 223 of 1940

December 4, 1940

AGARWALA, J.

CENTRAL CO-OPERATIVE BANK—APPELLANT

versus

KASHI SAHU AND OTHERS—RESPONDENTS

Bihar Tenancy Act (VIII of 1885), s. 65—Mortgage suit—Defendant claiming priority being purchaser in execution of rent decree under s. 65—Mortgagor challenging—Objection of defendant not upheld on ground that he failed to get encumbrance annulled within time under s. 167—Mortgage decree passed—Execution taken out—Defendant raising same objection that property can only be sold subject to his prior charge—Held, that though decision in suit was wrong, the objection could not be raised in execution.

Mortgagees instituted a suit for the sale of mortgaged property to realise their dues under the mortgage. One of the defendants, *i. e.*, defendant No. 2 was also a purchaser in execution of a decree passed in a rent suit. The mortgagor plaintiff distinctly challenged the priority of defendant No. 2 by alleging that the latter's purchase was not in execution of a rent decree but of a money decree. Defendant No. 2 did take up the challenge and claimed priority conferred by s. 65, Bihar Ten. Act on the ground that the decree in execution of which he purchased was a rent decree, and he further alleged that he had taken steps under s. 167 of the Bihar Ten. Act to annul the plaintiff's encumbrances. Although the Court found that the decree in execution of which the defendant purchased was a rent decree it held that as the defendant had not annulled the mortgage encumbrances within a statutory period prescribed by the Ten. Act his holding was subject to the plaintiff's mortgage and accordingly the plaintiff was entitled to a mortgage decree against both the defendants. In the result a decree was passed directing the sale of the mortgaged property. When the decree-holders applied to execute this decree defendant No. 2 raised an objection that the mortgaged property could be sold only subject to his prior charge:

Held, that the mere fact that a purchaser in execution of a rent decree had not availed himself of his statutory right to annul the encumbrances did not, in any way, affect the priority conferred on him by s. 65 of the Act. 182 Ind. Cas. 678 (2), followed.

Held, however, that the defendant No. 2 sought in the litigation which resulted in this decree (the fact that it was a wrong decision being irrelevant) to establish his priority and had failed to do so and that being the case he could not be allowed subsequenly to reagitate that question in the proceedings in execution of the decree.

A. from an order of the District Judge of Bhagalpur, dated February 28, 1940.

Mr. *K. N. Lall*, for the Appellant.

Messrs. *S. N. Dutt* and *S. K. Mitra*, for the Respondents.

Judgment.—The respondents instituted a suit for the sale of mortgaged property to realise their dues under the mortgage. They impleaded as defendants in the suit the mortgagor as defendant No. 1 and the appellant as defendant No. 2. With regard to defendant No. 2 it was alleged that this defendant was also a purchaser in execution of a decree passed in a rent suit but that that decree was a money decree and not a rent decree as it was not against all the tenants of the holding or in respect of the entire holding. The suit was not contested by the mortgagor but it was contested by defendant No. 2. In the result a decree was passed directing the sale of the mortgaged property. When the decree-holders applied to execute this decree defendant No. 2 raised an objection that the mortgaged property could be sold only subject to his prior charge. The prior charge on which he relies is that conferred by s. 65 of the Bihar Ten. Act on a person who purchases in execution of a rent decree. The objection was upheld by the Munsif but has been overruled on appeal on the ground that defendant No. 2 cannot be permitted at this stage to agitate this question.

It is now contended on behalf of the appellant-defendant No. 2 that as the Court which tried the suit has found that the decree in execution of which he purchased in the rent suit was a rent decree, he is entitled to have the priority which the statute confers on him in spite of the course taken during the trial of the suit itself. Now the question whether the owner of a paramount right is precluded from raising the question of his priority by reason of his having been a party to a suit on a mortgage has been the matter of frequent discussion. In *Sadu Behera* v. *Dibakar Tara* (1) it was held that as a general rule a paramount title cannot be drawn in con-

(1) 9 Pat. 539; 121 Ind. Cas 353; 10 P L T 645; A I R 1929 Pat. 678; Ind. Rul. (1930) Pat. 329.

troversy in a mortgage action; but if a plaintiff in such an action alleges a distinct case in his plaint in derogation of the priority which may be claimed by the defendant and seeks in his suit to displace that prior title and postpone it to his own, it is incumbent upon the defendant to establish his priority, and, if he fails to do so, he will not be allowed to raise that question in a subsequent suit of his own. Now, in the mortgage suit with which I am concerned the mortgagor-plaintiff distinctly challenged the priority of defendant No. 2 by alleging that the latter's purchase was not in execution of a rent decree but of a money decree. What the position would have been had defendant No. 2 not taken up that challenge it is unnecessary to discuss because, as a matter of fact, defendant No. 2 did take up the challenge and claimed priority on the ground that the decree in execution of which he purchased was a rent decree, and he further alleged that he had taken steps under s. 167 of the Ten. Act to annul the plaintiff's encumbrances. Although the Court found that the decree in execution of which the defendant purchased was a rent decree it held that as the defendant had not annulled the mortgage encumbrances within a statutory period prescribed by the Ten. Act his holding was subject to the plaintiff's mortgage and accordingly the plaintiff was entitled to a mortgage decree against both the defendants.

Now, in view of the decision in *Mahadev Maharaj* v. *Jagdev Singh* (2) it is clear that the view of the law which the trial Court took was wrong. The mere fact that a purchaser in execution of a rent decree has not availed himself of his statutory right to annul the encumbrances does not, in any way, affect the priority conferred on him by s. 65 of the Act. Be that as it may, there was this decision at the trial and that it was a wrong decision is irrelevant to the present question. The appellant was dissatisfied with that decision and appealed against it but unsuccessfully. In the circumstances of this case it is clear to me that the appellant sought in the litigation which resulted in this decree to establish his priority and has failed to do so, and that being the case he cannot be allowed now to reagitate that question in the proceedings in execution of the decree.

(2) 20 P L T 460; 182 Ind. Cas. 678; A I R 1939 Pat. 339, 5 B.R 799; 12 R P 44; 18 Pat. 676.

The result is that this appeal fails and is dismissed with costs.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Rule No. 1020 of 1940

August 14, 1940

LODGE AND MOHAMAD AKRAM, J.

DHIRENDRA NATH ROY—PETITIONER

versus

SAILAJ KUMAR BOSE—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLI rr. 6, 5—Stay under O. XLI, r. 5 refused—Court, if justified in refusing jurisdiction under r. 6.

If an order has been made for sale and an application under O. XLI, r. 6, Civil P.C., has been made to the Court, the Court should stay the sale on suitable terms and the Court must consider what terms are suitable. The fact that the stay has been refused under O. XLI, r. 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under O. XLI, r. 6. *Jitendra Nath* v. *Bholanath* (1), relied on.

C. Rule for setting aside the order of the Sub-Judge, First Court, 24 Parganas, Alipore, dated July 8, 1940.

Messrs. *Hemendra Ch. Sen* and *Sailendra Nath Banerji (Jr.)*, for the Petitioner.

Messers, *Rabindra Nath Bhattacharya* and *Arunendra Nath Tagore*, for the Opposite Party.

Order.—This was a rule issued on the opposite party to show cause why an order passed by the Subordinate Judge, First Court, Alipore, refusing to entertain an application for stay of sale under O. XLI, r. 6 (2) should not be set aside. The material facts are as follows: The opposite party obtained a decree on the original side of this Court. He took out execution proceedings in the Court of the Subordinate Judge, First Court, Alipore. The petitioner filed an objection under s. 47, Civil P. C. This objection was heard by the learned Subordinate Judge and disallowed on July 29, 1939. Thereafter the petitioner filed an appeal to this Court against the order disallowing his objection. When the appeal was admitted, a rule was issued to the opposite party to show cause why further proceedings in the execution case and the sale of the immovable property should not be stayed, pending the decision of the appeal. When the rule was heard, an order was passed staying further proceedings on terms. The terms were that Rs. 1,000 should be deposit-

ed on or before January 31, 1940 that a further sum of Rs. 1,500 should be deposited on or before March 20, 1940 and that security for the balance to the satisfaction of the lower Court should be furnished by March 20, 1940. The first two terms were fulfilled and security for the balance of the amount due was tendered to the lower Court before March 20, 1940. But the lower Court was dissatisfied with the security offered and directed the petitioner to furnish further security. The Court then decided that it had no jurisdiction to extend the time within which security should be furnished. Thereafter the present petitioner applied to the learned Subordinate Judge under O. XLI, r. 6 (2) for stay of the sale of the immovable property. The learned Subordinate Judge held that he had no jurisdiction to entertain that application, because there was no appeal pending from the decree in execution of which the sale was to be held. He, accordingly, rejected the application under O. XLI, r. 6.

This rule has been obtained to show cause why that order should not be set aside. It has been pointed out by the learned Advocate for the petitioner that the Subordinate Judge has looked the provisions of O. XLI, r. 8 and it is not necessary in order to give the Court jurisdiction under O. XLI, r. 6 that there should be an appeal pending from the decree in execution of which the sale was to be held. It is sufficient if there be pending an appeal from an order made in execution of that decree. The rule has been opposed not on the ground on which the order was passed by the Subordinate Judge, but on the ground that the learned Subordinate Judge had no jurisdiction to vary the order passed by this Court and had no jurisdiction to pass an order staying the sale which would in effect modify the stay order passed by this Court. In our opinion, there is no substance in this objection. The order passed by this Court in Rule No. 1228 (M) of 1939 was an order passed under O. XLI, r. 5. Such an order is discretionary, it can be granted or refused at the discretion of the Appellate Court. We will assume for the purposes of this case that the terms on which stay was granted under O. XLI, r. 5 were not fulfilled. It follows, therefore, that the rule for stay under O. XLI, r. 5 must be taken to have been discharged. That order stands and cannot be set aside or modified by the lower Court and possibly not even by this Court. The result of this is that the position is the same as if an order for stay under O. XLI, r. 5 had been refused by this Court. But O. XLI, r. 6 does not leave it to the discretion of the Court whether stay should be granted or not. Under that Rule the sale shall be stayed on such terms as to security or otherwise as the Court thinks fit. It follows, therefore that if an order has been made for sale and an application under O XLI, r. 6, has been made to the Court, the Court shall stay the sale on suitable terms and the Court must consider what terms are suitable. The fact that the stay has been refused under O. XLI, r. 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under O. XLI, r. 6. This very question came up for consideration in this Court in *Jitendra Nath* v. *Bholanath* (1) where it has been held that :

"although an application for stay of execution of a decree made under O. XLI, r. 5 (1), Civil P. C. may have been refused by the Appellate Court still after an order for sale of immovable property in execution of the decree has been made, the Court making such order has jurisdiction to, and indeed must stay the sale on terms as to security or otherwise".

When the terms on which the stay was granted under O. XLI, r. 5, were not fulfilled the position was exactly the same as if stay under that order had been refused. In our opinion, it was incumbent upon the learned Subordinate Judge to entertain the application under O. XLI, r. 6 and to consider what were the appropriate terms on which the sale should be stayed. This rule is therefore, made absolute, the order of the learned Subordinate Judge is set aside and the case is remanded for disposal of the application under O. XLI, r. 6 (2) according to law. The petitioner is entitled to his costs which we assess at one gold *mohur*.

S. *Rule made absolute.*

(1) 44 C W N 701.

PATNA HIGH COURT

Appeal from Appellate Order No. 153 of 1940

December 12, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

ADIT NARAYAN SINGH AND OTHERS —APPELLANTS

versus

Smt. BINAPANI AND OTHERS— RESPONDENTS

Execution—Decree compromised—Judgment-debtor

to pay certain portion of decretal amount by instalments on fixed date and execute assignment deed in respect of balance—Deed not executed on fixed date but later—Other terms not complied—Decree-holder acting on deed—Whether can take out execution in respect of decretal amount including that portion for which deed of assignment was executed—Bihar Money-lenders Act (III of 1938), s. 2 (f)—"Loan"—Debt in question held not "loan" within meaning of section.

Where by a compromise decree the judgment-debtors were to pay the decretal amount in certain fixed instalments, on certain fixed day and execute deed of assignment of the arrears of rent, in respect of the balance of the decretal amount, but the terms are not fulfilled by the judgment-debtors except to execute the assignment deed on same date later than the one fixed by the compromise, and it is found that the decree-holder had acted on the deed by collecting the rent, he cannot take out the execution of his decree in respect of that portion of the decree for which this assignment deed was executed, on the ground that the judgment-debtor had failed to execute it on the date fixed by the compromise.

The arrangement between the parties who were co-sharers was that any collection which were due from the tenants should be divided by the common *patwari* half and half. The *patwari*, instead of sending half the amount to one of them made over all the amount to the other who thereafter became liable to pay the same to the former not as a loan but on account of the fact that the other had received the money from the *patwari* on trust for or for the use of the former;

Held, that the debt was not a "loan" within the meaning of s. 2 (*f*), Bihar Money-lenders Act and, therefore, the Act had no application to the case.

A. from an order of the District Judge of Patna, dated May 2, 1940.

Chaudhuri *Mathura Prasad*, for the Appellants.

Messrs. *B. C. De* and *S. N. Banarji*, for the Respondents.

Manohar Lall, J.—This is an appeal by the decree-holders who are aggrieved by the appellate order passed by the learned District Judge of Patna, dated May 2, 1940, by which he reversed the order of the learned Munsif in an execution case started by the appellants.

It appears that the decree-holders and the judgment-debtors were co-sharer landlords of village Bariarpur in which each was interested to the extent of eight annas. The collection of the village was in charge of a common *patwari*, and the arrangement between the parties was that if at the end of the year it was ascertained that any sum larger than what was actually the share of one of the co-sharers was paid over by the *patwari*, the other co-sharer would be entitled to recover from his co-sharer the excess amount which was so discovered on accounting together with interest at the rate of one per cent. per mensem. The decree holder's case was that they discovered some time in 1936 or 1937 that a sum of Rs. 1,400 was paid over to the judgment-debtors by the *patwari* in excess of what were the legitimate dues of the judgment-debtors. Accordingly they instituted a suit for the recovery of that sum, but the matter was compromised between the parties and a compromise decree was passed on July 14, 1937, for a sum of Rs. 1,247. It was also provided in that compromise decree that the amount which was thus fixed as payable by the judgment-debtors should be paid in this way; Rs. 600 was to be paid in cash in January 1938, Rs. 200 was to be paid on or before March 20, 1938, and the balance of Rs. 447 odd was to be liquidated by the execution of a deed of assignment for the arrears of rent due to the judgment-debtors in favour of the decree-holders. It may be observed here that the judgment-debtors had transferred their share in the village to a third party and, therefore, all that was due to them in this village was the arrears of rent which apparently had not been transferred to the vendee. This deed of assignment was to have been executed by July 17, 1937. After this compromise decree was passed, the judgment-debtors did not carry out any of the terms of this compromise beyond executing the deed of assignment on July 21, 1937, that is to say four days after the date fixed for its execution.

One of the points taken by the decree-holders was that as the judgment-debtors had not executed the deed of assignment within the time fixed by the compromise the subsequent execution thereof was not in compliance with the terms of the compromise and therefore, they claimed to be entitled to execute the decree for the entire sum of Rs. 1,247. The learned District Judge, in agreeing with the learned Munsif, held that the time was not of the essence of the contract and, therefore, he thought that the judgment-debtors were entitled to have the delay condoned. It is unnecessary to consider this aspect of the case, because the learned District Judge has found as a fact that the deed of assignment was really acted upon by the decree-holders, who collected some of the arrears due from the tenants on the strength of this deed. This finding was objected to by the learned Advocate for the appellants

before us, but it is difficult for this Court to interfere in second appeal with this finding of fact which is binding on us. Now once the findings of fact is ruled to be binding it must be held that the decree-holders have waived their right to execute the decree for the sum which was covered by this deed of assignment. It follows that the decree-holders are entitled to execute their decree for Rs. 800, being the two instalments which had not been paid over in January and March 1938, together with interest thereon as provided by the compromise decree.

The learned Munsif was asked to exercise his power under the Bihar Money-lenders Act by fixing instalments by which this sum should be paid to the decree holders and also by fixing the valuation of the properties which were attached by the decree-holders in execution. But the learned Munsif took the view that the original sum of Rs. 1,400 which was due to the decree-holders was not a "loan" within the meaning of s. 2 cl. (*f*), Bihar Money-lenders Act. He, therefore, refused to take action under the provisions of the Bihar Money-lenders Act. The learned District Judge in appeal, however, has come to the conclusion that it is difficult to understand how the debt in question was not a loan within the meaning of s. 2 (*f*) of the Bihar Money-lenders Act, and in that view he directed the learned Munsif to proceed to exercise his powers under the relevant provisions of the Money-lenders Act.

In my opinion the learned Judge was in error in treating the amount due to the decree-holders in this case as a loan within the meaning of s. 2 (*f*). If the nature of the events which led to the institution of the claim by the plaintiffs is borne in mind, it is obvious that that the plaintiff-decree-holders have never made any advance on interest to the judgment-debtors, assuming that the plaintiffs are money-lenders. It was argued that in substance the transaction was a loan. I do not see how in substance this transaction can in reality be called a loan. The arrangement between the parties was that any collection which were due from the tenants should be divided by the common *patwari* half and half. It is a matter of common experience that at the end of the year, unless there has been an arrangement to the contrary, the *patwari* or the Tahsildar makes up the accounts and then sends on the amount collected to the master for whom he has made the collections after making such deductions as are permissible to be made by the *patwari*. Now, in this case the *patwari*, instead of sending half the amount to the plaintiffs, made over all the amount to the judgment-debtors. The judgment-debtors thereafter were liable to pay the same to the decree-holders not as a loan but on account of the fact that they had received the money from the *patwari* on trust for or for the use of the decree-holders.

For these reasons I am of opinion that the learned District Judge took an incorrect view when he held that the provisions of the Bihar Money-lenders Act should be applied to this case. The order of the learned District Judge, so far as he directed the learned Munsif to take action under the Bihar Money-lenders Act, is set aside. In other respects his order under appeal is affirmed.

The result is that the appeal is allowed in part and the decree-holders will be entitled to proceed with their execution in the ordinary course. As the decree-holders have succeeded to the extent of Rs. 800, they are entitled to half the costs in all the Courts.

Harries, C. J.—I agree.

D. *Appeal allowed.*

MADRAS HIGH COURT

Appeal No. 93 of 1937
September 11, 1939
WADSWORTH J.

CHADALAVADA ANANDARAMAYYA—APPELLANT

versus

CHADALAVADA SUBBAYYA—RESPONDENT

Contract—Public policy—Marriage performed outside British India to evade provisions of Sarda Act, whether opposed to public policy—Contribution towards such marriage if can be recovered in execution of decree—Partition—Decree directing member to pay certain sum as his share of marriage expenses of his sisters—Absence of notice of marriage, whether ground to refuse such payment.

The power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. Clearly the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But I see no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is

made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal. A marriage, therefore, performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act, is not one opposed to public policy and contribution towards it can be recovered in execution of a decree. 170 Ind. Cas. 309 (1), distinguished.

According to a decree in a partition suit a member of the family was required to pay a certain sum towards his share of the marriage expenses of each of his sisters. The member objected to pay the amount due under the decree because he was not given notice of the marriage:

Held, that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure.

A. against the appellate order of the District Court, Guntur, dated September 29, 1936.

Mr. *K. Kotayya*, for the Appellant.

Mr. *P. Satyanarayana Rao*, for the Respondent.

Judgment.—This appeal arises out of the execution of a decree in a partition suit whereunder the appellant was required to pay a sum not exceeding Rs. 1,000 towards his share of the marriage expenses of each of his sisters. The youngest sister was married on March 7, 1935 and it was admitted by the father (the respondent) that he had the marriage celebrated within the Hyderabad State because it would have been illegal under the Child Marriage Restraint Act (XIX of 1929) had it been performed in British India. There is no suggestion that any of the parties belonged to or was domiciled in Hyderabad. The appellant objects to pay the amount due under the decree towards this marriage firstly because the marriage was one opposed to public policy and secondly because he was not given notice of the marriage. As to the second point the trial Court rejects the respondent's assertion that he sent an invitation to the appellant for the wedding. It is of course, not unlikely that the appellant knew all about the marriage as the parties were living in the same village. But whether this be so or not though the judgment of the Full Bench which eventually decided the litigation contemplates previous notice to the appellant the decree is silent on the point. The utmost therefore that could be said is, in my opinion, that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure.

It turn next to the more substantial question whether a marriage performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act, is one opposed to public policy towards which no contribution can be recovered in execution of a decree. My attention has been drawn to a decision of Panckridge, J. reported in *Pan Mal-Lodha* v. *Gad Mal Lodha* (1). The learned Judge declined to sanction payment of money by a Court's Receiver for the purpose of solemnization of a marriage outside British India which would have been illegal if celebrated in British India, where the parties were domiciled. I see no reason to differ from the conclusions arrived at by the learned Judge in that case. But it seems to me very evident that a refusal of the Court to make a discretionary payment towards a marriage the object of which was clearly to avoid the law of British India is quite a different matter from the refusal of the Court to direct a payment unconditionally required under the Court's decree, on the ground that the object for which the payment was to be made was one which would have been illegal if performed in British India.

It is well-established that the power of the Court to decline to enforce contacts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. Clearly the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But I see no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the Law of British India when that object was actually performed in a State where it was perfectly legal. If it had been the policy of the Legislature to prevent British Indian subjects from going into another State to celebrate marriages which would be prohibited under Act XIX of 1929 in British India then surely the Legislature would have made provision in the statute itself to restrain such migrations for matrimonial purposes. The Act as passed originally was very restricted in its scope and was surrounded by many safeguards to prevent it from being operated in an oppressive manner. One is not justified in importing into the Act an

(1) 63 C 1153; 170 Ind. Cas. 309; A I R 1937 Cal 257; 10 R C 147.

intention which the Act itself does not declare to regulate the conduct of British Indian subjects when outside the territories to which the Act applies. I must therefore hold that the learned District Judge was right in declining to accept the contention that the amount payable under the decree towards this marriage should be refused on grounds of public policy. The appeal is therefore dismissed with costs. Leave to appeal is refused.

N.-S. *Appeal dismissed.*

RANGOON HIGH COURT

First Appeal No. 113 of 1940
November 18, 1940
ROBERTS, C. J. AND DUNKLEY, J.
U LUN—APPELLANT
versus
U CHIT HLAING—RESPONDENT

Government of Burma Act, 1935, *ss.* 41, 42 *—Ordinance has same force as Act — Promulgation of Ordinance — Publication in* Gazette *is necessary—Expiry of Ordinance — Ordinance issued by Governor — Whether implies that Governor has formed his opinion and exercised his individual judgment—Ordinance expressing purpose of enabling Governor satisfactorily to discharge functions—Governor is sole Judge—Court, if can sit on judgment—Power of Speaker of House to declare seat of member vacant—Ordinance, if should contain preamble—Injunction—Grant of, is discretionary—Defendant assuring that he would take no action to the prejudice of plaintiff—Injunction should not be granted—Civil Procedure Code (Act V of* 1908), *O. VIII, r.* 5*—Contention that allegation needs no reply whether amounts to denial by necessary implication.*

An Ordinance promulgated under either s. 41 or s. 42 of the Govt. of Burma Act has the same force and effect as an Act of the Legislature. [p. 115, col. 1.]

Promulgation and publication in the *Official Gazette* are not synonymous. Publication in the *Official Gazette* is not *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. Reading of an Ordinance by the Speaker of the House of Representatives is sufficient promulgation. 193 Ind. Cas. 91, **Reversed.** [p. 115, col. 2; p. 116, col. 1.]

An Ordinance was promulgated under s. 41 of the Govt. of Burma Act; the Legislature re-assembled on February 15, 1940:

Held, that the Ordinance expired at the midnight which concluded on March 28, as six weeks from February 15, 1940, expired on March 20, 1940. 193 Ind. Cas. 93, affirmed. [p. 115, col. 1.]

The Governor's functions are capable of being exercised in any one of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; indeed it is not their duty to aid or advise him in respect of these matters; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters in the Govt. of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second or third group according to the opinion formed by the Governor as to the course which he should take. Hence where an Ordinance issued is expressed to be under powers conferred by s. 42, it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him. [p. 116, col. 2.]

The Court will not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an Ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an Ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only Judge of that. 131 Ind. Cas. 415 (1), relied on, 140 Ind. Cas. 304 (2), referred to. 193 Ind. Cas. 91, **Reversed.** [p. 117, col. 2; p 118, col. 1.]

The question whether a seat of a member of the House of Representatives has become vacant or not is not a point of order at all for the Speaker, nor is it the matter for the House to determine. It is a point of law affecting the status of an individual and is for a Court to determine. 193 Ind. Cas. 91, affirmed. [p. 118, col. 1.]

Obiter Per *Dunkley, J.*—There ought to be a common form of preamble for all Ordinances, and the preamble should set out that the Governor is satisfied as required by the terms of s. 42 (1) and also the purpose within s. 48 (1) for which the Ordinance is promulgated. But it is not legally necessary that this should be done, and legally all that is necessary is that the Governor should declare that he promulgates the Ordinance under the provisions of s. 42, Govt. of Burma Act; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an Ordinance. [p. 120, col. 2.]

The granting of an injunction is a discretionary matter and the Court would be loath to consider that circumstances could make it desirable to grant one in a case where the defendant has given an assurance that he would refrain from any action to the prejudice of the defendant. [p. 118, col. 1.]

There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. [p. 115, col. 2.]

F. A. against the decree of Mr. Justice Sharpe, reported in 193 Ind. Cas 91.

Mr. *U E Maung*, for the Appellant.

Mr. *U Kyaw Din*, for Respondent No 1.

Roberts, C. J.—This was an action brought by the Appellant U Lun against U Chit Hlaing, Speaker of the House of Representatives, for a declaration that the plaintiff was a member of the House of Representatives and that his seat had not become vacant by reason of any disqualification and for an injunction to restrain the defendant from interfering with the exercise of the plaintiff's rights and privileges in that behalf. The facts have been

set out very fully by the learned trial Judge. The plaintiff had been duly elected a member of the House of Representatives representing Insein North at the General Election in November, 1936 and in March, 1940, he was appointed a Second Lieutenant in the Army in the Burma Reserve of Officers subject to the approval of His Majesty.

The holder of a commission in His Majesty's forces enjoys an office of profit under the Crown and by s. 25 (1) (*a*), Govt. of Burma Act he is disqualified for being chosen as, or for being, a member of either Chamber unless this office is declared by an Act of the Legislature not to disqualify its holder. His Excellency the Governor, in pursuance of his powers under s. 41, Govt. of Burma Act, promulgated an Ordinance on September 18, 1939, which provided that a person should not be disqualified nor should be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legislature by reason only that as a member of His Majesty's forces he was holding or had held any office of profit under the Crown. An Ordinance promulgated under either s. 41 or s 42 of the Act has the same force and effect as an Act of the Legislature, and consequently it protected the plaintiff from the disqualification which he would otherwise have suffered. But this particular Ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature unless (which never happened) a resolution disapproving it were passed by the House of Representatives and agreed to by the Senate on some earlier date.

The Legislature re-assembled on February 15, 1940, and six weeks from that date brings us to March 28, 1940. I respectfully agree with the learned trial Judge for the reasons given by him that this Ordinance expired at the midnight which concluded March 28. On March 29, when the Legislature was in session, the Governor, in pursuance of his powers under s. 42 of the Act, promulgated a further Ordinance in similar terms. It was afterwards published in a *Burma Gazette Extraordinary* dated March 30, but published in a truncated and inaccurate form. Its concluding words were: "The above Ordinance is promulgated under the powers conferred by s. 42, Govt. of Burma Act, 1935." By a surprising and unfortunate omission none of these concluding words were contained in the *Official Gazette*. During the afternoon of March 29, the original of this second Ordinance was delivered to the Speaker and read by him to the House of Representatives; an advance copy of it had been already supplied to him by the Premier. It never has been contended by any party to this suit that promulgation did not take place on March 29. In para. 10 of the plaint it was expressly pleaded that March 29, was the date of promulgation. In the written statement of the respondent he was content to aver that this allegation needed no reply; and by O. VIII, r. 5, Civil P. C., every allegation of fact not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. If the second Ordinance was a valid Ordinance and was promulgated on March 29, there never was a time when the appellant's seat became vacant by reason of any disqualification, and no question of its validity could be raised on the ground of its contravention of the provisions of sub-s. (4) of s. 42, which enacts that an Ordinance passed under the section shall only be valid if and so far as an Act of the Legislature in similar terms would be valid.

The learned trial Judge has taked the view that promulgation was not effected until March 30, although the Governor's signature to the document on March 29, states that it "is promulgated" and not that it will be. The original document was however never produced in Court before him, for the notification in the *Gazette* was admissible in evidence as to its contents though entirely misleading in its effect. I find myself unable to accept the suggestion that promulgation and publication in the *Official Gazette* are synonymous. If the Act used the word "publication" it might no doubt be said that the term connoted the fact of making the public in this way aware of the existence of the Ordinance, and that publication meant publication in the *Official Gazette*. But I have asked myself why the Act uses the word, "promulgate" in preference to the more popular word "publish," and it seems to me that there is a distinction. What is promulgated is no doubt in practice published in the *Official Gazette* so as to ensure wider dis-

semination. But the promulgation of an Ordinance is an emergency measure; it depends on the necessity for immediate action, as the Act states. The Governor is empowered to take this action at once and is not obliged to wait till the printers are ready, or to communicate with them, it may be from a great distance, before his action becomes effective. Some proclamation or making known by public declaration is no doubt necessary; no one can be said to promulgate what he keeps locked up in his breast: but publication in the *Official Gazette* does not appear to me to be *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individual. The India and Burma Emergency Provisions Act, 1940, had not been published in Burma at the time of the judgment. In that Act the Governor is empowered to make certain provisions which under s. 157, Govt. of Burma Act, could be made by an Order in Council or which under the Act fell within the scope of rules issuable by the Secretary of State. This he can do "by notification in the *Official Gazette of Burma.*" The new statute does not say that these provisions may be made and promulgated by the Governor, and lays down a procedure different from that contemplated in the case of promulgation of an Ordinance under the Govt of Burma Act.

Illustration (*e*) to s. 114, Evi. Act, says that the Court may presume that judicial and official acts have been regularly performed. We have seen the Governor's signed declaration on March 29, 1940, that the second Ordinance is promulgated, and indeed the fact appears to have been admitted on the pleadings; I cannot hold that no promulgation with due regard to form and procedure took place before March 30. It is also unfortunate that the attention of the learned trial Judge was, as we are assured, not drawn to this point in the voluminous pleadings and that he was allowed to think that a type-written copy of the Ordinance was all that was delivered to the Speaker on March 29.

Then was the second Ordinance a valid Ordinance? In my view the answer to this question must be in the affirmative. The Ordinance did not attract the provisions of s. 42 (4) as being one which would be invalid if enacted by the Legislature. Such part of it as would appear to give retrospective effect to its provisions, namely the words "nor shall be deemed ever to have been disqualified," are clearly severable from the remainder, and the remainder freed the appellant from any disqualification since it came into operation immediately upon the expiry of the first Ordinance at the midnight concluding March 28.

It is desirable to examine the scope of s. 42 which deals with the Governor's power to make Ordinances when the Legislature is in session.

The Governor's functions appear to me, with great respect, to be capable of being exercised in any one of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; indeed it is not their duty to aid or advise him in respect of these matters; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. The third group comprises all cases in which the Governor does not regard it as inconsistent with the fulfilment of any of the special responsibilities which are committed to him by the Act, or with the proper discharge of the functions which he is otherwise by or under the Act required to exercise in his individual judgment, to be guided by his Ministers' advice.

In performing any of the functions in the second or third group the Governor (acting under para. 8 of the Instrument of Instructions issued to him by His Majesty) forms his own opinion as to whether, having regard to its terms, he should be guided by his Ministers or not. Thus, matters in the Govt. of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second or third group according to the opinion formed by the Governor as to the course which he should take.

Paragraph 8 of the Instrument of Instructions relates to all matters within the scope of the executive authority in Burma save the purely discretionary functions. They may become matters for the exercise of the individual judgment of the Governor simply because he has formed the opinion referred to in the paragraph. When an Ordinance is issued expressed to be under the powers conferred by s. 42 it is implied that such an opinion has been formed.

The learned Judge has examined with

great care the question whether the subject-matter of the second Ordinance was concerned with one of the discretionary functions of the Governor, or with one of his special responsibilities, or with one of the other matters about which he is required to exercise his individual judgment. But he has, I respectfully think, omitted to notice that within this last class there may fall a matter which he describes as "one entirely for the Ministers."

As I read the Act and the Intrument of Instructions, there are no matters which can be dismissed from consideration as "entirely for the Ministers": they act in the name of the Governor and their executive acts can become a matter for the individual judgment of the Governor if he forms the opinion that to be guided by them would be inconsistent (1) with the fulfilment of his special responsibilities under the Act, or (2) with the proper discharge of functions which he is otherwise by or under the Act required to exercise in his individual judgment. We do not precisely know which of these two opinions he has formed, but by the issue of the second Ordinance he has impliedly formed one or other of them, and has therefore exercised his individual judgment; unless, indeed, he has promulgated the Ordinance for the purpose of discharging functions which lie within his discretion.

We have been informed that the attention of the learned Judge was never drawn to s. 8 (1) (*h*) of the Act which makes it one of the Special Responsibilities of the Governor to secure that the due discharge of his functions, whether discretionary or in the exercise of his individual judgment under the Act (which of course includes the Instrument of Instructions), is not prejudiced or impeded by any course of action taken with respect to any other matter. I should have thought that to permit a Member of the House of Representatives to be penalised for his loyalty and readiness to serve in the armed forces of the Crown in time of war might well impede the course of action taken with respect to defence: that is however, entirely by the way, and I must not be taken to hazard any guess as to the grounds upon which the Governor saw fit to promulgate the Ordinance in question; it seems to me irrelevant to inquire. It was, again, unfortunate that the attention of the learned trial Judge was not drawn to the important decision of the Privy Council in *Bhagat Singh* v. *Emperor* (1).

There the Governor-General, acting under s. 72, Govt. of India Act, 1915, being satisfied that a state of emergency existed, promulgated an Ordinance expressed to be for the peace and good Govt. of India. Its validity was challenged. Lord Dunedin said (at p. 283*):

"The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition—It connotes a state of matters calling for drastic action which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.

Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (*a*) by this Board declaring that once the Ordinance was challenged in proceedings by way of *habeas corpus* the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (*b*) by a finding of this Board—after contentions and protracted enquiry—that no state of emergency existed, and that the Ordinance with all that followed on it was illegal.

In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it.

It was next said that the Ordinance did not conduce to the peace and good Govt. of British India. The same remark applies. The Governor-General is also the judge of that. The power given by s. 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do although it is made clear that it is only to be used in extreme cases of necessity where the good Govt. of India demands it."

And in *In the matter of Amrita Bazar Patrika* (2) at p. 168 Rankin, C. J. said:

"As the validity of the Ordinance rests neither upon proof of an emergency nor upon the recital of an emergency but upon the judgment of the Governor-General that immediate action of this character was necessary, there is in my judgment, no basis for the contention that the Ordinance was not valid and effective. In no event could the validity of the Ordinance be determined by evidence adduced before the Court as to whether a state of emergency did or did not exist."

The Court will thus not inquire whether circumstances in fact existed which ren-

(1) 12 L 280; 131 Ind Cas 415; A I R 1931 P C 111; 32 Cr. L J 727; 35 C W N 646; Ind. Rul. (1931) P C 143; (1931) A L J 448; 8 O W N 446; 53 C L J 383; (1931) M W N 601; 33 Bom. L R 950; 34 L W 57; 58 I A 169; 32 Bom. L R 658; 61 M L J 279; (1931) Cr. Cas. 521 (P C.)

(2) 37 C W N 166, (168); 140 Ind. Cas 304; A I R 1932 Cal. 738; 56 C L J 157; (1932) Cr. Cas. 747; Ind. Rul. (1932) Cal. 696; 33 Cr. L J 919 (F B.)

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dered immediate action necessary before the promulgation of an Ordinance. That is for the Governor to decide. I cannot see that the Court should assume the burden of deciding for what purpose the action was necessary. In the Lahore case the purpose of the Ordinance was expressed to be for the peace and good Govt. of British India, and the Governor-General was held to be the judge of that—here the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions, and I regard myself as bound by the authority of the Privy Council decision to say that the Governor must be the judge of that. I think it unnecessary to go further and examine the provisions of s. 5 (3) of the Act.

In this view of the law the appeal must be allowed. Each of the Ordinances was valid and since the second followed the first with no intervening gap there is no ground for stating that the second Ordinance would have been invalid as an Act of the Legislature. The plaintiff-appellant is entitled to a declaration in the terms sought by him in his plaint; for the reasons given by the learned Judge the respondent had no power to determine the matters disposed of by him in what has been described as his ruling of April 2, 1940. The question at issue was not a point of order at all for the Speaker, nor was it a matter for the House to determine. It was a point of law affecting the status of an individual and is for this Court to determine. With regard to the prayer for an injunction this has been most properly withdrawn upon the assurance that the Speaker will refrain from any action to the prejudice of the appellant's rights as declared in our judgment. In any event the granting of an injunction is a discretionary matter and we should be loath to consider that circumstances could make it desirable to grant one in such a case. Before concluding the judgment I desire to express our appreciation of the assistance given to us by the learned Advocate-General whom we have heard as *amicus curiae*, and to add one or two further observations.

U Kyaw Din who appeared to represent the respondent informs us that from the circumstances in which he was engaged, instructed and remunerated he thought he was appearing instead of the Advocate-General. He has gone into the circumstances at length and we think there was confusion of thought which arose not unnaturally but which was allowed to continue through inadvertence. He was entirely mistaken in his view, for the Advocate-General was in no way concerned, but the learned trial Judge was led to believe that the Govt. was represented before him when in fact that was not the case. It was a misfortune for the Judge, and it is apparent from what we have learned that, apart from being unintentionally misled on this matter, the crucial authorities on the law were never cited to him and he was also misinformed on several facts, it appears that he did not even see the original Ordinance and could never have known that it was incorrectly reproduced in the *Official Gazette*, the latter being receivable in evidence as a Govt. publication, and presumed to be accurate. On these two matters, namely, the date of promulgation, and the Privy Council decision to which I have referred, he was entirely without the data which have proved conclusive in the determination of this appeal. This appeal will accordingly be allowed; the judgment and decree of this Court on the original side, dismissing the plaintiffs' suit is set aside and instead thereof the plaintiff-appellant will be granted declarations as prayed for in the first and second prayers of his plaint. The respondent must pay the costs both here and in the Court below. Advocate's fee in this Court forty gold *mohurs*.

Dunkley, J.—I concur in the conclusions at which my Lord the Chief Justice has arrived. The points which were considered and decided by the learned trial Judge in his judgment may be briefly summarized as follows: (1) that this High Court has jurisdiction to determine the questions raised by and to give the reliefs claimed in the plaint; (2) that the plaintiff-appellant was holding an office of profit under the Crown on March 28 and 29; (3) that Ordinance No. VII of 1939 ceased to operate at midnight of March 28-29; (4) that Ordinance No. V of 1940 was not promulgated until March 30; (5) that the Courts have jurisdiction to enquire whether an Ordinance purporting to be promulgated under s. 42, Govt. of Burma Act, was in fact promulgated under the conditions prescribed by sub-s. (1) of that section; (6) that Ordinance No. V of 1940 was *ultra vires* the Governor. As long ago as 1866 their Lordships of the Privy Council in *Eshen Chunder Singh* v. *Shama Churn Bhutto* (3) at p. 20 pointed out "the absolute necessity

(3) 11 M I A 7, (20); 6 W R 57; 2 Sar. 209; 2 Ind. Jur. (N. s) 87; 1 Suther. 649 (P C.)

that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made." This salutary rule is often forgotten, and, with the greatest respect, it was apparently overlooked by the learned trial Judge. Order VIII, r. 5, Civil P. C., enacts that

" every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted."

Paragraph 10 of the plaint states: "On March 29, 1940, His Excellency the Governor promulgated under s. 42 of the Act an Ordinance, being No. V of 1940 ...." Paragraph 5 of the written statement of the defendant-respondent reads : "Paragraphs ...10 ... of the plaint need no reply." Hence the allegation in para. 10 of the plaint, that Ordinance No. V of 1940 was promulgated on March 29, was not denied specifically or by necessary implication or stated to be not admitted in the written statement, and should therefore have been taken to be admitted. Moreover, the printed copies of the proceedings of the House of Representatives on March 29, and April 1 and 2, were admitted as evidence by consent, and the defendant-respondent's "ruling" delivered on April 2 (at p. 1729) contains the following sentence: "It is admitted that in the afternoon of March 29, ...His Excellency the Governor promulgated the new Ordinance under s. 42, Govt. of Burma Act." This is an unequivocal admission that Ordinance No. V of 1940 was promulgated on March 29, and this question was not in dispute between the parties. Hence, with all due respect, it was not open to the learned Judge to come to the finding, at which he did arrive, that this Ordinance was not promulgated until March 30. Order VIII, r. 2, Civil P. C., enacts that

"the defendant must raise by his pleading all matters which show the suit not to be maintainable... ..and all such grounds of defence as ... would raise issues of fact not arising out of the plaint, as, for instance, ...facts showing illegality."

The defendant-respondent did not, either during the prolonged discussion in the House of Representives, or in his "ruling" of April 2, or in his written statement, suggest that Ordinance No. V of 1940 was not validly promulgated by the Governor under s. 42, Govt. of Burma Act. In fact, as I have already stated, he did not reply to para. 10 of the plaint, which set out the facts concerning the due promulgation of this Ordinance, and the defence that the Ordinance was *ultra vires* the Governor was raised only in the written statement of defendant No. 2 in the suit, against whom the appeal has been withdrawn. The decision of the learned Judge on the first three points was correct and was in favour of the plaintiff-appellant, and, so far as the present respondent is concerned, no other issue arose on the pleadings. However, I propose to make a few observations regarding each of the points decided by the learned trial Judge. There was no substance in the respondent's demurrer to jurisdiction. The Speaker derives his authority and powers from the Govt. of Burma Act, and in deciding a disputed question as to whether a duly elected and sitting member of the House of Representatives had since become disqualified under s. 25 (1) (*a*) of the Act by reason of having accepted an office of profit under the Crown he arrogated to himself the status of a Court, and furthermore in his "ruling" of April 2, which is nothing more nor less than a considered judgment, he purported to inflict a penaly of Rs. 500 per day on the appellant. These are things which the Speaker is expressly prohibited from doing by s. 27 (3) of the Act. He cannot assume the status of a Court and no punitive powers can be conferred on him. Yet he assumed authority to deprive the appellant of his salary as a member of the House of Representatives and to inflict a fine of Rs. 500 a day on him. As regards the argument that, in the absence of any provision of the Govt of Burma Act declaring the authority which shall determine whether a seat is vacant or not, by implication the Speaker must be that authority, I do not understand nor has it been explained to us, how any such implication arises. Possibly the Legislature could pass an Act, or the Governor could make a rule under cl. 15, Sch. III to the Govt. of Burma Act, determining the authority which shall declare when a seat becomes vacant and ousting the jurisdiction of the Civil Courts in such a matter; but in view of s 27 (3) neither the Legislature nor the Governor could confer this authority on the Speaker, and in the absence of any such Act or rule ousting the jurisdiction of the Courts such a matter is clearly a question of status to be determined by the Courts under s. 42, Specific Relief Act.

The correctness of the learned trial Judge's conclusion on the second point has not been challenged by the appellant. On the third point the respondent held in his "ruling" of April 2 that Ordinance No. VII of 1939 ceased to operate at midnight of March

27-28 a patently erroneous decision which his learned Counsel has not attempted to support. The contention now is, that, as the Legislature re-assembled at 11 A. M. on February 15, under s. 41 (2) (*a*), Govt. of Burma Act, this Ordinance ceased to operate at 11 A. M. on March 28. But as the learned trial Judge has pointed out, the law takes no notice of the fractions of a day, and he has cited a line of cases in which this maxim has been applied, of which I need mention only *Tomlinson* v. *Bullock* (4) at p. 232. Section 41 (2) (*a*) enacts that an Ordinance promulgated under that section shall cease to operate "at the expiration of six weeks from the re-assembly of the Legislature," and if the expression "six weeks" is to be construed as equivalent to any 42 consecutive days, then Ordinance No. VII of 1939 ceased to operate at midnight of March 28-29. That conclusion is sufficient for the disposal of this case. But it seems to me that it might have been urged with cogency that if Parliament had intended the period to be 42 days it would have said so in express terms, and that this construction does violence to the actual wording of the section; and, further, that just as, in law, a day begins at midnight and ends at midnight, so a week begins on Saturday/Sunday midnights and ends on the following Saturday/Sunday midnight. Then it would follow, on the analogy of the cases cited by the learned trial Judge, that when the expression "week" is used in a statute no notice can be taken of the fractions of a week. If this is the correct interpretation of s. 41 (2) (*a*) it follows that Ordinance No. VII of 1939 ceased to operate only at midnight of March 30-31. Attractive as I find this line of thought to be, this view has not been raised before us in argument, and for the decision of this appeal it is unnecessary to consider it, and therefore I must reserve it for further consideration if and when the question arises again.

As regards the fourth point, it is most unfortunate that the learned trial Judge was left with the erroneous impression in his mind that what was read out to the members of the House of Representatives by the Speaker on March 29, was a typed copy of Ordinance No. V of 1940. The document which was read out by the Speaker has been shown to us by the learned Advocate-General, and it is now admitted on all hands that what was read was the original Ordinance, signed by the Governor and in part in the Governor's own handwriting. It is even more unfortunate that this Ordinance was inaccurately reproduced in the *Gazette Extraordinary* of March 30. The public and the Courts are entitled, and in fact are required by law, to rely on the accuracy of statements appearing in the *Burma Gazette*, and the failure of the judicial department of the Govt. of Burma to publish in this *Gazette* the identical terms of the Ordinance as made and promulgated by the Governor is extremely surprising. In the course of the hearing of this appeal, we have had produced before us two notifications in the *Gazette* purporting to publish two different Ordinances of the Governor promulgated under s. 42, Govt. of Burma Act, and they are in essentially different forms. At the risk of being accused of going outside the matters falling for determination in this appeal, I venture to suggest that there ought to be a common form of Preamble for all such Ordinances, and that the premable should set out that the Governor is satisfied as required by the terms of s. 42 (1) and also the purpose within s. 42 (1) for which the Ordinance is promulgated. In making this suggestion I have not overlooked the judgment of Rankin, C. J., in *In the matter of Amrita Bazar Patrika* (2) at p. 168*, and I realize that it is not legally necessary that this should be done, and that legally all that is necessary is that the Governor should declare that he promulgates the Ordinance under the provisions of s. 42, Govt. of Burma Act; but I think that the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an Ordinance.

Now, under s. 42 (1), the Governor "promulgates" an Ordinance, and there is no special legal significance about the word "promulgate"; it is an ordinary English word, not in common use, which according to Murray's Dictionary means to publish or proclaim formally. That is the sense in which it is used in ss. 41 and 42, Govt. of Burma Act. It does not connote publication in the *Official Gazette*: that is, as my Lord has pointed out, quite unnecessary, and indeed, if it were necessary, it would render the provision of s. 42 ineffectual for the purpose which they are obviously designed to meet. Publication in the *Gazette* is merely a convenient means of bringing the Ordinance to the notice of the public generally, but not a necessary means. As the learned trial Judge has pointed out, the Speaker is a medium of communication from the

(4) (1879) 4 Q B D 230, (232); 48 L J M C 95; 40 L T 459; 27 W R 552.

* Page of 37 C. W. N.—[*Ed.*]

Governor to the House of Representatives. In that capacity, the Speaker read out the original Ordinance No. V of 1940 to the members of the House. How better could this Ordinance be "promulgated" than by reading it out formally to the body of persons most affected thereby? To my mind, it is clear that this Ordinance was promulgated, within the meaning of s. 42 (1), Govt. of Burma Act, when it was read out by the Speaker to the House of Representatives on March 29. Therefore, in view of the provisions of s. 4 (2), General Clauses Act, it came into operation at midnight of March 28-29. Points Nos. 5 and 6 are covered by authority namely, the judgment of their Lordships of the Privy Council in *Bhagat Singh* v. *Emperor* (1) at p. 253*, and it is highly regrettable that this case was not cited to the learned trial Judge. In view of this judgment of the Judicial Committee, it must, with all due respect, be held that the decisions of the learned Judge on these two points were wrong. I therefore agree that this appeal must be allowed, the judgment and decree of the original side of this Court reversed, and the plaintiff-appellant granted declarations in accordance with prayers (*a*) and (*b*) of the plaint. I agree with my Lord's order regarding the costs of the suit and the appeal.

D. *Appeal allowed.*

*Page of 12 L.—[*Ed.*]

ALLAHABAD HIGH COURT

Second Appeal No. 408 of 1938
October 24, 1940
THOM, C. J. AND GANGA NATH, J.

MUNICIPAL BOARD, GORAKHPUR—DEFENDANT—APPELLANT
versus
RAI KAMLAPAT RAI AND OTHERS—PLAINTIFFS—RESPONDENTS

U. P. Municipalities Act (II of 1916), ss. 189, 120, 8 (i) (j)—S. 189, if refers to out-fall of drain—Ss. 189, 120 and 8 (i) (j) whether empower Municipality to acquire land outside Municipal limits for drain or sewage works without owner's consent and without notice and compensation—Drain constructed by Municipality for draining sewage and rain water into plaintiff's jheel *without his consent—Suit by him for injunction—Municipality held acted negligently and arbitrarily—Practice—Evidence—Construction of drain for running rain and sewage water into plaintiff's* jheel*—Plaintiff's suit for injunction on ground that drain water would pollute* jheel *and damage plants and fish in it—Municipality must prove to the contrary—It cannot be allowed to adduce expert evidence that drain water would not pollute* jheel, *after close of evidence.*

Section 189 U. P. Municipalities Act does not refer to the out-fall of any drain which may be constructed by a Municipality. It does not empower a Municipality to take its sewage outside the Municipal boundaries and dispose of it where it likes upon private property regardless of the rights of the property owner. Sections 189 and 120 read with s. 8 (i) (j) do not confer upon the Municipality the power to take land outside the Municipality for the purposes of a drain or a sewage works without notice to the owner or the occupier of that land and without his consent and without compensation.

A Municipal Board constructed a drain for running the sewage and rain water of the city into the plaintiff's *jheel* situated outside the Municipal limits. The plaintiff who derived an income from the *jheel* brought a suit for injunction against the Board. The Court found that the dirty water would pollute the *jheel* and prove deleterious to the plants and fish in the *jheel*:

Held, that even if the Board were within its rights in using the plaintiff's *jheel* for the disposal of the sewage of the city, it was acting arbitrarily and negligently in that it did not consult the plaintiff or offer him compensation and, secondly, it did not take ordinary and reasonable steps to purify the sewage before running it on to the plaintiff's property. Injunction could therefore be granted.

Held, further that it was for the Municipality to prove that the sullage was so mixed with pure rain water that what flowed into the *jheel* would not have any deleterious effect upon the plants and fish, but after the evidence was closed the Municipality could not be allowed to adduce expert evidence to show that the drain water would not pollute the *jheel* as the Municipality knew well what case it had to meet.

S. A. from the decision of the Additional Civil Judge, Gorakhpur, dated November 30, 1937.

Messrs. *S. K. Dar* and *A. Sanyal*, for the Appellant.

Sir *Tej Bahadur Sapru* and Mr. *Shiva Prasad Sinha*, for the Respondents.

Thom, C. J. — This is a defendant's appeal arising out of a suit for an injunction. The plaintiff is one of the owners of a *jheel* near Gorakhpur known as the Ramgarh *tal*. Defendant No. 1 is the Municipal Board of Gorakhpur and defendants Nos. 2 and 3 are co-owners of the said *jheel*. The plaintiff seeks an order injunction in the following terms :

"That a permanent injunction be issued against the Municipal Board, Gorakhpur, forbidding it from constructing the drain and from accumulating or allowing to accumulate, and from flowing or discharging any rain, surplus, artificial or dirty and foul water or other material by any artificial means or operations or through the newly dug drain into or near or about the said Ramgarh *tal* or on the plaintiff's land."

The material facts of the case are not in dispute. Ramgarh *jheel* lies on a level lower than that of Gorakhpur. The *jheel* in the rains is about five miles long by three miles broad, in the dry season two miles long by one-and a-half mile broad. The plaintiff avers that he derives along with the other co-owners a considerable income from the plants which grow in the *jheel*, from the fish in the *jheel* and from crops grown upon the land which is covered by the *jheel* during the rainy season but which during the dry season can be cultivated. The Municipal Board of Gorakhpur for purposes of draining part of the city of Gorakhpur have constructed a drain from the city to a point close to the Ramgarh *tal*. This drain was practically completed in 1935 and the Municipal Board intended to drain the storm water and the sullage and other dirty water from Gorakhpur into the *jheel*. The plaintiff objected. He averred that the drainge of the dirty water into the *jheel* would pollute the *jheel* and destroy the fish and plants, and further as a result of the construction of the drain a larger volume of rain water would flow into the *jheel* than did find its way into the *jheel* by natural water courses and sewage before the drain was constructed. The trial Court dismissed the suit. The learned Civil Judge in the lower Appellate Court reversed the judgment of the learned Munsif and has decreed the suit. The findings of fact by the learned Civil Judge are against the Municipal Board. Upon a consideration of the evidence he found as follows:

"(1) Prior to the construction of the disputed drain only rain water and not sullage water of the city flowed into the plaintiff's lake (2) The entire rain water of the city did not flow into the plaintiff's *tal* but only of half of the city. (3) Most of the water so flowing was absorbed in the intervening *kachcha* land and ponds and very little quantity of even that half flowed into the plaintiff's tank. (4) It is not proved that the aforesaid water entered the plaintiff's tank at the point where the disputed drain empties its water now. (5) The above water formely flowed through natural channels and not artificial ones and it is not proved that the disputed drain stands in place of them. (6) The new drain discharges into the plaintiff's tank the entire rain and sullage water of the city."

The learned Judge visited the *jheel* and in the course of his judgment referring to his inspection he observes:

"At the time of my inspection I found the place where the disputed water entered the plaintiff's tank so full of offensive smell, that it was undoubtedly impossible for any life to survive there. The entire rain water of such a big city as Gorakhpur is next likely to overflow the banks of the lake and the crops like Boro, Jarhan etc., which can only grow in shallow water, are likely to suffer. I therefore find that the disputed drain will cause injury to the plaintiff's crops, fish etc, in their lake."

These findings are findings of fact which cannot be disturbed in second appeal. It was contended for the Municipality however that the learned Munsif in the trial Court had wrongfully refused to permit the Municipality to produce expert evidence to prove that the water flowing through the drain into the *jheel* was not filthy water and would not pollute the *jheel*. Learned Counsel contended that an application had been made after the evidence had been closed in which the Municipality prayed that they might be permitted to adduce expert evidence and that this prayer had been refused. It appears however that no such application was presented. After the evidence had been closed an application was preferred in which the Municipal Board requested the Court to direct that the water flowing through the drain should be tested by a certain medical officer of health. This prayer was refused in our judgment rightly. The Municipal Board knew well what case it had to meet. The plaintiff alleged in his plaint that the water flowing into the *jheel* through the aforementioned drain would pollute the *jheel*. It was a matter of admission that not only did rain water flow through the drain but also sullage from at least half of the large city of Gorakhpur. In our judgment in these circumstances it was clearly for the Municipal Board to show that the sullage was so mixed with pure rain water that what flowed into the *jheel* would not have any deleterious effect upon the plants and fish. It was maintained however that even upon the finding that water which flowed into the *jheel* through the said drain would pollute the *jheel* the plaintiff was not entitled to decree in terms of the prayer of his plaint. It was urged that in constructing the said drain and draining the rain water and sullage from the city of Gorakhpur into the plaintiff's *jheel* the Municipality was acting in virtue of its statutory powers under s. 189, Municipalities Act, and that therefore the plaintiff had no right to challenge its action. Section 189, Municipalities Act, enjoins that:

"(1) The Board may construct, within or, subject to the provisions of sub-s. (2) of s. 120, outside the Municipality, such drains as it thinks necessary for keeping the Municipality properly cleansed and drained and may carry such drains through, across or under any street or place, and, after reasonable notice in writing to the owner or occupier into, through or under any buildings or land."

Section 120 is in the following terms :

"(1) The Municipal fund and all property vested in a Board shall be applied for the purposes, express or implied for which, by or under this or any other enactment, powers are conferred or duties or obligations are imposed upon the Board.

(2) Provided that the Board shall not incur any expenditure for acquiring or renting land beyond the limits of the Municipality or for constructing any work beyond such limits except :

(*a*) with the sanction of the Local Govt., and (*b*) on such terms and conditions as the Local Govt. imposes."

With these two sections may be read s. 8 (1) (*j*) :

"A Board may make provision, within the limits of the Municipality and with the sanction of the Commissioner outside such limits for,

(*j*) establishing and maintaining a farm or factory for the disposal of sewage."

It is clear that the intention of the Legislature was that so far as property outside the Municipal limits was concerned the Municipal Board could acquire land for the purposes of a drain or for the purposes of disposal of sewage only with the consent of the Local Govt. and upon such terms as the Local Govt. approved. The aforementioned provisions do not, as was contended by learned Counsel for the Municipality, confer upon the Municipality the power to take land outside the Municipality for the purposes of a drain or a sewage works without notice to the owner or the occupier of that land and without his consent and without compensation. During the course of the argument there was an extensive citation of authorities upon the question of the powers which a Municipality could exercise in the discharge of its statutory functions. It is unnecessary to refer in detail to these decisions. The law upon the point is not in doubt. It was clearly expounded in *East Fremantle Corporation* v. *Annois* (1). The facts of that case were that a Municipality in Western Australia at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road. It was held by the Privy Council that the respondent was without remedy since none had been given by statute and the appellants had not exceeded the powers conferred upon them by the Western Australia Municipal Institutions Act. In the course of his judgment Lord Macnaghten observes :

"The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Keynon and Buller, J., and their view was approved by Abbott, C. J. and the Court of King's Bench. At the same time Abbott, C. J. observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly or oppressively," were taken from the judgment of Gibbs, C. J., in *Sutton* v. *Clarke* (2), decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language, Turner, L. J., observed in a somewhat similar case that "such powers are at all times to be exercised *bona fide* and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present master of the rolls, then Collins, L. J, observed that 'the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In the present case, even if under the statute the Municipal Board of Gorakhpur had the power to drain the sewage and the storm water of the city on to the plaintiff's property the Board has in our judgment acted arbitrarily and negligently. According to the plaintiff's allegations the plaintiff derives an income from the *jheel* and according to the finding by the learned Civil Judge in the lower Appellete Court water drained by the Board into the *jheel* will pollute the *jheel* and prove deleterious to the plants and fish. Even if the Board were within its rights in using the plaintiff's *jheel* for the disposal of the sewage of the city, it was acting arbitrarily and negligently in that it did not consult the plaintiff or offer him compensation and, secondly it did not take ordinary and reasonable steps to purify the sewage before running it on to the plaintiff's property.

Be that as it may, in our judgment the provisions of the Municipalities Act do not entitle the Municipality to drain the sewage from the city on to private property out of the boundaries of the city without the owner's consent. If the Legislature had intended to endow Municipalities with such wide and far reaching powers inconsonant with the rights of private property, it would have so declared in clear and specific terms. The provisions of the Act already referred to appear to us rather to contemplate that a Municipality if it

(1) (1902) A C 213; 71 L J P C 39; 85 L T 732; 67 J P 103; 18 T L R 199.

(2) (1815) 6 Taunt 29; 1 Marsh 429; 16 R R 563.

desires for any purpose to use land outside its boundaries it should acquire the land for example under the Land Acquisition Act or by a private agreement with the sanction of the Local Govt. It is to be observed further that s. 189 does not refer to the out-fall of any drain which may be constructed by a Municipality. Provision is made for carrying a drain underneath or through or into property but there is certainly nothing in the section to justify the contention that a Municipality can take its sewage outside the Municipal boundaries and dispose of it where it likes upon private property regardless of the rights of the property owner. In our opinion the Municipal Board of Gorakhpur have acted in this matter in a high-handed and arbitrary manner. It is difficult to understand how a public body could conceive that it had any right to drain the dirty water from the city on to private property outside the limits of the Municipality without the owner's permission. In contesting the plaintiff's claim instead of taking the more reasonable course of acquiring the *jheel* under the Land Acquisition Act or making some reasonable provision for the construction of a sewage farm or factory the Board, in our opinion, have not shown that circumspection and sense of responsibility which is to be expected from a public corporation.

By the time the suit was disposed of in the trial Court apparently the drain had been completed and water was being drained through it into the plaintiff's *jheel*. The learned Civil Judge in the lower Appellate Court had this fact and the immediate difficulties which faced the Municipal Board in view when he made his final order. He granted decree restraining the defendants from discharging the rain and sullage water of the City of Gorakhpur into the plaintiff's *jheel* but he deemed it proper to direct that the decree should come into force after the case had been finally decided in this Court. In the public interest whilst dismissing this appeal we consider it expedient that the Municipal Board should have some time within which to take such steps as it may be advised for the disposal of the water and sullage which at the present moment is flowing into the plaintiff's *jheel* through the aforementioned drain. In the result the appeal is dismissed with costs. The operation of the decree however, will be suspended untill January 15, 1941. It will be open to parties at any time to apply for further orders. The suspension of the decree will not affect any claim for damages which the plaintiff may have.

S. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Original Order No. 270 of 1939

December 10, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

Pt. CHANDRA SEKHAR DHAR MISRA—APPLICANT—APPELLANT

versus

BHAGWAN DAS AND OTHERS—OPPOSITE PARTY—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 90—Notice under r. 22 signed by judgment-debtor—He cannot contend that he was unaware of the notice—Sale, when can be set aside—Bihar Money-lenders Act (III of 1938), s. 16—Act coming into force before the conclusion of sale—No objection under s. 16 taken—Sale held—Objection under s. 16 in application under O. XXI, r. 90, Civil Procedure Code cannot be allowed subsequently—Application under r. 90 dismissed by lower Court—In appeal against dismissal objection under s. 16 cannot be allowed.

Where the judgment-debtor had signed the notice under O. XXI, r. 22, Civil P. C., he cannot afterwards say that he was not aware of the notice.

In order to entitle the judgment-debtor to have the sale held in execution of a decree against him, set aside, it is to be established that there had been some illegality or irregularity in the publication and conduct of the sale which had resulted in the property being sold at an inadequate price to the prejudice of the judgment-debtor.

Where before the sale was concluded, the Bihar Money-lenders Act had come in force, and the Court could be asked to value, the property under s. 16 of the Act, but the Court was never asked to value, and no objection whatsoever was taken to the sale proceeding on the old proclamation of sale this point cannot be put forward before the Court because it was a ground that could have been put forward before the sale was concluded and therefore, not a ground which could be urged even for the admission of the application under O. XXI, r. 90. If the lower Court could not admit the judgment-debtor's application under O. XXI, r. 90, Civil P. C. on this allegation, he cannot raise it in appeal before the High Court.

A. from an order of the Subordinate Judge, Motihari, dated July 29, 1939.

Mr. *Raj Kishore Prasad* for Mr. *Jaleswar Prasad*, for the Appellant.

Mr. *Kameshwar Dayal*, for the Respondents.

Harries, C. J—This is a judgment-debtor's appeal from an order of the learned Subordinate Judge of Motihari dismissing his application which had been made under the provisions of O. XXI, r. 90, Civil P. C.

The decree-holders held a judgment

against the judgment-debtor-appellant and proceeded to execute the same. On August 1, 1938, the sale proclamation was issued announcing the sale of a number of properties. On November 10, 1938, the sale was held and the properties were sold for an amount less than the decretal amount.

On December 10, 1938, the judgment-debtor filed an application for setting aside the sale, and the application was stated to be made under s. 47 and O. XXI, r. 90, Civil P. C. It is clear, however, from a perusal of the application that it was one under O. XXI, r. 90, Civil P. C. because it was alleged that the notices and processes had been fraudulently suppressed and that by reason thereof the property had been surreptitiously sold at a grossly inadequate price to the prejudice of the judgment-debtor. The application eventually was heard by the learned Subordinate Judge of Motihari, and evidence was led by the appellant with a view to showing that the processes had been suppressed and had never been served. The learned Subordinate Judge in a careful judgment has dealt with this evidence and has come to the conclusion that all the processes in this case were duly served. The reasons, which the learned Subordinate Judge gives for his finding, cannot possibly be challenged and are not seriously challenged in this Court. It is clear that the judgment debtor had signed the notice under O. XXI, r. 22, Civil P. C. and all he could say, when he was confronted with his signature was, that the signature on the document resembled his own; but he could not remember whether he put his signature on the document. I am not surprised that the learned Subordinate Judge held that it was duly served upon him and that it bore his signature. The learned Subordinate Judge was also satisfied on abundant evidence that the sale had been properly published according to law. In the result the learned Subordinate Judge held that the judgment-debtor had wholly failed to show any irregularity or illegality in the publication and conduct of the sale.

The learned Judge further considered the evidence as to whether any of the properties in question had been sold at an inadequate price and eventually came to the conclusion that only one property, namely Sauna, had been sold at a price which was inadequate. He valued Sauna at Rs. 1,500, whereas it was sold for Rs. 650. In his view the prices obtained for the other properties were fair and reasonable prices.

Mr. Raj Kishore Prasad has attempted to challenge the Judge's finding with regard to one property, namely Narwal Sikatia. The learned Judge proceeded on the basis that this property was encumbered to the extent of Rs. 7,000, though one witness stated that the encumbrance was Rs. 13,000. The learned Judge, after considering the income of this property, came to the conclusion that unencumbered it could not be worth more than Rs. 7,600 and Rs. 600, had actually been paid for it. It was urged that the learned Judge was wrong in not holding that the property was encumbered to the extent of Rs. 13,000; but I cannot see how that can possibly help the judgment-debtor. If the property was encumbered for Rs. 13,000, then clearly the equity of redemption was worth nothing at all, and Rs. 600, was actually paid for it. The findings as to the other properties have not been challenged.

As a result of these findings the learned Subordinate Judge dismissed the application. He pointed out that though a grossly inadequate price had been obtained for one property, that was no ground for setting aside the sale. In order to entitle the judgment-debtor to have the sale set aside, it had to be established that there had been some illegality or irregularity in the publication and conduct of the sale which had resulted in the property being sold at an inadequate price to the prejudice of the judgment-debtor. As the judgment-debtor had failed to establish the irregularities and illegalities alleged by him, his application was bound to fail.

In appeal in this Court an entirely new ground has been taken which was never urged before the Court below and, indeed, never even mentioned in the petition under O. XXI, r. 90, Civil P. C. On July 15, 1938, the Bihar Money-lenders Act (Act III of 1938) came into force. That Act has now been replaced by the Bihar Money-lenders (Regulation of Transactions) Act, 1939, and ss. 16 and 17 of the old Act are replaced by ss. 13 and 14 of the new Act.

It is to be observed that these new sections are precisely in same terms as the old sections. Section 16 of the 1938 Act enjoined the Court in the execution proceedings to hear the parties to the decree and to estimate the value of the property attached or of that portion of such property the proceeds of the sale of which the Court considers would be sufficient to satisfy the

decree; and sub-s. (2) of the section provides that any person aggrieved by an order passed under sub-s. (1) can appeal to the Court to which appeals from the Court executing the decree ordinarily lie. This section contemplates that the judgment-debtor should make an application for valuation of the property, and in such a case the Court is bound to value, and if it refused to do so or values improperly there is a right of appeal. Section 17 of the old Act then provided that after such valuation the sale proclamation should include only such portion of the property as would be sufficient to satisfy the decree as found in the earlier proceedings and the value of such property as found by the Court.

In the present case the sale proclamation was issued on August 1, 1938, that is after the Bihar Money-lenders Act, 1938, came into force. No application was made to the Court to value the properties or any portion thereof which would be sufficient to satisfy the decree. The sale proclamation contained the value given by the decree-holders, and in due course the properties were sold on November 10, 1938. It is now contended for the first time that the failure to value the properties and to give the value so found in the proclamation of sale constitute an irregularity or illegality in the publication and conduct of the sale which would entitle the Court to set aside the sale under O. XXI, r. 90, Civil P. C.

As I have stated, this point is taken for the first time, and we have no findings of fact as to why no such application was made to the Court to value the properties under s. 17, Bihar Money-lenders Act, 1938. It was certainly in force and an application could have been made; but no such application was made. No objection was taken that the properties had not been valued up until the time the sale took place, though the present objection could well have been urged in which case the Court would have been bound to value as directed by s. 16 and proceed with the sale as directed by s. 17 of the 1938 Act. Nothing was done, and we have no means of ascertaining why the sale proceeded in the manner it did. Has the point been taken in the Court below, all the facts would have been investigated, and we would have been in a position to consider the matter on its merits.

In my view the point was not even open to the judgment-debtor in the Court below. The objection that the property should have been valued and the value inserted in a fresh proclamation of sale was one which could have been taken and should have been taken before the sale took place and by an amendment of O. XXI, r. 90 made by this Court it is expressly provided that no application to set aside a sale shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale was concluded. The Act was in force, and the Court could have been asked to value, and an appal lay from its decision. The Court was never asked to value, and no objection whatsoever was taken to the sale proceeding on the old proclamation of sale. If this point had been put forward before the learned Subordinate Judge, he would have been bound to hold that it was a ground that could have been put forward before the sale was concluded and, therefore, was not a ground which could be urged even for the admission of the application. If the lower Court could not have even admitted the judgment-debtor's application under O. XXI, r. 90, Civil P. C. on the present allegation, how can this Court in appeal reverse the Court below upon this point? If it was not open to the judgment-debtor to raise the matter in the Court below, clearly he cannot raise it in appeal before this Court. In my judgment it would be wholly wrong to allow the judgment-debtor-appellant to raise this mixed question of law and fact at this stage even if there was no legal bar to his doing so. In my view, however, he cannot, by reason of the matters which I have referred, ask this Court at this stage to consider the matter. In any event, it appears clear from the judgment of the learned Subordinate Judge that these properties, with the exception of one, realised their full value, and the inadequacy of price with regard to that one property is not a very serious matter.

For these reasons I hold that this appeal fails and would dismiss it with costs.

Manohar Lall, J.—I agree.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Application in Suit No. 156 of 1940

March 4, 1940

PANCKRIDGE, J.

TOLARAM CHAMPALAL—PLAINTIFF

versus

JEWANRAM GANGARAM—DEFENDANT.

Arbitration Act (IX of 1899), s. 19—By contract in writing defendants selling certain goods of

Japanese manufacture to plaintiff—After shipment of part of goods defendants asking for extension of time for shipping remaining goods due to outbreak of war — Plaintiff not accepting request —Defendant under terms of contract cancelling it and repudiating liability for damages—Plaintiff's suit for damages—Defendant relying on arbitration clause in contract applying for stay—Defendant held could apply for stay but held that under special circumstances it could not be granted.

Under a contract in writing the defendants sold certain piecegoods of Japanese manufacture to the plaintiff. A part of the goods were shipped and accepted by the plaintiffs. Thereafter the defendants requested the plaintiff for an extension of time for shipping the rest of the goods due to outbreak of war. The plaintiff did not accept the request. The defendants thereupon informed the plaintiff that the contract stood cancelled as per terms of the contract and also repudiated his liability to pay any damages. The plaintiff instituted a suit for damages. Relying on the arbitration clause contained in the contract, the defendants applied for stay of suit under s. 19, Arbitration Act. It was contended on behalf of the plaintiff, that the defendant could not take up the position of cancelling the contract and at the same time invoke the arbitration clause in the contract:

Held, that by using the word "cancellation," the defendants meant no more than that owing to the events which had happened, they had been relieved of their liability to deliver the goods. They did not mean that the contract had come to an end for all purposes, as when a contract is rendered void by frustration. The defendants were not therefore deprived of their right to apply for, and obtain, an order for stay. *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd* (1), *Harinager Sugar Mills Ltd.* v. *Skoda (India), Ltd.* (2) and *Toller* v. *Law Accident Insurance Society, Ltd.* (3), referred to.

Held, also that one of the questions which the tribunal dealing with his matter would have to decide was whether the state of things then existing in the Far East was war within the meaning of the contract. It was by no means a simple question of law and was most unsuited for decision by laymen. Under the terms of the contract the defendents were entitled to have the matter referred to the decision of two Japanese merchants. If the defendants were to take that course, the decision would cause considerable embarrassment to the parties responsible for it. That was a special circumstance in this case which must be taken into consideration. Having regard therefore to the nature of this dispute, and to the terms of this particular arbitration clause, the Court ought to exercise its discretion against the defendants. *Edward Grey & Co.* v. *Tolme & Runge (No. 1)* (4), relied on.

Mr. *K. P. Khaitan*, for the Plaintiff.

Mr. *Sethia*, for the Defendant.

Order.—This is an application on the part of the defendants for an order staying the suit under the provisions of s. 19, Arbitration Act. The claim is one for damages said to have been occasioned by the failure of the defendants to deliver 19 out of 21 cases of piecegoods, which the defendants had sold to the plaintiff under a contract in writing dated December 29, 1938. Shipment under the contract was expressed to be "June—July 1932, *via* Rangoon" It is common ground that the piecegoods in question were of Japanese manufacture. On September 21, 1939, the defendants wrote to the plaintiffs as follows :

"We have been informed by our supplier's representative that on account of the very unsettled international situation they are unable to give definite information as regards the shipment of the goods relating to the contract above-mentioned. We draw attention to cl. 6 of the contract and make it clear that we are not in any way liable for late arrival of the goods."

The plaintiffs replied on September 22, by a letter in which they observed :

"The present international situation was created in the month of August and hence we fail to understand why the goods were not shipped in August."

On November 24, 1939, the defendants informed the plaintiffs that the goods had not yet been delivered and that the manufactures were asking for a further extension of a month which meant that shipment should be made in November 1939. The letter ends :

"If we do not receive confirmation of the required extension within 48 hours, we shall understand that you cancel the above goods, which please note."

The plaintiffs on November 28, wrote accepting November shipment with the usual late allowance, but apparently this acceptance was conditional on the defendants furnishing a satisfactory explanation of the delay, for, three days later, the plaintiffs write a letter which ends as follows :

"Please note that owing to your failure to supply the goods, we had to sustain a loss of about Rs. 2,000, and we shall look to you for the said loss. If we do not receive any satisfactory reply from you immediately, we shall be forced to do the needful in the matter as will be advised by our lawyer."

On December 7, 1939, the plaintiffs wrote to enquire by what vessel the goods had been shipped in November. This elicited no reply and on January 3, 1940, the plaintiffs' solicitors called on the defendants to deliver within 48 hours. On January 11, the defendant's solicitors replied stating that the plaintiffs had refused to agree to the extension of the time for shipment as requested, the contract stood cancelled and that there was no liability on the part of the defendants to pay any damage. The suit was filed on January 22, 1940, and notice of the present application was taken out on February 15. The arbitration clause is in the following terms :

"In the event of any dispute between the parties as to damage, difference, inferiority, short quantity or measure or weight or defect or amount of allowance or any dispute in question arising between the parties hereto regarding this contract, or the goods subject of this contract, it shall at the option of the sellers be

referred to the Bengal Chamber of Commerce or two European or Japanese merchants, one to be named by each party."

It is evident from the correspondence that the defendants are seeking to justify their failure to perform the contract by relying on cl. 6. Clause 6 is as follows :

"Should the goods or any portion of the same not have been shipped owing to war, Govt. control, suppliers and or producers stopping payment or being prevented by accidents to or the destruction of works from preparing same or any other cause beyond human control or should they be destroyed or rendered unmerchantable in course of transit or from any cause whatsoever should fail to reach their destination after being shipped, then the contract shall be rescinded for such goods or portion thereof and the sellers shall not be responsible for any such non-fulfilment of the contract, in the event of the manufacturers experiencing any difficulties in making the goods such as Govt putting control on the output or stopping exports etc., directly or indirectly on account of war, the contract will be considered as cancelled unconditionally with respect to the entire lot or to the portion remaining unshipped as the case may be."

The reference to this clause and to the international situation, when regard is had to the place of origin of the goods, indicate that the defendants will maintain that the goods have not been shipped owing to war, within the meaning of the clause. The plaintiffs have, among other things, called attention to the use of the term "cancellation" by the defendants, and they say that the defendants should not be permitted to take up the position that the contract has been cancelled, and at the same time invoke the provisions of the arbitration clause in it. On that point I am not in agreement with the submissions made on the plaintiffs' behalf. By using the word "cancellation," I think the defendants mean no more than that owing to the events which have happened, they have been relieved of their liability to deliver the goods. They do not mean that the contract has come to an end for all purposes, as is the case when a contract is rendered void by frustration. An example of such a state of thing is to be found in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (1) where a steamship, the subject-matter of a charter party, was requisitioned by the Govt before the date of the charter party coming into operation. There it was held that the adventure having been frustrated by the action of the Govt, the charter party came to an end for all purposes, including the purpose of the arbitration clause. I have been referred to a case in which I dealt with a somewhat similar contention, *Harinager Sugar Mills Ltd.* v. *Skoda (India) Ltd* (2) and finally an authority of great weight, *Toller* v. *Law Accident Insurance Society Ltd* (3).

It has also been suggested that the defendants have not been ready and willing to do all things necessary for the proper conduct of the arbitration within the meaning of s. 19. The only ground for such a contention is their denial of liability and their statement that the contract has been cancelled. I think that these facts are quite insufficient to deprive them of the right which they would normally have to apply for, and obtain, an order for stay. I have referred to decisions of the Court of Appeal which show that in the vast majoirty of cases the Court will not on its discretion refuse to grant an application such as this one. I certainly should make the order asked for but for the decision of the Court of Appeal in *Edward Grey & Co.* v. *Tolme & Runge* (*No.* 1) (4). In that case there was a contract for the sale of goods to be shipped to Hamburg. There were provisions in the contract that in the event of Germany being involved in war with England, the contract should be deemed to be closed, and that if war should prevent shipment, any party should be entitled to go to arbitration. Before the contracts were performed, war broke out beween England and Germany with the result that the sellers were unable to ship the sugar. The buyers thereupon brought an action for a declaration that the contracts were suspended or dissolved and an injunction restraining the defendants from proceeding to arbitration. The defendants thereupon applied for a stay order under s. 4, Arbitration Act, 1899, which Scrutton, J. in his discretion refused. An appeal against his decision was unsuccessful.

The question there was a question of law as to the construction of the contracts. Now it seems to me that if Scrutton, J. was right in holding that the matter was not one which should be decided by arbitration, the sort of consideration which induced him to come to that decision applies far more strongly in the present case, because one of the questions which the tribunal dealing with this matter will have to decide, is whether the state of things now existing in the Far East is war within the meaning of cl. 6. It is by no means a simple question of law and appears to me most unsuited for

(1) (1926) A C 497; 95 L J P C 121; 134 L T 737; 31 Com. Cas. 199; 17 Asp. Mc. 8; 42 T L R 359; 24 Ll. L Rep. 210.

(2) 41 C W N 563.

(3) (1936) 2 All. E R 952.

(4) (1914) 31 T L R 137; 59 S J 218.

decision by laymen. I observe that under the terms of the contract the defendants are entitled to have the matter referred to the decision of two Japanese merchant. I cannot help feeling that if the defendants were to take that course, the decision would cause considerable embarassment to the parties responsible for it. That is a special circumstance in this case which I feel I am entitled to take into consideration. Having regard therefore to the decision in *Edward Grey & Co.* v. *Tolme & Runge* (*No.* 1). (4), to the nature of this dispute, and to the terms of this particular arbitration clause. I feel that I ought to exercise my discretion against the defendants. The consequence is that this application is dismissed with costs.

D. *Application dismissed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 966 of 1939

December 13, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

BALMUKUND RAM—DEFENDANT—APPELLANT

versus

JANARDAN PRASAD NARAIN SINGH AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS

Civil Procedure Code (*Act V of* 1908), *O. XLI, r.* 27 (1) (b)—*Additional evidence—Appellate Court, when can allow.*

Under O. XLI, r. 27 (1) (*b*) it is only where the Appellate Court "requires" (*i e.*, finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but " when on examining the evidence as it stands, some inherent lacuna becomes apparent." Where there is no inherent lacuna or where the Court does not require it to pronounce the judgment, the additional evidence cannot be allowed 132 Ind. Cas. 721 (1) and 74 Ind. Cas. 747 (2), relied on.

A. from a decision of the District Judge of Darbhanga, dated July 2, 1939, affirming a decision of the Munsif of Samastipur, dated June 30, 1938.

Messrs. *S. M. Mullick, M. N. Pal* and *D. P. Sinha*, for the Appellant.

Messrs. *B. N. Rai* and *Prem Lall*, for the Respondents.

Manohar Lall, J.—This is an appeal by the defendant who is aggrieved by the concurrent decisions of the Courts below by which the suit instituted by the plaintiffs for recovery of possession of 2 *kathas* 6 *dhurs* out of Survey plot No. 1029 in *Khata* No. 175 of village Bhagwanpur, has been decreed.

The facts found by the Courts below are no longer in dispute. It appears that on July 18, 1935, the settlement of this land was made by Mr. Gordon, who was then in charge of the estate of the plaintiffs to which they became entitled as a result of compromise in the Privy Council Appeal No. 79 of 1934 on February 21, 1935. The case of the plaintiffs was that Mr. Gordon had no right to make the settlement which was relied upon by the defendant. The defendant relied upon a registered *kabuliyat* which he had executed in favour of the Manager of the Court of Wards and also relied upon the fact that he had been paying rents to the plaintiffs. It was admitted that in the record there was no lease executed by or on behalf of the lessor, and, therefore, there was no document in writing from which the terms of the contract to transfer the land in dispute could be ascertained with reasonable certainty. In this state of the record the Courts below refused to apply the provisions of s. 53-A, T. P. Act, because there is nothing in writing to satisfy the requirements of the first clause of the section.

In appeal it had to be admitted by the learned Advocate for the appellant that on the record as it stands he could not successfully challenge the decision of the Courts below; but he desired that this Court should exercise its power under O. XLI, r. 27, Civil P. C. and take in fresh evidence either in this Court or that the case may be remanded to the Court below to enable the appellant to give fresh evidence there. Two applications have been filed in this Court in this connection. The first application was filed on September 2, 1940, with a prayer that the plaintiffs may be directed to produce the answer of the Collector, dated September 19, 1935, and that the Collector may be requested to produce the objection of the plaintiffs dated August 15, 1935, so that these two documents may be admitted as additional evidence. These two documents were never called for at any stage of the trial, nor was the learned District Judge who heard the appeal requested to send for these documents. By the second petition dated November 18, 1940, the prayer made to this Court was that *Parwana* No. 110 by which the settlement was said to have been

made by Mr. Gordon with the appellant should be called for from the plaintiffs. There is also prayer that two rent receipts of the years 1342 and 1344 *Fasli* may be exhibited in this Court.

It is convenient to deal with the question of receipts first. It appears that these receipts were filed on January 5, 1938, in the trial Court long before the case was taken up for trial; but for some reasons which are impossible to ascertain these receipts were not proved in evidence, and, therefore, they were not exhibited. In the grounds of appeal to this Court it is stated in the 12th ground of the memorandum of appeal filed in this Court that the rent receipts ought to have been exhibited as the trial Court relied on them. On a perusal of the judgment of the trial Court it appears that this statement is wholly incorrect. There is no trace of any mention of these receipts in the judgment of the trial Court. The lower Appellate Court was asked to admit these rent receipts or that the suit should be remanded for the purpose of taking this additional evidence in order to enable the Court to pronounce judgment in favour of the appellant. These receipts, as already stated, are for 1342 and 1344 *Fasli*,; but the lower Appellate Court refused to admit these into evidence, because in its view even if the receipts were admitted in evidence, they would only establish that the lessor had accepted rents from the lessee. It was in consequence of this remark of the lower Appellate Court that the appellant has moved this Court to allow the appellant to produce some further evidence, namely the correspondence between the Collector and the plaintiffs and the *Parwana* No. 110. In the receipt for 1342 it is stated that the settlement was made with the appellant by means of a registered *ekrarnama* dated July 18, 1935, by virtue of *Parwana* No. 110. It is clear, therefore, that the learned Judge was correct when he took the view that the receipts even if they are admitted in evidence, would be of no assistance to the appellant to satisfy the requirements of s. 53-A, T P. Act, because the receipts do not purport to contain the terms of the contract in writing signed by or on behalf of the lessor by which the land in suit was transferred to the appellant from which the terms of that transfer could be ascertained with reasonable certainty. The appellant had given no explanation beyond a vague suggestion in argument as to why these receipts were not proved as evidence in the trial Court. All that learned Advocate on his behalf urged was that this was due to the carelessness of the lawyer in the Court below. This suggestion is negatived by the wording of ground No. 12 of the memorandum of appeal to this Court referred to above. For these reasons we decline to accede to the prayer of the appellant.

After the decision of their Lordships of the Judicial Committee in the case of *Parsotam Thakur* v. *Lal Mohar Thakur* (1), it is impossible to allow the appellant to adduce additional evidence in this Court of the nature which has been stated in the two petitions referred to above and for the production whereof no attempt was made in either of the Courts below. It was conceded by the learned Advocate for the appellant that he could not be allowed an opportunity to give these documents in evidence at this stage; but he suggested that under cl. (*b*) of O. XLI, r. 27 (1) this Court should, in the circumstances, hold that this Court requires these documents to be put in evidence in order to enable it to pronounce judgment. In dealing with a similar argument their Lordships of the Judicial Committee in the case of *Parsotam Thakur* v. *Lal Mohar Thakur* (1), made these observations at p. 668* :—

"Turning to the provisions of r. 27, cl. (1) (*a*) has no application in the present case. Under cl. (1) (*b*) it is only where the Appellate Court "requires" (*i. e.* finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna becomes apparent.' "

At p. 668* their Lordships explained the meaning of some of the observations which are to be found in the judgment delivered by Mr. Ameer Ali in *Indrajit Pratap Sahi* v. *Amar Singh* (2) which has also been relied on before us. Their Lordships express themselves on this point in this

(1) 10 Pat. 654; 132 Ind. Cas. 721; A I R 1931 P C 143; 33 Bom. L R 1015; (1931) A L J 513; 35 C W N 786; Ind. Rul. (1931) P C 209; 34 L W 76; 54 C L J 1; 12 P L T 683; (1931) M W N 929; 61 M L J 489; 58 I A 254 (P C).

(2) 50 I A 183; 74 Ind. Cas. 747; 21 A L J 554; 4 P L T 447; A I R 1923 P C 128; 1 Pat. L R 345; 2 Pat. 674; 33 M L T 233; 45 M L J 578; 18 L W 728; 25 Bom. L R 1259; 28 C W N 277; 39 C L J 318 (P C).

*Pages of 10 Pat.—[*Ed.*]

way :—

"The question in that case was as to the power of the Board to admit additional documents which the High Court had rejected, and this power is not in any way restricted or governed by the provisions of the Code. If any incidental remarks appearing in this judgment have occasioned any doubt as to the meaning of the rules above referred to, or the conditions under which the discretion of the Appellate Court is to be exercised their Lordships desire to emphasise their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code."

In my opinion it is impossible after this authoritative pronouncement to accede to the prayer of the appellant in the present case. This Court does not find any inherent lacuna on examining the record as a Second Appellate Court nor does it require the proposed evidence to enable it to pronounce judgment.

For these reasons the appeal fails and must be dismissed with costs.

Harries, C. J.—I agree.

D. *Appeal dismissed.*

MADRAS HIGH COURT

City Civil Court Appeal No 39 of 1937

September 6, 1939

WADSWORTH AND VENKATARAMANA RAO, JJ.

M. M. SHAHUL HAMEED MARAKAYAR AND OTHERS—APPELLANTS

versus

Kazi MOHAMMAD HUSSAIN SAHIB AND ANOTHER—RESPONDENTS

Muhammadan Law—Waqf—Mutwalli—Mutwalli *himself* peish imam—*Surrender by him of* mutwalliship *to mosque committee—Committee's power to dismiss him acting as* peish imam—*Absence of* mutwalli—*Power of nomination and appointment of* imam, *by whom to be exercised.*

It is no doubt customary in many mosques for the *mutwalli* to exercise full disciplinary powers over the servants of the mosque. But this power cannot be said to have vested in the *mutwalli* of the mosque, where the *mutwalli* was himself the *peish imam* for, it is absurd to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. Therefore, the surrender by such person of his functions as *mutwalli* to the mosque committee cannot be said to have invested that committee with a power of dismissal over that person which he as *mutwalli* could not have exercised.

In the absence of a *mutwalli* the power of nomination and appointment of an *imam* to a mosque is given to the *waqif's* descendants and the members of his family preferentially to others. If the person appointed by the *waqif* is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the Kazi for the removal of the incompetent servant and the appointment of the person selected by the congregation.

A. against a decree of the Additional City Civil Judge, Madras, in O. S. No. 651 of 1936.

Messrs. *P. Viswanatha Iyer* and *S. K. Ahmed Meeran*, for the Appellants.

Messrs. *C. Srinivasachari* and *C. A. Mohamad Ibrahim*, for the Respondents.

Wadsworth, J.—This appeal arises out of a suit brought by respondent No. 1 for an injunction restraining the defendants (appellants) from interfering with him in performing his services as *peish imam* in the Masjiday Mohmood, Pudupet, Madras. He also prayed for damages. The suit was decreed and the defendants appeal. We are this day passing judgment in a connected appeal (C. C. C. A. No. 35 of 1935) from a suit brought by the present defendants against the present plaintiff for an injunction restraining him from interfering with the defendants' management of the same mosque and from collecting subscriptions in the guise of *mutwalli* of that mosque. It is alleged that the Pudupet mosque was founded by one Ghulam Mohammad in 1849 and has been financed from its inception by public subscriptions. It was founded to serve the needs of the Muhammadans living in the neighbourhood of Pudupet. The first *mutwalli* was the maternal grandfather of the plaintiff. The plaintiff bases his title to the offices of both of *mutwalli* and *peish imam* and what is called a *towliatnama* (Ex. 1) of the year 1887 in which the plaintiff's grandfather purports to assign to the plaintiff the offices of *mutwalli* and *peish imam*. The instrument purports to be attested by Ghulam Mohammad, the original founder of the mosque. The lower Court has given various reasons for rejecting this document as a forgery. Besides those reasons set forth by the learned Judge, there are two circumstances which in our opinion go to confirm this conclusion. One is the improbability that Ghulam Mohammad who founded this mosque in 1849 would have been alive in 1887. There is of course no evidence of his death, but ordinarily the founder of a mosque would be a man of some standing in the community and it is unlikely that in 1849 he was very young. Even if he was in early middle age, it is hardly probable that he would have been alive 38 years later. The more decisive circumstance is the fact that the plaintiff at the time of this *towliatnama* appears to have been only about 12 years old and it is not very probable that the offices of *mutwalli* and *peish imam* would have been conferred upon an imma-

ture boy. The probability, therefore, seems to be that this document is not genuine.

In our opinion, however, this does not seriously affect the plaintiff's case, for it is common ground that the plaintiff did exercise the functions of *mutwalli* and *peish imam* of this mosque without challenge to his title for very many years upto the years 1918, when the leading members of the congregation including the plaintiff himself formed themselves into a registered society for the purpose of managing the affairs of the mosque and raising subscriptions to finance it. It is indubitable that this society known as the Masjiday Mohamood Jamait Managing Committee was in control of the business affairs of the mosque from 1918 until the quarrels started in 1932. During this period it appears that the office of *mutualli* was treated as having lapsed, the function of the *mutwalli* being performed by the committee. The plaintiff, though he ceased to describe himself as the *mutwalli* and ceased to exercise the functions of that office, continued to be one of the two *peish imams* of the mosque and in that capacity he was paid a salary by the committee. He also functioned for a considerable period as the assistant secretary of the committe and received additional emoluments for that office. In 1932 quarrels began and the plaintiff resigned from the committee and repudiated its authority. He also attempted to revive the office of *mutwalli* which he had not in fact exercised for a period of about 14 years. In the connected appeal we have held that the Jamait Committee, whatever be the defects of its original constitution, has prescribed for the right to manage the secular affairs of the mosque and to perform those functions which had hitherto been performed by the *mutwalli* and that it is not open to the present plaintiff to revive the lapsed office of *mutwalli* by virtue of which he claims the right of exercising those functions which have in effect been established as the legitimate functions of the Jamait Committee.

It is contended for the appellants in the present appeal that once their committee is recognized as the legitimate successor of the *mutwalli* with his powers of control over the mosque and its servants, it follows that the committee has the right to dismiss the plaintiff from his office of *peish imam* of the mosque; and that the plaintiff having repudiated the authority of his master, there can be no question as to the propriety of his dismissal. It seems to us that this argument overlooks the weakness of the position of the committee based as it is on prescription. It does not appear that any powers were conferred upon the committee at its inception otherwise than by the general consent of the congregation of the mosque including the plaintiff himself. The nature of the objects with which this committee started its work can be ascertained from its memorandum of association. Quite clearly it was intended firstly to collect subscriptions for the maintanence of the mosque and secondly to pay the expenses of the committee and of the mosque and utilise any balance for religious, educational and charitable purposes connected with the mosque and for the creation of endowments for the mosque. The rules purport to carry out these objects, but do not expressly confer upon the committee, any disciplinary powers. The proceedings of the committee throughout the following years indicate that the committee has exercised a general control over the servants of the mosque including the two *peish imams*, has required that they should not absent themselves without leave, has reproved them for unpunctuality and has paid the wages and when subscriptions were insufficient to meet the wages has decided on the proportionate reductions. There is a record of the removal from service of an acting *muazzin*, but even that is not clearly shown to have been a disciplinary act. Taking the history of this period as shown in the records, it must be conceded that there is no instance of an assertion by the committee of a right to punish the *peish imam*, though there are instances of the exercise of a general supervision over him along with other servants.

It is contended that if the committee has power to supervise and control, it must necessarily have a power of dismissal in case its authority is flouted. It is doubtful whether this proposition is sound. The *peish imam* was certainly not appointed by this committee. Whatever be the origin of the plaintiff's appointment, he had certainly been in unquestioned enjoyment of the office of *peish imam* for very many years before the committee came into being. Although the committee took over the functions hitherto exercised by the *mutwalli*, it never described itself as a *mutwalli* of the mosque and there are obvious difficulties in asserting that the surrender by the plaintiff himself of the functions of *mutwalli* to the committee automatically invested this committee with the power of dismissal of the *peish imam*. Doubtless it is customary in

many mosques for the *mutwalli* to exercise full disciplinary powers over the servants of the mosque. But this power cannot have vested in the *mutwalli* of the suit mosque, for the *mutwalli* was himself the *peish imam* and it is absurd to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. It seems, therefore, necessary to postulate that at the time when the plaintiff was the *mutwalli*, the disciplinary control over him in his capacity of *peish imam* must ultimately have resided elsewhere, whether in the congregation as a whole or in the descendants of the founder or in the Court as representing the *Kazi*. The natural conclusion, therefore, is that the surrender by the plaintiff of his functions as *mutwalli* to the committee cannot have invested that committee with a power of dismissal over the plaintiff, which he as *mutwalli* could not have exercised.

Ameer Ali in his Muhammadan Law (Edn. 4, p. 465) states that in the absence of a *mutwalli* the power of nomination and appointment of an *imam* to a mosque is given to the *waqif's* descendants and the members of his family preferentially to others. At p. 467 it is suggested that if the person appointed by the *waqif* is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the *Kazi* for the removal of the incompetent servant and the appointment of the person selected by the congregation. Now, in this case though the committee has doubtless for many years functioned with the consent and approval of the congregation, it is not constitutionally a representative body acting for the congregation, but an independant self-constituted society owing no formal allegiance to any general body. It cannot, therefore, have any disciplinary powers over the staff of the mosque by the force of Muhammadan Law. Any powers which it has must have been acquired by prescription or by grant. There is no evidence of any valid grant of powers to this committee. The extent of its powers must, therefore, be governed by the extent to which it has established those powers by the exercise of them during the 14 years during which those powers were unquestioned. There having been no acquisition during this period of a power to dismiss a *peish imam* of the mosque, the necessary conclusion is that the committee is not clothed with such a power.

It is contended that the absence of such a power will make the proper control of the mosque impossible. The answer to that contention is that there is now pending a suit for framing a scheme for the proper control of the mosque in which any defects in the system whereunder it is administered can be put right. For the present we are only concerned with the powers of the parties as they stood at the time when these disputes began. Our conclusion must be that the plaintiff was in lawful possession of the office of *peish imam* and was entitled to perform its functions and receive its emoluments and that the defendants were not clothed with any authority to remove him from that office. It follows, therefore, that the dismissal of the plaintiff was without authority and that the plaintiff is entitled to the injunction which he seeks. It is represented that the plaintiff does not press for the nominal damages of Rs. 25 awarded by the trial Court. The decree will, therefore, be modified by the exclusion of the relief of damages. In other respects the appeal is dismissed with costs. We desire to observe that this judgment in no way affects the relation between the committee and the other *peish imam* who is not a party.

N.-S. *Decree modified.*

ALLAHABAD HIGH COURT

Application in F. A. No. 252 of 1940

September 13, 1940

IQBAL AHMAD AND VERMA JJ.

BAIJNATH PRASAD—PLAINTIFF

versus

TEJPAL AND OTHERS—DEFENDANTS

Court Fees Act (VII of 1870), s. 6 (4) (as amended by U. P. Court Fees (Amendment) Act XIX of 1938)—Suit for partition—Point as to deficiency in court-fee raised—Court not following procedure under s. 6 (4) but deciding issue with other issues—Court ordering plaintiffs to make good deficiency and preparation of decree to be deferred till deficiency was made good—Deficiency not made good within time allowed—Appeal preferred styling it as under s. 96, Civil Procedure Code (Act V of 1908), and s. 6 (4), Court Fees Act (VII of 1870)—Appeal, held could not be treated as revision under s. 115, Civil Procedure Code (Act V of 1908), nor as appeal from decree but as appeal from under s. 6 (4).

The necessity of faithfully following the provisions of cls. 2, 3 and 4 of s. 6, Court Fees Act is imperative in order to avoid anomalies.

In a partition suit one of the points raised in defence was that the plaint was insufficiently stamped. The Judge did not follow the procedure enjoined by s. 6 (4), Court Fees Act, and decided the issue as regards the court-fee along with the other issues framed in the case. He held that the

court-fee paid was insufficient and, by the operative portion of his judgment, directed the plaintiff to make good the deficiency in the court-fee and further ordered that the preparation of the decree be deferred till the deficiency in the court-fee was made good. The plaintiff, however, did not pay the deficiency within the time allowed, and filed an appeal styling the same as a first appeal under s. 96, Civil P. C., and s. 6-A, Court Fees Act:

Held, that as the decision of the Court would be appealable to the High Court as a decree, s. 115, Civil P C, could have no application to the case and, therefore, the memorandum of appeal filed by the plaintiff could not be treated as an application in revision. Nor could the appeal be considered as an appeal against a decree because no decree had been prepared in the case. The plaintiff was, however, entitled to assail by appeal the order of the Court below calling upon him to make good the deficiency in the court-fee and the appeal must, therefore, be regarded as an appeal from order in accordance with the provisions of s. 6-A, Court Fees Act.

Mr. *K. L. Misra*, for the Applicant.

Mr. *N. Upadhiya*, for the Opposite Party.

Iqbal Ahmad, J.—This is a report by the taxing officer and arises under the following circumstances. Baijnath Prasad plaintiff-appellant filed a suit for partition in the Court of the Civil Judge of Azamgarh. The suit was contested by the defendant-respondents and one of the points raised in defence was that the plaint was insufficiently stamped. In consequence of this plea raised by the defendants one of the issues raised in the case was whether the court-fee paid was sufficient. In view of the provisions of s. 6 (4), Court Fees Act, it was the duty of the Civil Judge to have decided the question of sufficiency or otherwise of the court-fee paid on the plaint before proceeding to decide the other issues in the case. It however, appears that an assurance was held out by the plaintiff's Counsel that if, while deciding the suit, the Civil Judge found the court-fee to be insufficient the insufficiency in the court-fee will be made good by the plaintiff forthwith. In view of this assurance the learned Civil Judge did not follow the procedure enjoined by s. 6 (4), Court Fees Act, and decided the issue as regards the court-fee along with the other issues framed in the case. In other words, the learned Civil Judge delivered one judgment in the case dealing with the question of the court-fees and with the question of the rights of the parties as regards the subject-matter of the suit. It is needless to observe that this procedure was in flagrant violation of the provisions of s. 6 (4), Court Fees Act, and should not have been followed by the learned Civil Judge. The learned Civil Judge held that the court-fee paid was insufficient and, by the operative portion of his judgment, directed the plaintiff to make good the deficiency in the court-fee and further ordered that the preparation of the decree be deferred till the deficiency in the court-fee was made good. The words used by the Court below were: "The decree to be prepared when the deficiency in court-fee is made good."

The Court below allowed 15 day's time to the plaintiff to make good the deficiency. The plaintiff however did not pay the deficiency within the time allowed, and filed an appeal in this Court styling the same as a first appeal under s. 96, Civil P. C. and s. 6-A, Court Fees Act. He valued his appeal at Rs. 2,.00 and paid a court-fee of Rs. 15. No less than 24 grounds were embodied in the memorandum of appeal but only some of those grounds related to the decision of the Court below on the question of court-fees, and the remaining grounds were with respect to the decision of the Court below as regards the merits of the case. The relief sought by the appeal was that the decree of the Court below be modified and the plaintiff's suit be decreed in full, or such other and further relief be granted to the plaintiff as this Court may think fit. The facts stated above gave rise to the question as to whether the appeal filed in this Court was an appeal against a decree or an appeal against an order or was in fact not an appeal at all and was merely an application in revision. The taxing officer rightly considered that the question raised was beset with difficulty and he accordingly referred the question for decision to us.

It is clear that the memorandum of appeal filed by the plaintiff in this Court cannot be treated as an application in revision for the simple reason that, in accordance with the provisions of s. 115, Civil P. C., an application in revision can be filed in this Court only in cases in which no appeal lies to this Court against the decision of the Court below. In the case under consideration the decision of the Court below will be appealable to this Court as a decree and as such s. 115 can have no application to the case. It is also obvious that the appeal filed by the plaintiff in this Court cannot be considered as an appeal against a decree for the simple reason that no decree has yet been prepared in the case There is however an order passed by the Court below calling upon the plaintiff to make good the deficiency in court-fee, and an appeal

against such an order is allowed by s. 6-A, Court Fees Act. On the facts as they stand the plaintiff is entitled to assail by appeal the order of the Court below calling upon him to make good the deficiency in the court-fee and the appeal filed by the plaintiff must, therefore, be regarded as an appeal from order in accordance with the provisions of s. 6-A, Court Fees Act. In this view of the matter the only grounds that can be properly embodied in the memorandum of appeal are the grounds that question the decision of the Court below on the question of court-fees. The remaining grounds that deal with the merits of the case are superfluous and the Counsel for the appellant must be called upon to strike off the same.

Before parting with this case we desire to draw the attention of the Court below to the imperative necessity of faithfully following the provisions of cls. 2, 3 and 4 of s. 6 Court Fees Act so that anomalies of the description with which we have to deal in the present case may not arise in future.

Order accordingly.

MADRAS HIGH COURT

Second Appeal No, 595 of 1936
November 27, 1939

LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.

YENAMANDRA JAGANNADHAM—PLAINTIFF—APPELLANT

versus

THEERTHALA ADILAKSHMI AND OTHERS—DEFENDANTS—RESPONDENTS

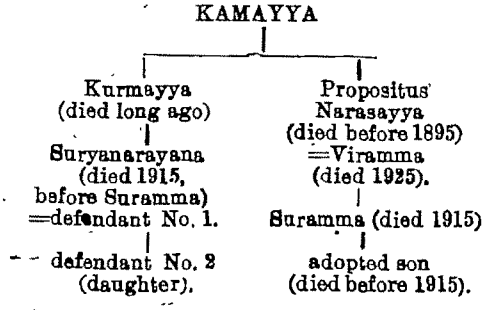
Hindu Law—Inheritance — Madras— Brother's son's daughter.

Under the Hindu Law as administered in the Presidency of Madras female *bandhus* are entitled to come in after the male *bandhus* are exhausted, provided of course they satisfy the other conditions required by law. Consequently a brother's son's daughter is entitled to inherit. *Kutti Ammal* v. *Radhakrishna* (3), relied on.

S. A. against the decree of the Sub-Judge, Vizagapatam, in A. S. No. 197 of 1934.

Order of Reference

Wadsworth, J.—It seem to me that this appeal, which involves a decision of the question whether a brother's son's daughter is an heir under the Mitakshara law as administered in Madras, should be posted before a Bench, there being no direct authority so far as I am aware. The following genealogical tree shows the position :


KAMAYYA
Kurmayya (died long ago)
Suryanarayana (died 1915, before Suramma) =defendant No. 1.
defendant No. 2 (daughter).
Propositus Narasayya (died before 1895) =Viramma (died 1925).
Suramma (died 1915)
adopted son (died before 1915).

The plaintiff (appellant) sues for possession of property formerly enjoyed by Viramma as heir of her husband Narasayya Plaintiff (a relative of Viramma) put forward a title based on the will of Suramma (to whom Viramma had gifted the properties) and on a surrender by the presumptive reversioner Suryanarayana, who died long before the reversion opened. Quite obviously, this title will not prevail against the right of the nearest reversioner to Narasayya's estate. The trial Court found that plaintiff was in possession at any rate during the lifetime of Viramma, that defendants Nos. 1 and 2 were not reversioners of Narasayya and that plaintiff was entitled to a decree. The Subordinate Judge abstained from giving any finding on the two additional issues (relating to the possession of the plaintiff and the heirship of the defendants Nos. 1 and 2) framed by the District Judge before remand but dismissed the suit on the strength of his conclusion that plaintiff had not proved title or adverse possession. He appears to have overlooked the fact that plaintiff is entitled to claim a decree on the strength of his possessory title if defendants Nos. 1 and 2 are trespassers. With reference to the heirship of defendant No. 2, he refers to a statement that there are nearer heirs, *viz.*, the sister of Suryanarayana and her son, which statement so far as I can find, receives no support in the evidence unless it can be deemed that a question asked in cross-examination of P. W. No. 2 which elicited the reply, "I do not know," can be deemed to be evidence. Since the heirship of defendant No. 2 was in issue and there is no evidence of nearer heirs, it must be taken that they do not exist, especially in view of the fact that plaintiff pleaded that there were no heirs at all and defendants Nos. 1 and 2 pleaded that they were the nearest heirs. If neither of defendants Nos. 1 and 2 is found to have

title, a remand will be necessary to the lower Appellate Court for a finding on the second additional issue.

It cannot, I think, be contended that widow of a brother's son is an heir. She has no community of blood with the propositus and cannot be a *bhinnagotra sapinda*. The position of the brother's son's daughter, defendant No. 2, is however different. She is certainly a *bhinnagotra sapinda* or *bandhu* within the five degrees. On the authorities, she would be excluded in any male *bandhu* entitled to succeed. But in the absence of a male heir, can it be said that the brother's son's daughter will not be entitled to inherit to her great uncle? The authorities are summarized in Mayne's Hindu Law, Edn. 10, paras. 509 and 510. The learned author quotes *Lakshmanammal* v. *Thiruvengada* (1) and *Venkatasubramaniam Chetti* v. *Thayarammal* (2), and opines that the reasoning of these judgments is unassailable and applies to all descendants, ascendants and collaterals within five degrees. Hitherto, the rights of the son's daughter, the daughter's daughter and the sister have been confirmed by legislation while the rights of the father's sister, brother's daughter and sister's daughter have been recognized by Madras decisions, I do not think that the right of the brother's son's daughter to succeed has ever been expressly recognized or negatived by a Madras authority. But the following propositions seem to be established:

(1) A brother's son's daughter is a *bandhu* within the five degrees; (2) a female *bandhu* is not disentitled to inherit (in the absence of a male heir) merely by reason of her sex; (3) the heirship of female *bandhus* is not limited to those mentioned in express texts but is governed by the propinquity of their blood relationship. Granted the truth of these propositions, it seems to follow that in the absence of male heirs a brother's son's daughter would be entitled to inherit. But the subject being uncovered by authority and the decision being one likely to affect the position of other female *bandhus* of like degree, it seems to me desirable that the appeal should be placed before a Bench. The appellant should furnish typed translations of the pleadings and typed copies of the depositions which have not been printed for the use of the Bench.

(1) 5 M 241.
(2) 21 M 263.

Messrs. *G. Lakshmanna* and *G. Chandrasekhara Sastry*, for the Appellant.

Mr. *B. Jagannadha Das*, for the Respondents.

Krishnaswami Ayyangar, J.—This is a second appeal which came before Wadsworth, J. in the first instance. The question raised in it related to the right of a brother's son's daughter to inherit under the Hindu Law. The precise question is not covered by authority in this presidency and for that reason the learned Judge has referred the point for consideration by a Bench. The appellant was the plaintiff in the trial Court. He instituted the suit for the recovery of possession of property which appertained to the estate of one Narasayya who died some time before 1895. He was succeeded by his widow, Viramma, who in 1895 entered into an arrangement with the next revereioner Suryanarayana who was her husband's brother's son. By that arrangement, Suryanarayana in consideration of a sum of Rs. 100 agreed to Viramma holding the estate as absolute owner—a transaction which is admittedly invalid under Hindu Law. Viramma having thus secured, as she probably thought, a valid right to dispose of the estate, made a gift of the property to her daughter Suramma in 1908. The daughter died in 1915 having in her turn purported to bequeath the property in favour of the appellant in this second appeal. The appellant's case thus rests on the arrangement of 1895, which is totally void—a point which is not disputed. The appellant's case is that he took peaceful possession of the property under the will and continued to enjoy the property undisturbed till 1925. That was the year in which Viramma died. After her death, respondent No. 1, who is Suryanarayana's widow and respondent No. 2, his daughter, dispossessed him of the property. The District Munsif decreed the suit. On appeal by the respondents, the District Judge allowed the appeal holding that respondent No. 2 was entitled to retain possession of the property on the ground that she had succeeded to the estate as the next heir of Narasayya. It is admitted that if she is an heir under the Hindu Law, the appellant must fail, as his rights based on mere possession cannot prevail against those of the true owner. The only question then is whether respondent No. 2 is not the true owner, and whether she has not succeeded to the estate of Narasayya in the events which have happened.

Respondent No. 2 is the daughter of a brother's son of the propositus, and is only four degrees removed from Narasayya's father, the common ancestor. She is thus within the prescribed limit of proximity, being less than seven degrees in ascent and descent from the last male owner. Further the test of mutuality is also satisfied as she and Narasayya are *sapindas* of each other in the Mitakshara sense of the term. Her right to succeed to the estate cannot be questioned except on the ground that being a female she is not within the class of heritable *bandhus* But it is now too late in the day to question the proposition that under the Hindu Law as administered in this presidency, female *bandhus* are entitled to come in after the male *bandhus* are exhausted, provided of course they satisfy the other conditions required by law. A series of decisions of this Court commencing from *Kutti Ammal* v. *Radhakrishna* (3), have established their right to rank as heirs under Hindu Law. It is true that there has been no direct decision relating to the right of a brother's son's daughter to inherit. But this can make very little difference, once it is established, as we hold it to be, that females are not to be disqualified by reason of their sex only. This proposition is firmly established for such a length of time that it is unnecessary to discuss it. The second appeal therefore fails and must be dismissed with costs.

N.D. *Appeal dismissed.*

(3) 8 M H C R 88.

LAHORE HIGH COURT

Civil Revision No. 280 of 1940
October 4, 1940
BHIDE, J.

Sm. LAL DEVI *w/o* PYARE LAL KHOSLA AND OTHERS—DEFENDANTS—PETITIONERS

versus

NATHU RAM—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Appeal against dismissal of suit—Appellate Court after dismissal of appeal, if can allow plaintiff to withdraw suit with permission to file fresh one.

After dismissing an appeal preferred against the dismissal of a suit, the Appellate Court has no jurisdiction to allow the plaintiff to withdraw the suit with permission to file a fresh suit. 91 Ind. Cas. 280 (1) and 178 Ind. Cas. 319 (2), relied on.

C. R. from an order of the Senior Sub-Judge, Lahore, dated January 4, 1940.

Dewan *Mehr Chand*, for the Petitioners.

Mr. *Roop Chand*, for the Respondent.

Order.—This is a petition for revision of the order of the Senior Subordinate Judge, Lahore, allowing the plaitiff's suit to be withdrawn under O. XXIII, r. 1, Civil P. C. It appears that the request for permission to withdraw the suit was made to the learned Senior Subordinate Judge when the appeal came up before him. He recorded the statements of the Counsel of the parties and then passed the order which concludes as follows:

"Hence the appeal is dismissed with costs. The plaintiff is granted permission under O. XXIII, r. 1, Civil P. C., to withdraw the suit with liberty to institute a fresh suit in respect of the subject-matter of such suit."

The learned Counsel for the petitioner has urged that the learned Senior Subordinate Judge has no jurisdiction to allow the suit to be withdrawn after he had passed the order dismissing the appeal with costs. Secondly, it was contended that the learned Senior Subordinate Judge had no power to allow withdrawal of the suit without being satisfied that there were reasons for permitting the suit to be withdrawn according to the provisions of O. XXIII, r. 1, Civil P. C. The learned Counsel for the respondent urged that the suit was allowed to be withdrawn with the consent of the parties. This is, however, not clear from the record. The learned Counsel for the petitioner, who appeared in the lower Court, simply stated that he had no objection to the appeal being withdrawn. He said nothing as regards the permission for the suit being withdrawn. The contention of the learned Counsel for the petitioner that the learned Senior Subordinate Judge had no jurisdiction to allow the suit to be withdrawn after dismissing the appeal with costs is supported by *Fateh Singh* v. *Jagannath Bakhsh* (1) and *Shahu* v. *Mst. Rahmon* (2). The provisions of O. XXIII, r. 1, Civil P. C., also require that the Judge should be satisfied about the conditions justifying withdrawal of the suit under that rule before granting permission. The learned Senior Subordinate Judge does not appear to have considered this aspect of the matter. I accordingly, accept this petition for revision and setting aside

(1) 47 A 158; 91 Ind. Cas. 280; A I R 1925 P C 55; 27 O C 334; 52 I A 100; 48 M L J 64; 2 O W N 2?; 12 O L J 117; L R 6 A P C 50; 27 Bom. L R 725; 29 C W N 749; 23 A L J 739; 22 L W 58 (P C).

(2) A I R 1938 Lah. 52; 178 Ind Cas. 319; 11 R L 444.

the order of the learned Senior Subordinate Judge, remand the case to him for disposal of the application for permission to withdraw the suit under O. XXIII, r. 1, Civil P. C., in accordance with the provisions of that rule. Costs will follow final decision. Parties to appear before the learned Senior Subordinate Judge (Lahore) on October 21, 1940.

S. *Petition allowed.*

MADRAS HIGH COURT

Appeal No. 99 of 1935
April 27, 1939
SOMAYYA, J.

P. S. AR. AR. ARUNACHALAM CHETTIAR BY AGENT SIVARAMAN CHETTIAR—APPELLANT

versus

OFFICIAL RECEIVER, COIMBATORE—RESPONDENT

***Provincial Insolvency Act** (V of 1920), s. 4—Interpretation—Official Receiver party to civil proceedings as representative of estate—Decision against him—Decision, whether can be re-opened by application under s. 4—Proper remedy—Insolvency—Official Receiver—His position as regards ordinary Civil Courts—Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Application by Receiver under s 52, Provincial Insolvency Act (V of 1920)—Sale stopped and execution struck off by executing Court—Attachment, if ceases.*

It is left to the discretion of the Court to entertain a petition under s. 4, Prov. Insol. Act. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under s 4. The procedure under s. 4 is only a substitute for a regular suit. The prior judgments against an insolvent are liable to be re-opened in the Insolvency Court at the instance of the Official Receiver only in cases in which before insolvency, judgments were obtained against debtor and they are sought to be re-opened on the daughter's adjudication to see whether they were binding on the Official Receiver as representing the general body of creditors. But where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate, he is not entitled to re-open an adverse decision in an application under s. 4. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. [p. 140, col. 2; p. 141, col. 1]

The Official Receiver so far as the ordinary Civil Courts are concerned is a suitor and a suitor only, He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter-affidavit he ought to do it in the proper form. [p. 140, col. 1.]

Where as a result of an application by the Official Receiver under s. 52, Prov. Insol. Act, the executing Court stops a sale in execution of a decree and strikes off the execution petition the dismissal cannot be said to be due to default of the decree-holder and hence the attachment of property before judgment does not cease.

A. against the appellate order of the District Court, Coimbatore, dated October 22, 1934.

Mr. *A. C. Sampath Ayyangar*, for the Appellant.

Mr. *K. V. Ramachandra Ayyar*, for the Respondent.

Judgment—The appellant in this second appeal is a creditor who filed O. S. No. 1375 of 1926 on the file of the District Munsif of Tirupur against one Konappa Naicken and his four sons. Konappa Naicken was defendant No. 1 and his sons were defendants Nos. 2 to 5. An application for attachment before judgment was ordered on October 14, 1926 and the attachment was duly effected. The suit was decreed on June 7, 1927. Thereafter the father, defendant No. 1, filed I. P. No. 157 of 1927 on July 14, 1927 and he was adjudicated on September 24, 1927. The decree-holder applied for execution of his decree in E. P. No. 2226 of 1929 on July 1, 1929. By that date the father was dead and the sons alone were added as parties; and the Official Receiver who had been appointed in I. P. No. 157 of 1927 was not made a party. Before this execution application came on for final orders, the Official Receiver sold the entire property including the son's shares on Febrpary 6, 1930 and there was a sum of Rs. 2,510 representing the net sale proceeds of those properties. On June 17, 1930, the Official Receiver wrote to the District Munsif of Tirupur who was executing the decree passed by him in O. S. No. 1375 of 1926 informing him that the father had been adjudicated insolvent and requesting that the sale which was to be held the next day or the day after be stopped under s. 52, Prov. Insol. Act. There was also an application filed by the Official Receiver for that purpose in E. A. No. 814 of 1930. On this an order was passed: "Sale stopped. Receiver will take possession." On June 20, 1930 the District Munisf passed an order on the execution Application No. 2226 of 1929. The order was:

"Sale stopped as per order on E. A. No. 814 of 1930, a petition by the Official Receiver, Coimbatore under s. 52 of Act V of 1920. This petition is struck off."

Then the decree-holder filed Application No. 1743 of 1931 in the District Munsif's Court requesting the Court to

direct the Official Receiver to send four-fifths of the amounts realized by him representing the four shares of the sons of Konappa on the ground that they were not adjudicated insolvents, that their share of the sale proceeds cannot be dealt with by the Official Receiver and that the decree-holder was entitled to proceed against the same and have it credited towards his decree. Notice of this application was issued to the Official Receiver. He sent a letter which may be treated as a counter-affidavit, which according to the respondent contained information that the proceeds had already been distributed by him under orders of the Insolvency Court and that therefore the amount cannot be sent over. Not being satisfied with this statement the District Munsif adjourned the matter for arguments first to September 25, then to the 30th, heard arguments and reserved orders. On October 8, he made an order that the Official Receiver was not entitled to deal with the shares of the four sons in the amount realized by him by sale or the properties that it was only the father's share that could be so dealt with by the Official Receiver and made an order directing the Official Receiver to send amount representing the four-fifths share of the sons to his Court. The District Munsif referred to a decision of this Court reported in *Official Receiver, Coimbatore* v. *Arunachalam Chettiar* (1), in support of his order. After this order was passed the Official Receiver approached the Insolvency Court for directions as to what he should do and it is said that the Insolvency Court asked him to write to the District Munsif requesting him to direct the decree-holder to go to the Insolvency Court to have it decided by that Court whether he was entitled to the amount in question. The decree-holder evidently did not respect this advice. He took the course of moving the District Munsif to commit the Official Receiver for contempt for disobedience of the order of October 8, 1931 and filed E. A. No. 1748 of 1932. Having come to know of this the application out of which this appeal arises was filed in the Insolvency Court on March 15, 1933 under ss. 4 and 5, Prov. Insol. Act. In this application the Official Receiver asked the Court to adjudicate upon the question whether the decree-holder is entitled to the sum representing the four-fifths share of the insolvent's sons. The creditor filed a counter-affidavit stating amongst other things:

"Further, the Official Reciever being a party to the execution proceedings is bound by the orders passed in execution. If the Official Receiver felt aggrieved his remedy was by way of appeal. It is respectfully submitted that the Insolvency Court is not entitled to vary or modify orders duly passed against the Official Receiver as a party."

It should be mentioned here that the Official Receiver in para. 7 of his petition referred to the Application No. 1743 of 1931 and to the order of the District Munsif's Court that the money should be sent to that Court. It is this order that he complains about in his petition and in answer to this the decree-holder replied in para. 8 of the counter-affidavit. The learned Subordinate Judge held that the Official Receiver is entitled to the declaration that the sale proceeds of the sons' shares of the insolvent are liable to be distributed among the creditors and granted the application of the Official Receiver. On appeal the District Judge confirmed this order. Hence this appeal by the creditor.

It is urged by learned Counsel for the respondent that when the father's properties were sold on February 6, 1930 the Official Receiver took the permission of the Insolvency Court and distributed the amount among the creditors, that the decree-holder approached the Insolvency Court at a later stage with a request that he should be paid a sum of Rs. 500 and odd which represented the costs of his suit and execution and that on that application the Insolvency Court made an order as prayed for by the decree-holder. It is said that at the time the decree-holder did not tell the Insolvency Court that he was entitled to four-fifths share of the sons and that there was an implied representation in the petition and in the affidavit that the balance after deducting Rs. 500 and odd claimed by him may be distributed by the Official Receiver among all the creditors. It is therefore urged that the creditor is now estopped from claiming the four-fifths share he not having put forward this objection in the Insolvency Court at the time when he wanted preferential payment in respect of Rs. 500 and odd which represented the costs of his suit and execution as provided by s. 52, Prov. Insol. Act.

I propose to deal first with the question whether the order of the District Munsif in E. P. No. 1743 of 1931, dated October 8, 1931 is liable to be called in question in the Insolvency Court as was

(1) A I R 1931 Mad. 118; 130 Ind. Cas. 479; Ind. Rul (1931) Mad. 399; 33 L W 607.

done in this case. Though the Subordinate Judge raised the question of the Insolvency Court's jurisdiction to entertain this application as point No. 5 he simply referred to s. 4 of the Act but did not deal with the question whether the order on I. A. No. 1743 of 1931 of the District Munsif's Court, Tirupur, had not become final and conclusive. The District Judge did not deal with this question at all. It will be seen that the District Munsif was acting prefectly within his jurisdiction when he was executing his decree in O. S. No. 1375 of 1926. In the course of that execution an application was made to him in E. P. No. 1743 of 1931 to send for certain moneys representing four-fifths share of the sons who were defendants Nos. 2 to 5 from the Official Receiver. The prayer was that the Official Receiver should be directed to deposit to the credit of that suit the sum representing the shares of the four sons defendants Nos. 2 to 5. Notice of this application was ordered to the Official Receiver who was made a party to that application. Presumably as the learned Advocate for the respondent tells me, the Official Receiver mentioned all that had taken place before in the letter which he sent to the District Munsif and urged that the conduct of the creditor was such that he was not entitled to an order that the four-fifths share of the sale proceeds should be paid to the credit of his suit by the Official Receiver. It will be noticed that on receiving this letter which the Official Receiver sent when notice of this application went to him, the District Munsif was not satisfied with the position urged by the Official Receiver and therefore, posted the matter for arguments. It was adjourned two or three times, arguments were heard and orders were reserved and the order was passed on October 8, 1931. The Official Receiver in the first place had no right to write a letter to the District Munsif when he got the notice on E. P. No. 1743 of 1931 asking him to show cause why he should not be directed to pay the four-fifths share of defendants Nos. 2 to 5 into Court.

The Official Receiver so far as the ordinary Civil Courts are concerned is a suitor and a suitor only. He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter-affidavit he ought to do it in the proper form. So far as suits in the ordinary Courts are concerned, he is in no better position than an ordinary suitor. We may take it that in this case he probable thought that the letter would take the place of the counter-affidavit. When after arguments were heard and the District Munsif passed the order on October 8, 1931 it was his duty to take up the matter in appeal in the regular course if he was dissatisfied with the order. He did not do it, there was no appeal and the order became final. I do not see what right he had to go to the Insolvency Court for directions; if he sought advice and such advice was given and that advice turns out to be wrong, he has himself to think. In this case the application was filed under ss. 4 and 5, Prov. Insol. Act. The procedure under s. 4 of the Act is only a substitute for a regular suit. When the Insolvency Court feels that the matter might be speedily adjudicated upon by the Insolvency Court itself, the Court has jurisdiction to deal with the matter relating to title and other questions referred to in s. 4 of the Act. It is obvious that it is left to the discretion of the Court to entertain a petition under s. 4 of the Act, which is a substitute for the ordinary proceeding in a Civil Court. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under s. 4, Prov. Insol. Act. In that proceeding he would be bound by the same rules and by the same conditions by which he would be bound if he had agitated the matter in a regular suit. If in this case the Official Receiver had filed an ordinary suit in Civil Court objecting to the order of the District Munsif in E. P. No. 1743 of 1931 he would have been immediately met with the plea that his remedy was to take up the matter in appeal and not to file a separate suit. I do not see how he can escape that effect by approaching the Insolvency Court under s. 4 of the Act.

My attention has been drawn by learned Counsel for the respondent to the fact that prior judgments against an insolvent are liable to be re-opened in the Insolvency Court at the instance of the Official Receiver in certain circumstances. That is no doubt true, but they are cases in which before insolvency, judgments were obtained against debtor and they are sought to be re-opened on the debtor's adjudication to see whether they were binding

on the Official Receiver as representing the general body of creditors. But where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate, he is not entitled to re-open an adverse decision in an application under s. 4, Prov. Insol. Act. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. I therefore hold that the order on E. P. No. 1743 of 1931, dated October 8, 1931, was conclusive and that the Insolvency Court cannot go behind that order and entertain an application of this kind.

As regard the conduct of the decree-holder in approaching the Insolvency Court on which much stress was placed by the respondent it will be noticed that in the application which he filed for being paid the sum of Rs. 500 odd in the first instance, there is no express mention made that the rest of it may be distributed among the creditors. He only said that until the sum of Rs. 500 was paid the distribution should be held up. He did not receive any dividend in the Insolvency Court. He only got Rs. 500 odd which the Court adjudged he was entitled to in preference to other creditors So far as the initial order of the Insolvency Court to distribute the moneys to the various creditors is concerned, I do not see how it is binding on the creditor because it is not alleged that it was passed after notice to him.

Then as regards the order that was passed on the creditor's application for preferential payment of Rs. 500 odd, which is I. A. No. 372 of 1931, the order says :

"I therefore direct the official Receiver to pay the petitioner the amount of his charges and declare a dividend on the balance alone and distribute the same."

This order does not mean that he was authorized to distribute in any manner which is not warranted by law. No adjudication was made that the creditor was not entitled to any portion of the balance. Further, all these questions ought to have been brought before the District Munsif in E. P. No. 1743 of 1931 and Mr. K. V. Ramachandra Ayyar, the learned Advocate for the respondent, tells me that they were brought to the notice of the District Munsif in the letter which the Official Receiver wrote in reply to the notice of the said application. It is presumably after being appraised of this situation that the District Munsif felt some difficulty and posted the matter for arguments. The District Munsif's attention was evidently directed to the decision of this Court in *Official Receiver Coimbatore* v. *Arunachalam Chettiar* (1), and the District Munsif rightly or wrongly passed the order that he did on October 8, 1931. If the District Munsif's order was wrong that should have been corrected in appeal. The Subordinate Judge and the District Judge say that the attachment effected in execution of the appellant's decree ceased when on June 20, 1930, the District Munsif struck off the execution petition. What happened was that on the Official Receiver's letter appraising the executing Court that defendant No. 1 had been adjudged an insolvent and that the sale advertised should be stopped as per s. 52, Prov. Insol. Act, the District Munsif passed the order on June 17, 1930, "Letter of Official Receiver. Sale stopped. Receiver will take possession." This was passed on Official Receiver's application I. A. No. 814 of 1930. Then the execution petition was taken up on June 20, 1930. On that day the Court said :

"Sale stopped as per order an E. A. No. 814 of 1930 a petition by the Official Receiver, Coimbatore, under s. 52 of Act V of 1920. This petition is struck off."

This is held to be a dismissal of the execution petition for default of the decree-holder on the ground that the decree-holder did not implead the Official Receiver as representing defendant No. 1 and that the attachment ceased. If the Official Receiver was not made a party, it was only a ground for dismissing the execution petition against defendant No. 1 or against Official Receiver as representing defendant No. 1, but not for dismissing the entire execution petition against defendants Nos. 2 to 4 as well. The District Munsif himself did not purport to dismiss or to strike off the execution petition on that ground. He did so on the stated ground that on E. A. No. 814 of 1930, the sale had been stopped. It is not open to the Courts now to find that the execution petition was dismissed for default of the decree holder when in fact the executing Court gave another reason in its order striking off the execution petition. As pointed above there was no default of the decree-holder as regards defendants Nos. 2 to 5 ; and the execution petition might well have proceeded against them. Further,

this again is a point that should have been urged in E. A. No. 1743 of 1931 before the executing Court. Whether the Official Receiver's sale was a valid sale of the sons' interest as well, whether the creditor was bound by prior orders of the Insolvency Court or of the executing Court and whether he was estopped from claiming the relief which he sought in E. A. No. 1743 of 1931 are all matters which should have been urged in that application. And if the executing Court passed an order adverse to the Official Receiver, the matter should have been rectified on appeal.

The question was expressly raised in the counter-affidavit of the appellant and he urged that in view of the District Munsif's order on E. A. No. 1743 of 1931 which had become final, the Insolvency Court had no jurisdiction to entertain the petition. The Subordinate Judge raised the question of jurisdiction, presumably on para. 8 of the appellant's counter-affidavit. Having raised the question, he did not at all deal with this question whether the Official Receiver was not bound by the order on E. A. No. 1743 of 1931. The District Judge also does not deal with this question. I reverse the decisions of both the lower Courts and dismiss the petition with costs throughout.

N.-S. *Appeal allowed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 57 of 1940

November 21, 1940

AGARWALA, J.

LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE SOCIETY—

APPELLANT

versus

DOMI RAM CHAUDHARY—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 80—Co-operative society in liquidation—Liquidator appointed under Bihar and Orissa Co-operative Societies Act (VI of 1935)—Plaintiff's suit against him claiming that he being agriculturist his house could not be attached—Notice under s. 80, if essential—Bihar and Orissa Co-operative Societies Act (VI of 1935), s. 44 (3) (a), 57 (2)—Award by Registrar—Liquidator taking proceedings on award—Plaintiff aggrieved—Suit by him without sanction of Registrar, maintainability.

Section 80 Civil P. C., bars the institution of a suit unless notice has been given only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under s. 80. For instance, when an Official Assignee or a Receiver is impleaded in a suit to realise a charge on the property of the insolvent which is vested in him, and no act or omission on the part of the Receiver is alleged, notice is not necessary where no relief is claimed against the liquidator of a co-operative society, the object of the plaintiff in the suit being to obtain a decision as to whether his house is liable to be attached. He being an agriculturist no notice under s. 80 is required, assuming that the liquidator appointed under the Bihar and Orissa Co-operative Societies Act is a public servant within the meaning of the section. 58 Ind. Cas. 411 (1) and 182 Ind. Cas 514 (3), dissented from, 130 Ind. Cas. 903 (2), referred to.

Where the liquidator was empowered by s. 44 (3) (*a*), Bihar and Orissa Co-operative Societies Act to take proceedings to execute the award, and the plaintiff, being aggrieved by the liquidator's action in taking such proceedings failed to apply to the Registrar to interfere with the liquidator's act or to grant leave for the institution of a suit under s. 57 (2) and he instituted a suit without asking the Registrar to exercise his powers of revision or to grant leave for the institution of the suit :

Held, that the suit must fail in the absence of the Registrar's sanction for its institution.

A. from a decision of the Subordinate Judge of 1st Court, Gaya, dated August 10, 1939.

Mr. *K. Dayal*, for the Appellant.

Mr. *Ram Nandan Prasad*, for the Respondent.

Judgment.—The plaintiff-respondent is a member of the Nawadah Bazar Co-operative Society in liquidation. The Registrar of Co-operative Societies made an award against him in respect of Rs. 1,200 and odd. The liquidator thereupon took proceedings under the Bihar and Orissa Public Demands Recovery Act for realisation of this amount and the Certificate Officer has attached a house belonging to the plaintiff. The plaintiff objected to the attachment on two grounds. First, on the ground that the amount claimed from him is not due and secondly on the ground that he was an agriculturist and that consequently the house was exempt from attachment under s. 18 of the Act. The objections were overruled. The plaintiff has, therefore, instituted the present suit to restrain the liquidator from selling the house and to obtain a release of the house from attachment. The plaintiff's case was that he borrowed Rs. 290 from the Society and that in respect of this debt Rs. 214 was still due from him but he denied that anything more was due from him. He alleges that he did approach the Society for a further loan of Rs. 600

and that the Secretary of the Society induced him to sign an acknowledgment for the money in anticipation of the loan being granted but that in fact it was never granted. He averred that the Secretary had fraudulently made entries in the books to evidence the alleged loan of Rs. 600. The defendant denied the alleged fraud and pleaded that the suit was not maintainable ; the plaintiff's allegation that he was an agriculturist was also denied. Both the Courts below have found that there was no fraud. The first Court held that s. 46 of the Public Demands Recovery Act was a bar to the maintainability of the suit. The Appellate Court, however, has disagreed with that view and, holding that the plaintiff is an agriculturist, has decreed the suit.

In this appeal by the defendant-appellant the first contention is that the suit is barrad by s 80 of the Civil P. C. for want of notice, it being contended that the liquidator of the Society is a public officer within the meaning of that section. In *Anna Laticia DeSilva* v. *Govind Balvant Parashare* (1) a Receiver appointed under the Prov. Insol. Act was held to be a public officer within the meaning of s. 80 of the Civil P. C. and a similar view was taken of a Receiver appointed in a civil suit, in *Prasaddas Sen* v. *K. S. Bonnerjee* (2). In Liquidator of Society *Sangakheda Kalan Co-operative Bank, Hoshangabad* v. *Syodhyaprasad Shiamlal* (3), Pollock, J, sitting singly, held that a liquidator appointed by the Registrar under s. 42 (1) of the Co-operative Socities Act, (II of 1912) is a public officer. Assuming that the liquidator appointed under the Bihar and Orissa Co-operetive Societies Act (VI of 1935) is a public servant within the meaning of s. 80 of the Civil P. C. that alone is not sufficient to decide the question whether the present suit is maintainable or not without notice. Section 80 bars the institution of a suit unless notice has been given only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under s. 80. For instance, when an Official Assignee or a Receiver is impleaded in a suit to realise a charge on the property of the insolvent which is vested in him, and no act or omission on the part of the Receiver is alleged, notice is not necessary *see Skippers & Co., Ltd.* v. *E. V. David* (4). In the present suit no relief is claimed against the liquidator of the Society. The object of the plaintiff in the suit is to obtain a decision as to whether his house is liable to be attached, he being an agriculturist as has been found by the Court of Appeal below. The facts in the Nagpur case to which I have referred were somewhat similar to those of the present case. Tnere the Registrar had issued an award against one Ramcharan for a debt due by the latter to the Co-operative Society of which he was a member, and in execution of the award the liquidator attached a house. Two other persons objected to the attachment on the ground that the house belonged to them. The objections were overruled and they instituted a suit under O. XXI, r. 63, of the Civil P. C. to establish their title. No notice having been served on the liquidator it was held that the suit could not be maintained. In the Bombay case referred to above the defendant had been appointed a Receiver in an insolvency matter. The plaintiff brought a suit out of which the appeal arose for a declaration that the property belonged to her and not to the insolvent. The Court held that since the Receiver was appointed under the Prov. Insol Act he became a public officer and was protected by s. 80 of the Civil P. C. against any plaintiff who filed a suit against him with regard to any act done by him as such Receiver without giving the requisite notice. With great respect to the learned Judges who decided that case I am unable to find what act it was that the Receiver had done or purported to do in his official capacity. The true scope of s. 80 is best illustrated by the Calcutta case to which I have referred. There the Official Receiver of the High Court had been appointed in a civil suit to act as a Receiver. A suit was instituted against him claiming damages for wilful default and neglect in his duty as Receiver and it was held that the suit could not proceed in the absence of notice under s. 80. In my opinion, the present suit is not against the Receiver in respect of any act done or purporting to be done by him in his

(1) 44 B 895; 58 Ind. Cas. 411; 22 Bom. L R 987.

(2) 57 C 1127; 130 Ind. Cas. 903; A I R 1931 Cal. 61; Ind. Rul. (1931) Cal. 423.

(3) A I R 1939 Nag. 232; 182 Ind. Cas. 514; 1939 N L J 215; 12 R N 8.

(4) 48 A 821; 99 Ind. Cas. 138; 24 A L J 1067; A I R 1927 All. 132.

official capacity requiring the service of notice under s. 80.

The next objection of the maintainability of the suit was based on sub-s. (2) of s. 57 of the Bihar and Orissa Co-operative Societies Act. That sub-section provides "while a society is in liquidation no suit .....shall be proceeded with or instituted against the liquidator as such or against the Society or any member thereof on any matter touching the affair of the Society, except by leave of the Registrar and subject to such terms as he may impose s. 44 (3) (*a*) empowers a liquidator to institute and defend suits and other legal proceedings on behalf of the Society by his name or office and cl. (*b*) empowers him to determine and realise all sums due to the Society from any person. By the opening words of the sub-section, however, the powers of the liquidator are made subject to the power of control and revision of the Registrar of Co-operative Societies and sub-s. (6) provides that the orders of the Registrar in revision, if any, shall be final. Section 56 empowers a Registrar on application or of his own motion to revise any order passed by a person exercising the powers of a Registrar or by a liquidator under s. 44. The result of these various provisions appears to be, in their application to the facts of the present case, that the liquidator was empowered by s. 44 (3) (*a*) to take proceedings to execute the award, and the plaintiff, being aggrieved by the liquidator's action in taking such proceedings failed to apply to the Registrar to interfere with the liquidator's act or to grant leave for the institution of a suit under s. 57 (2). He instituted a suit without asking the Registrar to exercise his powers of revision or could not or to grant leave for the institution of the suit. In my opinion, he was not entitled to do so and the suit must fail in the absence of the Registrar's sanction for its institution.

I would, therefore, allow this appeal and set aside the decree of the Court below. The appellant is entitled to his costs throughout.

Leave to appeal under the Letters Patent is granted.

D. *Appeal allowed.*

CALCUTTA HIGH COURT

Appeal No. 223 of 1937

April 18, 1940

R. C. MITTER AND ROXBURGH, JJ.

Smt. JARIMON KHATOON (CHOWDHURANI)—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE AND ANOTHER—DEFENDANTS—RESPONDENTS

***Court Fees Act** (VII of 1870, as amended in Bengal in 1935), ss. 12, 8-B (3), 8-C—No question as to class of suit—Valuation of Court of first instance is final—Deficit court-fee not paid within time fixed—Proper order to be passed—S. 8-C, applicability.*

Section 12, Court Fees Act has no application when the question for decision is as to the class under which a suit fell and not merely of valuation in that class. If there is a question of valuation, there being no question as to the class in which the suit fell, the valuation made by the Court of first instance is final. 167 Ind. Cas 963 (7), referred to, 5 Ind. Cas. 18 (8), not approved, *Omorao Mirza* v. *Mary Jones* (9), explained, *H. C. Studd* v. *Mati Mahto* (10), distinguished.

Proper order for the Court to pass, when the deficit court-fee is not paid within time fixed by the Court, is an order for dismissal under the provisions of s. 8-B (3), Court Fees Act, and not an order rejecting the plaint under the provisions of O. VII, r. 11, Civil P. C.

Section 8-C, Court Fees Act, is inapplicable to a case falling within s. 7 (*iv*), cl. (*c*).

[Case-law relied on]

A. from original decree of the Sub-Judge, First Court, Chittagong, dated April 8, 1937.

Messrs. *Krishna Kamal Moitra* and *Rohini Binod Rakshit*, for the Appellant.

Messrs. *Rama Prosad Mookerjee*, *Narendra Kumar Das* and *Durgesh Prosad Das*, for the Respondents.

Judgment.—The plaintiff is the appellant before us. She appeals against the order of the learned Subordinate Judge dated April 8, 1937 by which her plaint had been rejected for non-payment of the deficit court-fees of Rs. 1,980 which the Court below had asked her to pay. The suit was valued by the plaintiff for the purpose of jurisdiction and of court-fee at the sum of Rs. 2,100 and she paid *ad valorem* court-fee upon that amount at the time when the plaint was registered after presentation. After the plaint was registered, the defendants entered appearance and they raised the question of the sufficiency of the court-fees paid on the plaint. On that the learned Subordinate Judge took security for the payment of the additional court-fee that may eventually be found due and proceeded to determine

the amount payable. For the purpose of determining the amount payable, he started an enquiry under s. 8-C, Court Fees Act. A Commissioner was appointed for the purpose of finding out certain details which would, according to the learned Subordinate Judge, be relevant to find out the value of the property in suit. After the Commissioner had submitted his report he took further evidence and came to the conclusion that the net profits of the property in suit were Rs. 4,000 a year. He capitalized the said amount and came to the conclusion that the value of the property in suit was Rs. 60,000 The question as to the amount of court-fees on the plaint was then argued before him.

The plaintiff first contended that Art. 5 of Sch. II, Court Fees Act, was applicable and under that Article the court-fee stamp of 12 annas was sufficient. She further contended that if Art. 5, Sch. II was not applicable, the computation must be made in accordance with the terms of cl. (*xi*) of s. 7, Court Fees Act. These two points raised by the plaintiff were overruled by the learned Subordinate Judge. He came to the conclusion that the case fell within s. 7, sub-s. (*iv*), cl. (*c*), Court Fees Act. He further found that the valuation given in the plaint was an arbitrary valuation and for the purpose of computing court-fee under s. 7, sub-s. (*iv*), cl. (*c*), Rs. 60,000 should be taken to be the value of the subject-matter of the suit. This finding of the learned Subordinate Judge is recorded in his order dated January 30, 1937. On the basis of the said order, he found that Rs. 2,175 was the fee payable on the plaint but inasmuch as Rs. 195 had already been paid, he demanded from the plaintiff the difference, *viz.*, Rs. 1,980. He gave the plaintiff time to pay the said deficit amount by February 6, following. On February 6, however the plaintiff put in an application for amendment of the plaint with a view to circumvent the order of the learned Subordinate Judge passed on January 30, 1937. That application for amendment was refused on the same day and we think rightly. The Subordinate Judge however extended the time for the payment of deficit court-fee to February 20, 1937. In his order dated February 6, 1937, when extending the time up to February 20, the learned Subordinate Judge made it quite clear that no further time would be given for putting in the deficit court-fee inasmuch as the matter regarding court-fee was pending in that Court since June 17, 1936.

On February 20, however the plaintiff did not pay the deficit court fees but made an application for being allowed to continue the suit as a pauper. This last mentioned application was kept pending till April 5, 1937. On that date, the matter was fully gone into. The learned Subordinate Judge came to the conclusion that the plaintiff had failed to establish that she was a pauper. Further, he recorded a finding that the suit was really being continued by other persons behind the scene. On April 5, the plaintiff moved this Court against the order of the learned Subordinate Judge dated January 30, 1937 by which the amount of court-fees payable had been determined and also the order of February 5, 1937 by which her application for amendment of the plaint had been refused. On the next day, *viz.*, on April 6, she made an application to the learned Subordinate Judge which is printed at p. 98 of the paper-book. It is a curious application. First of all, it stated that notice ought to be issued upon the sureties to compel them to pay court-fees on her behalf. She further stated that she had moved this Court and this Court had issued a rule on her application. In the prayer she said that she wanted a further week's time for paying the deficit court-fees and at the same time prayed for a week's time for the purpose of enabling a communication to that Court of this Court's order, that is to say of the rule which had already been issued on April 5. The Court did not give further extension of time for the payment of court-fees as prayed for but only gave two days' time to the sureties to appear, and on April 8, following passed the formal order rejecting the plaint for non-payment of the deficit court-fees. It is against this order that the present appeal has been filed.

Mr. Moitra appearing on behalf of the plaintiff appellant accepts the position that neither Art. 5, Sch. II, Court Fees Act, nor s. 7 (*xi*) of the same Act is applicable to the case and that the learned Subordinate Judge was right in holding that the computation has to be made under the provisions of s. 7 (*iv*), cl. (*c*), Court Fees Act. He does not contend before us that s. 8-C, Court Fees Act, is inapplicable to a case falling within s. 7 (*iv*), cl. (*c*), Court Fees Act. In fact, having regard to the decision of this Court, that contention, even if it had been made before us, could not have been sustained: see the cases in *Jitendra*,

Nath Ghosh v. *Hiranmoy Kumar Saha* (1) *Santa Prosad Saha* v. *Mrinalini Saha* (2) *Urmila Bala Biswas* v. *Binapani Biswas* (3), *Kumudini Kanta* v. *Municipal Commissioners of the Barasat Municipality* (4), *Anath Nath Banerjee* v. *Kalimata Thakurain* (5) and *Kanai Lal Banerjee* v. *Satyabati Devi* (6). Nor does he contend that the reliefs prayed for in the suit before us have no objective standard of valuation. In the circumstances, he raised the question that the learned Subordinate Judge was not right in valuing the subject-matter of the suit at Rs. 60,000 for the purpose of computing court-fees under s. 7 (*iv*) (*c*), Court Fees Act. That is the first point he raised. The second point that he raised is that the Court ought to have given his client some further time for the purpose of enabling her to put in deficit court-fees. At least a week's time, he says, should have been granted to her as prayed for in her application printed at p. 98 of the paper-book. For deciding the first point, we will have to construe the provision of para. (1) of s. 12, Court Fees Act. That paragraph enacts :

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint...shall be decided by the Court in which such plaint...is filed, and such decision shall be final as between the parties to the suit."

This paragraph stood in the same form since 1870. It is only para. 2 that has been amended in Bengal by the Act VII of 1935. By the same Act (Ben. Act VII of 1935) an Explanation was added to the section. The Explanation is in these terms :

"For the purposes of this section a question relating to the classification of any suit for the purpose of s. 7, shall not be deemed to be a question relating to valuation."

On the section as it stood before its amendment by Act VII of 1935 (B. C.) there was a series of decisions in which the view was maintained that s. 12, had no application when the question for decision was as to the class under which a suit fell and not merely of valuation in that class. If there was a question of valuation, there being no question as to the class in which the suit fell, the valuation made by the Court of first instance was final. Some of these cases are mentioned in the judgment in *Sundar Mal* v. *J. C. Murray* (7) and in other cases which it is not necessary for us to review because the explanation added to s. 12 by Ben. Act VII of 1935 had made the position clear. It is the statutory recognition of the effect of the decisions given on para. 1 of s. 12, Court Fees Act, as it stood from 1870. As the appellant's Advocate does not dispute before us the finding of the learned Subordinate Judge, that computation has to be made under s. 7 (*iv*) (*c*), Court Fees Act, and as the learned Subordinate Judge valued the subject-matter at Rs. 60,000 for the purpose of computing the court-fees under that section, we do not think that it is open to the appellant to challenge the correctness of the finding of the learned Subordinate Judge that the value of the subject-matter is Rs. 60,000.

Our attention has been drawn by the appellant to a judgment of a Division Bench in *Prokash Chandra Sarkar* v. *Bishambhar Nath* (8), where Brett, J., and Sharfuddin, J. held that para. 1 of s. 12, Court Fees Act, does not prevent an appellant from challenging the valuation made by the Court of first instance for the purpose of assessing court-fee even when there is no question as to the class in which the suit falls. This view is not in accord with series of previous decisions of this Court and of other Courts which it does not appear were cited before them. They rely upon two cases, *Omrao Mirza* v. *Mary Jones* (9) and *H. C. Studd* v. *Mati Mahto* (10). The last-mentioned case, however, does not support the view taken in that case for there the question raised in the lower Court and in this Court related to the class in which the particular suit fell. In *Omrao Mirza* v. *Mary Jones* (9), the actual decision related to the question as to whether the suit fell within a particular class or not. There is, however, an *obiter* in that case which would support the view taken by Brett, J. and Sharfuddin, J. In view of the fact that the Legislature had made the position clear by adding the Explanation to s. 12, Court Fees Act, and having regard to the fact that a series of cases had decided the other way, we do not feel impressed by the judgment in *Prokash Chandra Sarkar* v. *Bishambar Nath* (8). In

(1) 41 C W N 977; 172 Ind. Cas. 794; I L R (1937) 2 Cal. 501; 67 C L J 123; 10 R C 424.
(2) 41 C W N 1339; 174 Ind. Cas 80; A I R 1937 Cal. 748; I L R (1938) 1 Cal. 196; 10 R C 616.
(3) 42 C W N 192; 177 Ind. Cas. 893; A I R 1938 Cal. 161; 11 R C 287.
(4) 42 C W N 315.
(5) 42 C W N 504; 179 Ind. Cas. 355; I L R (1938) 2 Cal. 64; A I R 1938 Cal. 865; 11 R C 536.
(6) 42 C W N 614; 181 Ind. Cas. 500; 68 C L J 413; A I R 1939 Cal. 265; 11 R C 815.
(7) 16 C L J 372; 16 Ind. Cas. 963.
(8) 14 C W N 343; 5 Ind. Cas. 18.
(9) 12 C L R 148.
(10) 8 C 334.

view of the fact that we have now a statutory enactment, we do not further feel inclined to refer the matter to a Full Bench for the purpose of considering the correctness of the decision in *Prokash Chandra Sarkar* v. *Bishambhar Nath* (8). We accordingly overrule the first point urged by the appellant.

With regard to the second point, we are of opinion that sufficient time had been given to the appellant to pay the deficit court-fee. The matter was hanging from June 1936. Just before the enquiry was started, security was demanded from her for court-fees which would be payable on a valuation of Rs. 60,000. She had warning from the time when the security was demanded, and that was in 1936. She had warning that she might be called upon to pay further court-fees. On January 30, 1937, the amount was assessed; she was given a week's time to pay the deficit court-fees. She did not comply with that order and got further time till February 20, 1937. On February 20, 1937, she asked for further time for seven days to put in the deficit court-fees and in that application she expressly stated that she would not pray for any further adjournment for further time. On the same day, however, she put in an application to continue the suit *in forma pauperis* and that application kept the suit still alive not for seven days but for nearly seven weeks. On April 5, 1937, her application to continue the suit *in forma pauperis* was dismissed. No final order had been passed on her plaint on that day. On the 6th she made a prayer for time for another week to pay in the deficit court-fees. But that prayer having regard to the contents of the application printed at p. 98 of the paper book and the other prayer made therein was not a *bona fide* prayer at all. In the circumstances, we think that the Court below was justified in rejecting the plaint on April 8, 1937. We think that the proper order for the Court would have been an order for dismissal under the provisions of s. 8-B (3), Court Fees Act, as amended in Bengal by Act VII of 1935 and not an order rejecting the plaint under the provisions of O. VII, r. 11, Civil P. C. But the form of the order is not very material to us in this case. We have proceeded on the footing of the order as actually made and even proceeding on that footing, we do not find any substance in this appeal. The appeal is accordingly dismissed with costs, hearing fee six gold *mohurs*, to be divided equally between the appearing respondents.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Revision Petition No. 581 of 1940

July 31, 1940

PATANJALI SASTRI, J.

CHINNIYA PILLAI—PETITIONER

versus

SUBBARATNAM PILLAI—RESPONDENT

Madras Local Boards Act (XIV of 1920), s. 55 (2) (b)—Person whose adjudication is annulled under s. 43, Provincial Insolvency Act (V of 1920), if "undischarged insolvent" within s. 55 (2) (b)—Whether disqualified to be member of Local Board—S. 55, if controlled by s. 73, Provincial Insolvency Act (V of 1920).

Annulment of adjudication, under ss. 35, 39 or 43, Pro. Insol. Act, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which, adjudication under the Act confers upon a debtor, and he can no longer be regarded in the eye of the law as an insolvent. Hence a person whose adjudication is annulled under s. 43, Prov. Insol. Act, is not disqualified for election as a member of a Local Board as an "undischarged insolvent" under s. 55 (2) (*b*), Mad. Local Boards Act. That expression in s. 55 is not controlled by s. 73, Prov. Insol. Act.

C. R. P. to revise an order of the District Court, Trichinopoly, dated November 11, 1939.

Mr. *T. A. Ramaswami Reddi*, for the Petitioners.

Mr. *A. V. Narayanaswami Aiyar*, for the Respondent.

Order.—The question that falls to be decided in this revision petition is whether a person whose adjudication is annulled under s. 43, Prov. Insol. Act, is disqualified for election as a member of a Local Board as an "undischarged insolvent" under s. 55 (2) (*b*), Mad. Local Boards Act. The respondent was adjudicated insolvent in 1920 and the adjudication was annulled in 1932 as he did not apply for discharge within the time prescribed. He was elected as a member of the Samayapuram-Kannanore Panchayat Board in June 1938. Apparently no objection was raised on the ground of disqualification when he offered himself for election nor was any proceeding instituted to set aside his election after he was elected but the petitioner who was also a member of the Board applied under s. 57 on November 21, 1938, to the District Judge, Trichinopoly, in which the area of the Local Board is situated, to determine whether or not the respondent

was disqualified under s. 55 of the Act. The learned District Judge held that the adjudication of the respondent having been annulled, he could not be said to be an "undischarged insolvent' and accordingty rejected the application. This civil revision petition is directed against that order.

The petitioner's learned Counsel contends that the expression 'undischarged insolvent' should be understood in a literal sense and that once a person was adjudicated insolvent he remained an 'undischarged insolvent' unless he obtained an order of discharge, though the adjudication itself was subsequently annulled. I have no hesitation in rejecting this contention, as its acceptance would lead to the obvious anomaly that a debtor who has obtained his discharge on a partial payment of his debts would be qualified for election to Local Boards, whereas a person whose adjudication has been annulled under s. 35, Prov. Insol. Act, either on the ground that he ought not to have been adjudged insolvent or that his debts have been paid in full, would continue to be disqualified for such election as he would be an 'undischarged insolvent' in the sense contended for by the petitioners' Counsel.

This certainly could not have been the intention of the Legislature in enacting s. 55 (2) (*b*). The petitioner's learned Counsel recognising this *reductio ad absurdum* endeavoured to draw a distinction between an annulment of adjudication under s. 35 and an annulment under s. 43, Prov. Insol. Act, on the ground that annulment under the latter provision does not remove the taint of insolvency but only emphasises the debtors insolvent state, and he placed reliance on s. 73 of that Act as recognizing the distinction. Apart from this section the bearing of which on the question in dispute I will presently consider, the Act makes no distinction between annulments of adjudication based on one ground or another so far as their legal effect is concerned There are three sections in the Act which provide for annulment of adjudication, namely, ss. 35, 39 and 43 and s. 37 which indicates what consequences are to follow on such annulment is made applicable in each case. It seems to me therefore that annulment of adjudication, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor. The extinction of such character due to annulment may operate to the advantage or to the prejudice of the person concerned according to the circumstances in which his adjudication is annulled, but it is clear that he can no longer be regarded in the eye of the law as an insolvent. It follows therefore that the respondent in this case cannot be held to be an 'undischarged insolvent.' It remains to consider whether this conclusion is affected by anything contained in s. 73, Prov. Insol. Act, That section relates to disqualification of insolvent debtors and so far as it is material here, runs thus :

"73.(1). Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from (*a*) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if (*a*) the order of adjudication is annulled under s. 35, or (*b*) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part."

It is clear that under this provision, a person adjudged an insolvent continues to be disqualified for election as member of any local authority notwithstanding the annulment of his adjudication under s. 43 of the Act and in this respect the provision goes beyond s. 55 (2) (*b*), Local Boards Act. Petitioner's learned Counsel did not argue before me that s. 73 enacted by the Central Legislature ought to prevail against s. 55, Local Boards Act, passed by the Provincial Legislature. Such a contention will obviously be of no assistance to the petitioner as the application in this case was made to the lower Court under the special procedure provided by s. 57, Local Boards Act, whereby jurisdiction is conferred upon the District Judge to decide questions of disqualification under certain specific provisions only, namely, ss. 54, 55, 56 and 59 of that Act. All that was argued was that the expression 'undischarged insolvent' used in s. 55 (2) (*b*) must be understood in the light of the provisions of s. 73, Prov, Insol. Act, so as to avoid a discrepancy between the two provisions. I am unable to see how this can be done consistently with established principles governing construction of statutes. The two provisions, though relating to disqualification for election to Local Board, so far as it arises out of insolvency, are worded altogether differently and the expression 'undischarged insolvent' does not occur in s. 73, Petitioner's Counsel pointed out

that the expression 'uncertificated bankrupt' in s. 53 (2) (*b*), Local Boards Act, must refer to the certificate which is provided for in s 73 (3) of the other Act and argued that the two sections must be read together. I fail to see how the meaning of the expression 'undischarged insolvent' in the former section can be controlled by anything contained in s. 73. It may be that the respondent is disqualified for membership of the *panchayat* board in question by virtue of the provisions of s. 73 and that, in an appropriate proceeding, he may be declared to be so disqualified. But that, in my opinion, cannot affect the question whether the respondent is disqualified under s. 55 (2) (*b*), Mad. Local Boards Act. The Court below was concerned only with this question in the proceeding out of which this civil revision petition arises and agreeing with its conclusion I dismiss this petition with costs.

N.-S. *Petition dismissed.*

LAHORE HIGH COURT

Second Appeal No. 1094 of 1939
February 14, 1940
BHIDE, J.

COURT OF WARDS ESTATE OF MALIK AMIR KHAN—DEFENDANT—APPELLANT
versus
Lala TEHLA RAM—PLAINTIFF—RESPONDENT.

Punjab Court of Wards Act (II of 1903), s. 32—Modification of order—Awarding additional and future interest.

Awarding additional and future interest would not amount to modification of the order of the Deputy Commissioner.

S. A. from the decree of the District Judge, Mianwali, dated May 4, 1939.

Mr. *Mohammad Monir*, for the Appellant.

Mr. *V. N. Sethi*, for the Respondent.

Judgment.—This is a second appeal arising out of a suit for recovery of Rs. 1,400 and a declaration to the effect that the plaintiff was entitled to charge interest on the principal sum in a bond, dated March 1, 1930, on which the plaintiff based his suit. The defendant *Khan Sahib* Malik Amir Khan, who had executed the bond, had come under the guardianship of the Court of Wards and the claim was notified by the plaintiff to the Deputy Commissioner; but the Deputy Commissioner allowed only the principal sum with interest at one per cent. per mensem from March 1, 1930, the date of the bond, to March 9, 1933. The plaintiff thereupon instituted the present suit to establish his claim to additional interest on the basis of the bond referred to above. The trial Court allowed him a decree for Rs. 1 211. On appeal the learned District Judge raised the decretal amount to Rs. 1,400 He also awarded future interest at Re. ·1-9-0 per cent. per mensem. From this decision the present appeal has been preferred on behalf of the Court of Wards. The learned Counsel for the appellant had challenged in the grounds of appeal the increase of the decretal amount by Rs. 189 by the learned District Judge on appeal, but this point was given up by him at the hearing. In view of the relinquishment of this claim the objection as to deficiency in the court-fee which had been raised on behalf of the respondent was not pressed. It may also be mentioned here that the respondent has made up the deficiency in the court-fee on the appeal in the lower Appellate Court as directed by my order dated February 7, 1940.

On merits the learned Counsel for the appellant has now raised only one point, namely that the additional interest which had been allowed by the Courts below amounts to an interference with the order passed by the Deputy Commissioner and the Courts had therefore no jurisdiction to allow this interest. The Courts below have held that they had power to allow the interest under s. 32, Court of Wards Act. The learned Counsel for the appellant contends that according to s. 32, Punjab Court of Wards Act, a Civil Court has no jurisdiction,

"to set aside or modify the order of a Deputy Commissioner fixing a date for the payment of such claim or regulating the order in which claims against the ward or properties under the superintendence of the Court of Wards shall be paid."

The learned Counsel contended that awarding additional and future interest would amount to modification of the order of the Deputy Commissioner as the Deputy Commissioner may find it necessary to pay the amount due to the plaintiff earlier than he intended to avoid accumulation of interest. It seems to me that this is a far-fetched interpretation to place on the wording of s. 32, Punjab Court of Wards Act. The section clearly gives a right to the plaintiff to agitate in the Civil Court any claim which has been duly notified to the Deputy Commissioner but which has been disallowed by him wholly or in part. In the present instance the claim for interest which has been allowed by the Courts below, was duly notified to the Deputy

Commissioner and was disallowed by him. Civil Courts had therefore jurisdiction to adjudicate on the plaint. In my opinion, the contention of the learned Counsel is not tenable in view of the language of s 32. I therefore disallow it and dismiss the appeal with costs.

D. *Appeal dismissed.*

OUDH CHIEF COURT

Second Rent Appeal No. 35 of 1937
January 13, 1941
AGARWAL, J.

DAYA SHANKAR—DEFENDANT—APPELLANT
versus
BADRI PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS

U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937), s. 2—Stayed Arrears of Rent (Remission) Act (XVIII of 1939), s. 3—Suit for arrears of rent—Appeal pending when Act IV of 1937 came into force—No stay order passed—S. 3 of Act XVIII of 1939 does not apply—U. P. Land Revenue Act (III of 1901), s. 36—Ex-proprietary rent—Liability to pay, when arises—Oudh Rent Act (XXII of 1886), ss. 19, 19-A—Remission of revenue, when entitles tenants to get remission of rent.

The words " which have been stayed " in s. 3 of U. P. Act XVIII of 1939, do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been under s. 2 of U. P. Act IV of 1937. Hence where an appeal against a decision in a suit for arrears of rent was pending when Act IV of 1937, (U. P. Stay of Proceedings (Revenue Courts) Act) came into force but no stay order was passed, the provisions of s. 3 of Act XVIII of 1939, (Stayed Arrears of Rent (Remission) Act) do not apply to the suit and the suit cannot be dismissed.

Tenant's liability to pay ex-proprietary rent arises from the date when ex-proprietary tenancy arises and from the date when mutation of names is effected. The new *semindar* becomes liable to pay revenue from the date of his purchase and if it has been realized from the former *semindar* the latter can recover it. *Mahadeo Prasad* v. *Mathura* (1), 1 Ind. Cas. 689 (2) and 15 Ind. Cas. 189 (3), relied on.

Mere remission of revenue does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered.

S. R. A. against the order of the District Judge of Unao, dated January 20, 1937.

Messrs. *R. B. Lal* and *M. M. Lal*, for the Appellant

Mr. *Haider Husain*, for Respondent No. 1.

Judgment.—This second appeal arises out of a suit for arrears of rent brought by the respondent No. 1 Badri Prasad against the appellant Daya Shankar and the respondent No. 2 *Mst.* Gomti. The suit was in respect of the years 1341, 1342 and 1343 *Fasli*.

The Assistant Collector dismissed the suit for *Kharif* 1341 *Fasli* but decreed it in full for *Rabi* 1341 and 1342 and allowed the defendants Rs. 13-8 on account of remission of rent for the year 1343. He also allowed part interest at the rate of 9 per cent. per annum and future interest at the rate of 3½ per cent. There was an appeal to the District Judge, Unao by the plaintiff and the defendants filed cross-objections. The appeal was allowed to this extent that the claim for 1341 *Kharif* was also decreed. The cross-objections were dismissed. An appeal to this Court was filed on April 16, 1937, by one of the defendants. The grounds taken were that the plaintiff was not entitled to recovery of rent for *Kharif* 1341 *Fasli* and that remission of rent ought to have been allowed for the years 1341, 1342 and 1343. It was also pleaded that the plaintiff ought not to have been awarded any interest and that the appellant was entitled to a credit of Rs. 72-12 paid by him towards land revenue and expenses for *Kharif* 1341 *Fasli*. An application was filed on December 17, 1940, that a further ground be added to the grounds of appeal that the plaintiff's suit was not maintainable at all in consequence of s. 2 of Act IV of 1937 and Act XVIII of 1939 passed after the filing of the appeal.

The first point which I have to consider is whether the plaintiff's suit is not maintainable under Acts IV of 1937 and XVIII of 1939. Act IV of 1937 received the assent of the Governor of the United Provinces on September 21, 1937, and was published under s. 75 of the Govt. of India Act on September 25, 1937, s. 2 of this Act provides :

"Notwithstanding anything contained in the Agra Ten. Act, 1926, or the Oudh Rent Act, 1886, or the Civil P. C., 1908, all proceedings in suits and applications of the classes specified in the Schedule to this Act, pending on the date when this Act comes into force, or instituted during the period this section remains in force, shall be stayed for such period as this section shall remain in force....."

When this Act was in force another Act (XVIII of 1939) was passed. It received the assent of the Governor of the United Provinces on January 30, 1940, and was published in the *United Pro-*

vinces Gazette on February 17, 1940. Section 3 of this Act provides :

"Notwithstanding anything contained in the Agra Ten. Act, 1926, or the Oudh Rent Act, 1886, or any other Act for the time being in force but subject to the provisions of s. 5, all suits or applications for the recovery of arrears of rent which have been stayed under the provisions of the United Provinces Stay of Proceedings Act, 1937 (Act IV of 1937) shall be dismissed, and no Court shall entertain any suit or application for the recovery of arrears of rent which if instituted or made during the period in which the United Provinces Stay of Proceedings Act is in force would have been stayed under the provisions of that Act."

It is contended on behalf of the appellant that when Act IV of 1937 came into force his appeal was pending and so the suit ought to have been dismissed under s. 3 of Act XVIII of 1939. It was contended on behalf of the appellant that an appeal is a proceeding in the suit but the respondents contested this point. I think it is not necessary to decide the point. Under s. 3 of Act XVIII of 1939 only those suits or applications will be dismissed which have been stayed under the provisions of Act IV of 1937. This suit or the appeal was never stayed by any order of the Court. It is argued that the appeal ought to be considered to have been stayed automatically without any order being passed. I think the words "which have been stayed" in s. 3 of Act XVIII of 1939 do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been under s. 2 of Act IV of 1937. Had the Legislature meant it, the words would have been "which have been stayed or ought to have been stayed". Act IV of 1937 is no longer in force and no stay can be made now. I think that the provisions of s. 3 of Act XVIII of 1939 cannot apply to this suit and that the ground taken by the appellant subsequent to the filing of the appeal has no force.

I now proceed to the appellant's grounds originally mentioned by him in his memorandum of appeal. The first two grounds are in respect of the rent for *Kharif* 1341, the claim about which was dismissed by the trial Court but allowed by the learned District Judge. The plaintiff purchased the plots in question at an auction sale on October 27, 1933. He obtained possession on November 17, 1933. Mutation of names in favour of the plaintiff was effected on April 27, 1934. The defendants were held to be ex-proprietary tenants of the plots in question on July 18, 1934, and a rent of Rs. 144-2-9 was fixed. The appellant's contention is that as mutation of names in favour of the plaintiff was effected after the expiry of *Kharif* 1341, so he is not entitled to rent for that *fasal*. Section 36 of the Land Revenue Act provides that the rent fixed shall be payable from the date the ex-proprietary tenancy arose and subject to the law of limitation as to arrears of rent and save as provided by s. 41 of the Agra Ten. Act or s. 35-B of the Oudh Rent Act shall not be liable to enhancement or abatement for a period of ten years except by an order of a settlement officer under s. 87. It has been argued on behalf of the appellant that the tenant's liability to pay rent does not begin from the date the ex-proprietary tenancy arises but that no enhancement or abatement for a period of ten years can be made from that date I see nothing in the wording of this section to put that interpretation upon it. The point has been decided by the Allahabad High Court and by this Court. It was held by a Full Bench of the Allahabad High Court in *Mahadeo Prasad* v. *Mathura* (I. L. R. 8., All., 189) (1), that a landlord is entitled to recover rent from the date the ex-proprietary tenancy arises. Their Lordships observed that the tenancy was created by the plaintiff's purchase of the original landlord's interest and the rent when fixed under the statute which provides the means for determining the rent payable, becomes the rent which is to be paid during the whole tenancy, or the rent of the land held by the tenant during the whole of his tenancy, and as soon as that has been fixed the landlord can put his remedy in force if the tenant fails to pay the debt. In *Hardeo Bakhsh Singh* v. *Sri Pargash Singh* (12 O. C., 35) (2) and *Bhan Partab Sahi* v. *Sheo Dat Bahadur Singh* (15 O. C., 45) (3), it was held that a *zemindar's* right to claim rent against an ex-proprietary tenant at the rate fixed by the Revenue Court accrues not merely from the date on which the rent is so fixed but from the date on which the ex-proprietary tenancy arises. It is argued on behalf of the appellant that the late *zemindar* is liable to pay revenue as long as his name remains in the *khewat* and it would be very unfair if he is made liable for the rent. This argument has no force. The new *zemindar*

(1) 8 A 189; A W N 1886, 52.
(2) 12 O C 35; 1 Ind. Cas. 689 (2).
(3) 15 O C 45; 15 Ind. Cas. 189.

becomes liable to pay revenue from the date of his purchase and if it has been realized from the former *zemindar* the latter can recover it. I see no reason to go contrary to the law laid down by the Allahabad High Ocurt and this Court. I therefore think that the learned District Judge was justified in decreeing the suit for *Kharif* 1341 *Fasli.*

Grounds Nos. 3 and 4 of the memorandum of appeal relate to the remissions of rent for the year 1341 *Fasli.* It was said that there was remission in the land revenue and so there should be a corresponding remission in rent also. Reliance is placed on ss. 19 and 19 A of the Oudh Rent Act. The evidence of the *patwari* shows that no remission was allowed to ex-proprietary tenants. It was said that the *khetauni* for 1341 shows that revenue was remitted but that does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered. It is not shown that there was any such order. These grounds therefore have no force.

Grounds Nos. 5 and 6 relate to the remissions in 1342 and 1343. The lower Courts have allowed remissions in 1343 and the evidence of the *patwari* shows that there was no remission allowed to ex-proprietary tenants in 1342. These grounds have no force.

Ground No. 7 relates to interest. The lower Courts had discretion in awarding interest and I see no reason to differ from them.

The last ground is that the appellant paid Rs. 72-12 on account of revenue in *Kharif* 1341 and he should get credit for that amount. I see no reason to allow that amount to the defendant in this case.

If he has paid anything on account of revenue, he can bring a fresh suit.

The appeal has no force and I dismiss it with costs.

S. *Appeal dismissed.*

MADRAS HIGH COURT

O. S. A. No. 30 of 1935
September 4, 1939
LEACH C. J. AND KUNHI RAMAN, J.
VISALAKSHI AMMAL—APPELLANT
versus
C. KRISHNAVENI AMMAL AND OTHERS—RESPONDENTS

Registration Act (XVI of 1908), s. 17—Equitable mortgage—Letter signed and delivered to mortgagee at time of depositing title-deeds, by way of security for loans—Letter, held required registration.

One *S* borrowed money on a promissory note and deposited with the creditor title-deeds of certain property as security. At the time of the deposit *S* signed and delivered to the mortgagee a letter which stated that *S* had received the amount in cash and for that amount had kept with the mortgagee as security, the original title-deeds relating to certain property. The letter further stated that at the time of the discharge of the bond, *S* would take back the letter as well as the title-deeds. In a subsequent mortgage the said letter was described not only as collateral security letter but as security for the loan;

Held, that the letter constituted the bargain between the parties and operated to declare the rights of the mortgagee in the property. Consequently, the memorandum fell within s. 17, Regis. Act, and ought to have been registered. Not having been registered it could not be admitted in evidence with the result that the equitable mortgage could not be proved. 181 Ind. Cas. 922, **reversed**. [p. 155, col. 1.]

[Case-law reviewed.]

A. from the judgment and decree of Mr. Justice Wadsworth, reported in 181 Ind. Cas. 922.

Mr. *N. K. Mohanarangam Pillai*, for the Appellant.

Messrs. *Srinivasaraghavan* and *Thayagarajan*, *K. Narasimha Ayyar* and *T. V. Subramania Ayyar*, for the Respondents.

Leach, C. J.—This appeal raises the question whether an equitable mortgage is unenforcable by reason of the non-registration of a letter signed by the mortgagor at the time of the deposit of the title deeds. One P. M. Sadasiva Chetty, his sons Subramanian and Somasundaram, (respondents Nos. 3 and 4), his brother Gangadhara Chetty, and Gangbdhara Chetty's son Thayamanaya (defendant No. 3 in the suit) constituted an undivided Hindu family. The family owned immovable property in Madras, 2.10 acres of land in Arasur, village, Chingleput District, and .42 acres of land and a rice mill in Ponneri village, which is also in the Chingleput District. The properties in Madras consisted of three houses and their sites, known as 16 Audiappa Chetti Street, 41 Guruvappa Chetty Street and 105 Egmore High Road, respectively. On August 2, 1930, Sadasiva, who was the manager of the family, borrowed from respondents Nos. 1 and 2 Rs. 1,900, on a promissory note and as security deposited the title deeds of No. 16, Audiappa Chetty Street. Before us it has not been disputed that this money was borrowed for the purposes of the family. At the time of the deposit Sadasiva signed and delivered to the mortgagees a letter in

Tamil of which the following is the official translation :

"On August 2, 1930, the collateral letter executed in favour of two persons (1) C. V. Krishnaveni Ammal and (2) C. Sundaram Chetty, residing in house No. 3, Cuddapah Rangiah Chetty Street, Periamet, Madras, by P. M. Sadasiva Chettiar, son of the late P. Munisami Chetti, Vannia Vaisya Caste, Saivaite, merchant, residing in house No. 16, Audiappa Chetti, Street, Chintadripet, Madras. On executing a pro-note to you this date Rs. 1,900 (rupees one thousand and nine hundred) has been received in cash from you. For this sum, I have kept with you as security, house No. 16, Audiappa Chetty Street, said *petta*, said Madras, and the original title deeds relating to the property. At the time when I discharge, the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds.

To this effect have I executed this collateral letter with consent."

On August 22, 1931, 41, Guruvappa Chetty Street, and 105, Egmore High Road were mortgaged to defendant No. 6 in the suit. He having died he is now represented by his executrix, respondent No. 6. This mortgage was effected by a registered instrument signed by Sadasiva for himself as manager of the joint family and as guardian of defendant No. 3, whose father was then dead. On April 19, 1932, Sadasiva and his eldest son, respondent No. 3, executed two mortgage deeds in favour of respondents Nos. 1 and 2, one to secure Rs. 2,000, made up of the Rs. 1,900 borrowed on August 2, 1930, and a further advance of Rs. 100, and the other to secure Rs. 500. The security for the first of these mortgages was No. 16, Audiappa Chetty Street and this mortgage was intended to take the place of the equitable mortgage. The security for the sum of Rs. 500 was the .42 acres of land and the rice mill in Ponneri village. The suit out of which the appeal arises was filed to enforce the mortgages.

On March 24, 1931, the minor defendant No. 3 through his mother, the appellant, instituted a partition suit on the original side of this Court (C. S. No 471 of 1931). The minor died during the pendency of the suit and the appellant was made a party as his legal representative. The mortgage of April 19, 1932, which replaced the equitable mortgage of August 2, 1930, having been created after the partition suit had been filed did not affect the minor's estate and the mortgagees are relegated to their rights if any under the equitable mortgage. The learned trial Judge (Wadsworth, J.) held that the letter which was given with reference to the deposit of title deeds did not require registration and therefore the minor's estate was bound by the equitable mortgage. On this basis he granted the mortgagees a mortgage decree in respect of the Rs. 1,900. Other contentions were raised before the learned Judge but the appeal has been confined solely to the question whether equitable mortgage of August 2, 1930, can be enforced. In the mortgage deed of April 19, 1932, for Rs. 2,000, made up of the Rs. 1,900 borrowed on the equitable mortgage and the further advance of Rs. 100, there is the following recital :

"A sum of Rs. 1,900 (rupees one thousand and nine hundred) has already been borrowed from you on August 2, 1930, by executing a bond and by giving you a collateral security letter as security thereof."

The appellant's case is that the letter given by Sadasiva at the time of the deposit of title deeds, read in the light of the recital in the mortgage deed of April 19, 1932, just quoted, must be construed as a declaration of the mortgagee's rights on the property and therefore required registration under s. 17, Regis. Act. Not having been registered it could not be admitted in evidence by reason of s. 49, Regis. Act. The learned Judge treated the letter as a mere memorandum of a transaction previously completed and on this footing held that it did not require registration.

Before considering certain authorities which have been quoted to us I will revert to the facts. As I have already stated, the execution of the promissory note, the deposit of the title deeds and the execution of the letter all took place on August 2, 1930. It may be taken that the signing of the promissory note and the deposit of title deeds took place before the letter was signed in actual point of time. The evidence discloses that five or six days before August 2, the title deeds were handed over to the mortgagees to enable their representative to scrutinise them, the understanding being that if the title deeds proved to be in order, they would advance money on equitable mortgage. The learned Judge has held that inasmuch as respondent No. 2 said that the examiner of the documents had approved of the title five or six days before August 2, 1930, it was reasonable to infer that for these five days the title deeds remained with respondent No. 2 as security for the loan and therefore there was a completed mortgage agreement some days anterior to August 2, 1930. I find

myself unable to share this opinion. The title deeds were handed over for the purpose of examination of the title and they must be deemed to have remained with the mortgagees for that purpose until they intimated to Sadasiva on August 2, 1930, that they were willing to advance the money. On the evidence both of respondent No. 2 and of the person who examined the deeds it is clear that they were handed over merely for the purpose of examination of title and that there was no deposit by way of equitable mortgage until August 2, 1930. The case therefore cannot be decided on the basis that there was a completed transaction before that date. With these observations I will now proceed to the examination of the authorities. In *Subramanian* v. *Lutchman* (1), the Privy Council had to consider a memorandum which was signed and delivered by the mortgagors at the time of the deposit of title deeds by way of equitable mortgage It was held in that case that oral proof of the mortgage was inadmissible because the document drawn up constituted the bargain between the parties. There the memorandum was in the following terms :

"We hand you herewith title deeds relating to Fifth Class Lot Nos. 78, 79 and 80, Block E, each measuring 25 by 50, with building thereon belonging to Saleman Ahmad Seedat, also his promissory note for rupees sixty-three thousand (Rs. 63,000) due to us, this; please hold as security against advances made to us; we also hand you second mortgage executed in our favour by C. Rangaswamy Moodaliar on First Class Lot No. 6 in Block F-1. On this we had advanced Rs. 32,000. Please also hold this as further security against advance made to us. We promise not to deal with same till your amount due is fully paid and satisfied."

Lord Carson who delivered the judgment of the Board said that their Lordships had no doubt that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected. Their Lordships were here applying the principles laid down in *Pranjivandas Mehta* v. *Chan Ma Phee* (2) at p. 900 and *Shaw* v. *Foster* (3). The question of the admissibility of a memorandum relating to a deposit of title deeds was considered by the Privy Council in *Obla Sundarachariar* v. *Narayana Ayyar* (4). There the memorandum consisted of a list of title deeds with the following introductory words :

"Written to E. N. A. Samoo Battar by Krishnaswami Ayyar, of S. V. Ramaswami Ayyar and Brothers. As agreed upon in person I have delivered to you the undermentioned documents as security."

Section 17, Regis. Act, requires registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property. Lord Tomlin, in delivering the judgment of the Board, pointed out that the question which fell to be determined was whether the memorandum, having regerd to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff, was an instrument of this nature. Their Lordships regarded the memorandum as a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties, and therefore did not require registration. While their Lordships did not think that the language of Lord Carson in *Subramanian* v. *Lutchman* (1), conveyed or was intended to convey the meaning that no memorandum relating to a deposit of title deeds could be within s. 17, Regis. Act, unless it embodied all the particular of the transactions of which the deposit formed part, they were of opinion that no such memorandum could be within the section unless on its face it embodied such terms and was signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit was concerned, it constituted the agreement between the parties. In the recent case in *Hari Sankar Paul* v. *Kedar Nath* (5), the Privy Council after reviewing their earlier decisions expressed themselves

(1) 50 C 338; 71 Ind. Cas. 650; A I R 1923 P C 50; 50 I A 77; 1 R C 6; 44 M L J 602; 32 M L T 184; 25 Bom. L R 582; 2 Bur. L J 25; 38 C L J 41; 18 L W 446; (1923) M W N 762; 28 C W N 1 (P C).

(2) 43 C 895 (900); 35 Ind. Cas. 190; A I R 1916 P C 115; 43 I A 122; 8 L B R 458; (1916) 1 M W N 443; 31 M L J 155; 4 L W 69; 14 A L J 638; 20 C W N 925; 18 Bom. L R 664; 20 M L T 242; 9 Bur. L T 125; 24 C L J 314 (P C).

(3) (1872) 5 H L 321; 42 L J Ch. 49; 27 L T 281; 20 W R 907.

(4) 54 M 257; 131 Ind. Cas. 338; A I R 1931 P C 36; 58 I A 68; (1931) A L J 245; (1931) M W N 349; 8 O W N 666; Ind. Rul. (1931) P C 104; 60 M L J 506; 33 L W 501; 35 C W N 494; 53 C L J 396; 33 Bom. L R 878 (P C).

(5) 43 C W N 806; 181 Ind Cas. 935; 1939 O L R 385; 11 R P C 292; A I R 1939 P C 167; 5 B R 747; 1939 O W N 570; 50 L W 33; 20 P L T 574; 70 C L J 163; (1939) 2 M L J 522; I L R (1939) 2 Cal. 243; 66 I A 184; (1939) A L J 869; 41 Bom. L R 1144; (1939) M W N 1166; (1939) Kar. P C 287 Sup. (P C).

thus :

"Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered."

Therefore what is to be considered in the present case is whether the memorandum of August 2, 1930, was made an integral part of the transaction and is an instrument intended to declare the right of the mortgagees in the property and not merely a record of what had transpired. The memorandum under discussion is written in part in the past tense. It states :

"On executing a pro-note to you this date Rs. 1,900 has been received in cash from you. For this sum, I have kept with you as security house No. 16, Andiappa Chetti Street, said *petta*, said Madras, and the original title deeds relating to the property."

But it goes on to say :

"At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds,"

and concludes with this statement : "To this effect have I executed this collateral letter with consent." If the letter is read as a whole there is a great deal to be said for the argument that it was intended to constitute the bargain between the parties, but our attention has been drawn to the decision of Schwabe, C. J., and Ramesam, J. in *Krishnaiya* v. *Ponnuswami Aiyar* (6), where it was held that a memorandum in the following terms did not require registration :

"Collateral security letter in respect of a house executed in favour of Messrs. Peruru Viswanadham and Koneti Desikacharayulu Co. of Madras. As you have this day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs. Peruru Viswanadham & Co, the same being the sum of principal and interest due, I have this day executed a pro-note in your favour for this sum and the sum of Rs. 500 taken to-day, *i. e.*, the total of Rs. 2,455; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras."

This memorandum has much in common with the memorandum under consideration in the present case. It is described as a collateral security and states what had preceded its execution. The learned Judges however treated it merely as a record of a completed transaction made for the purpose of regarding facts for the information of a new firm. The position here is not analogous and there is the further factor that in the mortgage deed of April 19, 1932, which the mortgagees obtained from the mortgagor the memorandum of August 2, 1930 is described not only as a collateral security letter but as security for the loan. Can it be said in these circumstances that the parties were merely contemplating a record of a completed transaction and not an operative instrument ? When the memorandum is read in the light of the recital in the subsequent deed of mortgage it seems to me that the only conclusion open is that it constituted the bargain between them and operated to declare the rights of the mortgagees in the property. Consequently I hold that the momrandum falls within s. 17, Regis. Act, and ought to have been registered. Not having been registered it cannot be admitted in evidence which means that the equitable mortgage cannot be proved. I would allow the appeal with costs both here and below against respondents Nos. 1 and 2.

Kunhi Raman, J.—I agree.

N. S. *Appeal allowed.*

(6) 47 M 398; 84 Ind. Cas. 629; A I R 1924 Mad. 547; 46 M L J 295; 19 L W 384; 34 M L T 298.

LAHORE HIGH COURT

Second Appeal No. 586 of 1939
October 24, 1940
ABDUL RASHID, J.

DR. MANI SHANKAR SOMESHWAR PANDYA—DEFENDANT—APPELLANT

versus

ALLIANZA UND STUTTAGARTER LABENS VERSICHERUNGS BANK AKTIENGESALLSCHAFT, GERMANY KNOWN IN INDIA AS ALLIANZ UND STUTTGARTER LIFE INSURANCE BANK, LTD. AND OTHERS—PLAINTIFFS—RESPONDENTS

Insurance—Life — Fraud — Person effecting insurance must be actually dependent on or expect advantage from continued existence of person insured —Person effecting insurance on his younger brother's life held had no insurable interest and hence the insurance contract was void under ss. 23 and 30, Contract Act (IX of 1872) — Insurance Company can under s. 92, Evidence Act (I of 1872), prove that person effecting insurance was doing it for his own use and benefit and not for use and benefit of person insured.

To give the person effecting the insurance an insurable interest in the life of the person insured, there must be actual dependence of the person effecting the insurance on the person whose life is insured or he must have an expectancy of some advantage from the continued existence of the person insured. *Harse* v. *Peral Life Assurance Co.* (3), referred to. [p. 157, col. 2.]

A doctor insured the life of his younger brother who was carrying on a money-lending business on his own behalf and was not rendering any valuable services to the doctor. He was receiving Rs. 11 per month from his brother on account of the price of a house that he had

transferred to him. He was also receiving maintenance and in lieu of that maintenance he used to assist his brother as a compounder. No such services were being rendered by him as could be enforced by the doctor in a Court of Law. The voluntary services rendered by him were also of an insignificant and perfunctory nature and in lieu thereof he used to receive maintenance from his brother. In the policy he was shown as a money-lender carrying on an independent business and was not insured as a compounder rendering services to his brother. Shortly afterwards, the policy was assigned in favour of his brother doctor and the assignment was registered in the office of the company. The company continued to receive premiums from doctor by means of cheques. On the death of his brother the doctor demanded a sum of Rs. 20,000, but the company refused to pay on the ground that the contract of insurance was void on account of fraud and misrepresentation, that the real person securing the insurance was the doctor and that his younger brother was merely a figurehead.

Held, that it could not be held that doctor was in any way dependent on his brother or that he expected to receive any substantial advantage from the continued existence of the life of his brother. In insuring his younger brother's life for a sum of Rs. 20,000 he was not insuring the life of a compounder but he was entering into a wagering transaction hoping to make money if his younger brother disappeared. The insurance contract was therefore against public policy and was also a wagering contract under the provisions of ss. 23 and 30, Contract Act. *Alamai* v. *Positive Government Security Life Assurance Co., Ltd.* (1), referred to. *Barnes* v. *London Edinburgh and Glasgow Assurance Co.* (2), distinguished. [p. 158, col 2]

Held, also that under proviso (1) to s 92, Evi. Act, the insurance company was entitled to prove facts showing that the insurance was really effected by the doctor for his own use and benefit and not for the use and benefit of his younger brother. *Shilling* v. *Accidental Death Insurance Co.* (4), relied on. [p 159, col 1]

S. A. from a decree of the Senior Sub-Judge, Delhi, dated January 11, 1939.

Mr. *Bhagwat Dayal*, for the Appellant.

Messrs. *Mehr Chand Mahajan*, *Nand Lal Bhalla* and *Jindra Lal*, for the Respondent.

Judgment.—The facts, bearing on the question of law involved in this appeal, may be shortly stated. On March 5, 1932, Dr. Mani Shankar Someshwar Pandya (hereinafter referred to as Dr. Pandya), defendant, sent a post-card to the plaintiff Company stating that he desired to insure the life of his younger brother Ganpat Lal Someshwar Pandya and that a copy of the prospectus of the Company should be sent to him. On June 1, 1932, the Company received a proposal from Dr. Pandya proposing to insure the life of his brother G. S. Pandya for a sum of Rs. 20,000 After the receipt of this proposal the Company wrote to its agent pointing out that Dr. Pandya had no insurable interest in the life of his younger brother G. S. Pandya, and suggesting that the proposal form should be filled in and signed by G. S. Pandya himself. On June 10, 1932, the agent of the Company secured a second proposal form which had been filled in by Dr. Pandya but which was signed by G. S. Pandya. Thereafter, G. S. Pandya was examined by two medical men and the Company accepted the proposal and issued a policy of insurance on the life of G. S. Pandya on October 26, 1932. Shortly afterwards, the policy was assigned by G. S. Pandya in favour of his brother Dr. Pandya, and the assignment was registered in the office of the Company on December 21, 1932. The Company continued to receive premiums from Dr. Pandya by means of cheques. G. S. Pandya died on July 24, 1933. Dr. Pandya demanded a sum of Rs. 20,000, but the Company refused to pay and instituted the present suit for the cancellation of the policy on April 7, 1936. It was stated by the Company that the contract of insurance was void on account of fraud and misrepresentation, that the real person securing the insurance was Dr. Pandya, and that his younger brother G. S. Pandya was merely a figurehead. It was further pleaded that as Dr. Pandya had no insurable interest in the life of his younger brother G. S. Pandya, the contract was a wagering contract, and was, therefore, void *ab initio* under the provisions of ss. 23 and 30, Contract Act. The defendant pleaded, *inter alia*, that no fraud had been committed and no misrepresentations had been made to the Company. It was also pleaded that the defendant had an insurable interest in the life of his younger brother G. S. Pandya as he used to work as a compounder of the defendant. It was denied that the contract was a wagering contract or that it was against public policy. The trial Court held that no fraud or misrepresentation had been established. The Company's claim was, however, decreed on the ground that Dr. Pandya had no insurable interest in the life of his younger brother and that the policy of insurance was therefore void under ss. 23 and 30, Contract Act. Against this decision Dr. Pandya preferred an appeal in the Court of the Senior Subordinate Judge of Delhi. This decision of the trial Court having been affirmed on appeal, the defendant has preferred a second appeal to this Court. Mr. Bhagwat Dayal, who argued the case of the defendant appellant with great ability, contended that the lower Courts had erred in applying the restrictive provisions of the English Insurance Act of 1774 to the present case. It has been enacted by

s. 1, Insurance Act of 1774 that

"No insurance shall be made by any person or persons . . . on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering."

Section 2 of the Act lays down that:

"It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made."

The argument of the learned Counsel was that the above-mentioned sections greatly restrict the meaning of the words "insurable interest," and that as these sections are not in force in India, the English Law on the subject should not have been applied by the lower Courts to the facts of the present case. In England it has been held (*i*) that a person has an insurable interest in his own life; (*ii*) that a wife has an insurable interest in the life of her husband, and (*iii*) that a husband has an insurable interest in the life of his wife. It has been held that in all other cases relationship *per se* does not create an insurable interest when one relation effects an insurance on the life of another. The learned Counsel contended that as the restrictive provisions of the Insurance Act of 1774 are not applicable to India, we must follow the American decisions wherein it has been held that relationship as such, on account of affection and moral obligation, creates an insurable interest when one relative effects an insurance on the life of another relative. Reliance was placed in this connection by Mr. Bhagwat Dayal on Basu's Law of Insurance (1940 Edition) p. 108. It is stated in Basu that in an American case it has been held that a sister has an insurable interest in the life of her brother. In another case insurable interest was presumed in the case of a parent and a child, and it was held that:

"the interest required need not be such as to constitute the basis of any direct claim in favour of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from its life."

In another American case it has been held according to Basu that

"except in cases where there are ties of blood or marriage the expectation of advantage from the continuance of the life of the insured in order to be reasonable, as the law counts, reasonableness must be founded on the existence of some contract between the person whose life is insured and the beneficiary, the fulfilment of which the death will prevent."

In the case of *Loomis* v. *Eagle Life and Health Insurance Company* (1) Shaw, C. J., observed that:

"In this common wealth (Massachussetts) . . a parent has an interest in the life of a child and *vice versa* a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law.

In reply Mr. Mehr Chand Mahajan referred to Barwell's Law of Insurance in British India (Edn. 1940). It has been stated in Barwell that the American Courts admit an insurable interest in the life of any relative where, apart from any legal liability in the matter, there is actual dependence on that relative. It was contended that even in America it cannot be held that a person insuring the life of a relative has an insurable interest in the life of the person insured unless there is actual dependence of the one on the other. The American reports in original are not available, but it appears to me that the effect of the American decisions has been too widely stated by Basu, and that Barwell's Summary of the American decisions represents the American Law correctly. In other words there must be actual dependence of the person effecting the insurance on the person whose life is insured to give the person effecting the insurance an insurable interest in the life of the person insured. Reference may be made in this connection to Macgilivray on Insurance Law (Edn. 2), p. 224. The following quotation from Macgilivray may be reprodnced *in extenso*:

"There are numerous decisions in America relating to insurable interest as among relatives. The settled rule appears to be that if there is a *de facto* state of dependence the dependant has an insurable interest in the life of the person who supports him even although he has no legal claim to be supported, but where a person is independent he has no insurable interest in the lives of relatives on the ground that he might in the future have a legal or moral claim to be supported by them. Thus, where there is actual dependence, and a reasonable expectation of the benefit continuing a granddaughter is held to have an interest in the life of her grandfather, and an adopted daughter in the life of a stranger who adopted her, and a woman in the life of her brother. But where there is no actual dependence or immediate pecuniary benefit the American Courts hold that a child has no interest in the life of a parent or a parent in the life of a child, and *a fortiori* in the case of remoter relationship. Where a child contributes his earnings to the joint support of the household some of the American Courts have held that the parent has an insurable interest; "*Loomis* v. *Eagle Life and Health Insurance Company* (1)."

(1) 23 B 191.

Mr. Mehr Chand Mahajan also referred to a Division Bench ruling of the Bombay High Court reported in *Alamai* v. *Positive Govt. Security Life Assurance Co., Ltd.* (1), where it was held that in India an insurance for a term of years on the life of a person in which the person effecting the insurance has no interest is void as a wagering contract under s. 30, Contract Act.

Mr. Bhagwat Dayal relied strongly on an English case, *Barnes* v. *London Edinburgh and Glasgow Assurance Co.* (2). In this case the plaintiff had promised the mother of a child to take care of the child and help to maintain her (the child being the plaintiff's step-sister) and there was no evidence that the child's father was alive. It was held that the undertaking to incur expense created an insurable interest. It was strongly urged that there was no dependence of the plaintiff on the child whose life had been insured and still the plaintiff was held to have an insurable interest in the life of the child. This is a border line case. This case was explained in *Harse* v. *Pearl Life Assurance Co.* (3), at p. 96. It was observed that in *Barnes* v. *London Edinburgh and Glasgow Assurance Co.* (2), the Court proceeded upon the ground that plaintiff having given a promise to the child's mother to look after the child and help to maintain it and having in discharge of that promise expended money in maintaining the child and having a reasonable expectation that the child, if it lived, would repay the money so expended on its behalf had an insurable interest in the child's life up to the amount of the payments actually made on its account analogous to that which a creditor has in the life of his debtor. It was further remarked that if the Court meant to go further in *Barnes* v. *London Edinburgh and Glasgow Assurance Co.* (2), and hold that an expectation of having some day to pay the funeral expenses of a person whom the plaintiff is under no legal obligation to bury is sufficient to create an insurable interest, the decision could not be supported. The case in *Barnes* v. *London Edinburgh and Glasgow Assurance Co.* (2), in view of the observations made in *Harse* v. *Pearl Life Assurance Co.* (3), cannot be held to govern the present case.

The question for consideration therefore is whether Dr. Pandya had an insurable interest in the life of G. S. Pandya in the sense that he expected any advantage from the continued existence of his younger brother. Both the lower Courts have held that G. S. Pandya was carrying on a money-lending business on his own behalf and that he was not rendering any valuable services to Dr. Pandya. He was receiving Rs. 11 per month from his brother on account of the price of a house that he had transferred to him. He was also receiving maintenance and in lieu of that maintenance he used to assist his brother as a compounder. No such services were being rendered by G. S. Pandya as could be enforced in a Court of Law by Dr. Pandya. The voluntary services rendered by him were also of an insignificant and perfunctory nature and in lieu thereof he used to receive maintenance from his brother. In these circumstances it cannot be held that Dr. Pandya was in any way dependent on G. S Pandya or that he expected to receive any substantial advantage from the continued existence of the life of his brother. Within a period of two years Dr. Pandya effected "insurance on the life of his younger brother to the extent of Rs. 20,000. Dr. Pandya has taken five policies on his own life but he has not chosen to inform the Court whether he has effected insurance for a heavy sum on his own life or whether the policies on his own life are much smaller in value than those of G. S. Pandya. It appears to me that in insuring his younger brother's life for a sum of Rs. 20,000 he was not insuring the life of a compounder but he was entering into a wagering transaction hoping to make money if his younger brother disappeared. In the insurance policies G. S. Pandya was shown as a money-lender carrying on an independent business and he was not insured as a compounder rendering services to his brother. The contract was therefore, in my opinion, against public policy and was also a wagering contract under the provisions of ss 23 and 30, Contract Act.

It was next contended by Mr. Bhagwat Dayal that the insurance company cannot go behind the policy and plead that G. S. Pandya had not taken out the policy but the real person who had insured the life of G. S. Pandya was his elder brother Dr. Pandya. He urged that by means of a letter the company had informed its agent that G. S. Pandya should sign the proposal form. It had not imposed any restriction on Dr. Pandya paying the premiums on the life of his brother. According to the learned Counsel the Company was estopped from

(2) (1892) 1 Q B 864; 8 T L R 143.
(3) (1903) 2 K B 92 (96); 72 L J K B 638; 89 L T 94.

denying that G. S. Pandya was the person who had effected the insurance on his own life. The lower Courts have gone into the entire oral and documentary evidence produced by the parties and have given a finding to the effect that G. S. Pandya merely affixed his signatures to the proposal form, and that the real person effecting the insurance was Dr. Pandya on the life of his brother. Holding that Dr. Pandya had no insurable interest in the life of his younger brother, the contract has been held to be void and unenforceable. Proviso 1 to s. 92, Evi. Act, lays down that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party. In my opinion, it is open to the company to prove facts which show that the contract of insurance was illegal from the very beginning in this case. By proving that the insurance was really effected by Dr. Pandya and not by G. S. Pandya they are showing the illegality of the contract forming the basis of the claim of Dr. Pandya. Reference may also be made in this connection to the case in *Shilling* v. *Accidental Death Insurance Co.* (4). In this case the insurance company was allowed to prove that the policy of insurance was in truth and in fact made and effected by one Thomas Shilling in the name and in the pretended behalf of the James Shilling, but for the use, benefit and on account and behalf of the said Thomas Shilling himself. I therefore hold that under proviso (1) to s. 92, Evi. Act, the insurance company was entitled to prove facts showing that the insurance was really effected by Dr. Pandya, for his own use and benefit and not for the use and benefit of his younger brother G. S. Pandya.

In view of the findings of fact given by the lower Appellate Court no other question of law arises in the present case. The appeal accordingly fails and is dismissed with costs. Mr. Bhagwat Dayal states that his client wishes to file a Letters Patent Appeal. I certify that this is a fit case for a further appeal under the Letters Patent.

D. *Appeal dismissed.*

(4) (1857) 26 L J Ex. 266; 2 H & N 42; 5 W R 567.

OUDH CHIEF COURT

Civil Revision Application No. 149 of 1939

January 13, 1941

AGARWAL, J.

SHEO NATH AND OTHERS—DEBTORS—OBJECTORS—APPLICANTS

versus

TIRBENI SHANKAR—DECREE-HOLDER—OPPOSITE PARTY

U. P. Encumbered Estates Act (XXV of 1934), s. 45—Revision against appellate order of District Judge passed before amendment of Act, filed subsequent to amendment, is incompetent—It cannot even be treated as second appeal.

Where an application for revision of an order of the District Judge passed in appeal on August 31, 1939, was filed on October 6, 1939 and the Encum. Estates Act as amended by Act XI of 1939, had come into force on September 30, 1939:

Held, that the revision was incompetence and it could not even be treated as a second appeal as under s 45, a second appeal could lie only in respect of appellate orders or decrees passed after the amending Act came into force and not to those passed before it. 189 Ind. Cas. 265 (1), relied on.

C. R. App against the order of the District Judge of Unao, dated August 31, 1939.

Mr. *Syed Mohammad*, for the Applicants.

Mr. *Mohammad Ayub*, for the Opposite Party.

Order.—This is an application for revision of an order of the District Judge of Unao upholding an order of the Special Judge second grade under the U. P. Encum. Estates Act. The order of the District Judge was passed in appeal on August 31, 1939 and this revision was filed on October 6, 1939. The Encum. Estates Act was amended by Act XI of 1939 which into force on September 30, 1939. Under the law as it stood before the amendment an appeal against any decree or order of a Special Judge second grade lay to the District Judge under s. 45. Under s. 46, the order of the Appellate Court was final. It was held by a Full Bench in *Ali Mohammad* v. *Khwaja Khalil Ahmad*, (1940 O. A., 463) (1), that the finality given to appellate orders in s. 46, could not be challenged by appeal or revision. The revision was therefore, incompetent.

Under the amendment, a second appeal has been provided from an appellate decree or order of the District Judge on certain grounds. I have been asked by the learned Counsel for the applicant to treat this revision as a second appeal. It was held in the Full Bench case above referred to that the Amended Act XI of 1939 had no

(1) 1940 O A 468; 189 Ind. Cas. 265; 1940 O L R 423; 13 R O 47; 1940 O W N 545; A I R 1940 Oudh 335; 1940 R D 287; 15 Luck. 612 (F B).

retrospective effect. The learned Counsel for the applicant says that this revision was filed after the Act had come into force and so the application for revision can be treated as a second appeal. The decree of the Appellate Court was passed before Act XI of 1939 came into force and the opposite party acquired certain rights under it. As remarked in the Full Bench case, the advantage gained by a party cannot be taken away by the provision of a second appeal after September 30, 1939. I think a second appeal can lie only in respect of appellate orders or decrees passed after the Amending Act came into force and not to those passed before it.

I, therefore, hold that no revision lay and I cannot treat the revision as a second appeal. The application is rejected with costs.

S. *Application rejected.*

LAHORE HIGH COURT

First Appeal No. 152 of 1939
March 20, 1940
DALIP SINGH AND SALE, JJ.
NARINJAN DAS—PLAINTIFF—APPELLANT
versus
KRISHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS

Hindu Law—Joint family—Self-acquired property—Person by will giving absolute estate to wife—Son adopted by widow on death of husband and property devised to him by will—Property in hands of adopted son is self-acquired.

A person made a will by which he conferred the absolute estate in the property on his widow. On the death of the testator his widow adopted a son under the authority given to her by her husband and made a will devising the property to her adopted son :

Held, that the absolute estate given to the widow would not be avoided by the adoption. The property was self-acquired in the hands of the widow. It was also the self-acquired property in the hands of the adopted son as he got it under the will of his adoptive mother.

F. A. from the decree of the Sub-Judge, First Class, Lahore, dated January 24, 1939.

Messrs. *Feroze-ud-Din Ahmad* and *Mela Ram*, for the Appellant.

Messrs. *M. C. Mahajan* and *Duni Chand Kapur*, for the Respondents.

Dalip Singh, J.—In this case the plaintiff sued for a declaration alleging that certain property attached in execution of a decree against his father, one Parshotam Das, could not be attached and sold in execution of that decree because the property was ancestral *qua* him and the debts for which the property was being sold were tainted with immorality and illegality. The trial Court held that these allegations were not proved, that the property was not ancestral and that the debts were not proved to be either illegal or immoral and therefore dismissed the suit. It is unnecessary in appeal to go into the second question because it appers to me that the question is really concluded by the decision on the first question. It is obvious that if the property is not ancestral *qua* the present plaintiff he has during the life time of his father no right therein and therefore his suit must fail. It is common ground that the property belonged to the maternal grandfather of the debtor, one Natha Singh, that he made a will dated December 19, 1883, (at p. 57 of the printed paper-book) by which he conferred the absolute estate in the property in dispute on his widow. Next, by a deed dated April 8, 1898 (at p. 59) the same testator, Natha Singh gave authority to his widow to adopt a son after his own demise. He added that the will of December 19, 1883, remained good, in other words, that the absolute devise to the widow would not be avoided by the adoption. Subsequently, it appears from a registered award dated May 17, 1914, that the widow devised the property to her grandson whom she had adopted under the deed dated April 8, 1898.

The trial Court has held, on these facts, that the property was self-acquired in the hands of the widow as it came to her by will from her husband. Similarly, the property was self-acquired in the hands of Parshotam Das, the original debtor in this case, as it came to him by will from his adoptive mother the widow of Natha Singh. It is contended, on the basis of the opinion of a Single Judge in *Sukhdev Doss Ramprashad* v. *Chotibai* (1), that the case of a widow stands on a different footing to other devisees. It is conceded that in the case of a devise made before the adoption and where the adoption takes place after the death of the testator property devised to the legatees would not be affected by the subsequent adoption, but it is contended that the case of a widow is different and as she herself creates the situation by which an adopted son comes into being, any estate or property bestowed on her by the will must be taken to have vested in the adopted son and to have been divested from the widow. There does not

(1) A I R 1928 Mad. 118; 109 Ind. Cas. 5; 27 L W 145; (1928) M W N 32.

appear apart from the opinion of the Single Judge in *Sukhdev Doss Ramprashad* v. *Chotilbai* (1) an other authority for this proposition. On the other hand in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (2) at p. 525 their Lordships of the Privy Counsil examined the question in principle and they state as follows :

"When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carrid away, it is clear that no rights of a son who is subsequenty adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place."

As I read this judgment of their Lordships of the Privy Council it would seem that their Lordships based their decision not on the ground that it would be inequitable to deprive devisees of property left by a will or on the ground that the devisees had taken no action subsequently which deprived them of the property but on the short ground that the property having already passed out of the testators's possession any subsequent adoption by the widow would not affect such donees or devisees. I see no reason therefore why a widow devisee should be an exceptional case for the reasoning that the property has been carried away applies equally to her as to other devisees. I would therefore hold that the trial Court was right in holding that this property was not ancestral *qua* Parshotam Das and was his self-acquired property. His son, therefore, had no right in the property and therefore had no right to maintain the present suit. The appeal fails and is dismissed with costs.

Sale, J.—I agree.

D. *Appeal dismissed.*

(2) 50 M 508(525); 101 Ind. Cas. 779; A I R 1927 P C 139; 54 I A 482; 29 Bom L R 969; 53 M L J 57; 45 C L J 620; 4 O W N 621; 31 C W N 910; 26 L W 186; (1927) M W N 469, 39 M L T 52 (P C).

OUDH CHIEF COURT

First Civil Appeal No. 70 of 1937

January 7, 1941

YORKE AND AGARWAL, JJ.

Mst. BASHIRAN—PLAINTIFF—APPELLANT

versus

MOHAMMAD HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS

Muhammadan Law—Gift—Hiba-bil-ewaz—*Deed duly executed and registered showing* bona fide *intention of donor to divest himself* in præsenti *of property and confer it upon donee—Deed delivered to wife—Gift is valid though possession is not delivered—Marriage—Proposal and acceptance—Form of—Lapse of long time—Presumption—Acknowledgment—Acknowledgment by man that certain woman is his wife, if invests that woman with status of married wife—Such acknowledgment, when raises presumption of marriage—Evidence Act (I of 1872), ss. 21 (1), 32, 68—Woman describing herself as wife of G in deeds when her marriage with G was not in dispute—Such statements, if admissible and if can be proved by her subsequently in dispute as to her marriage with G—Attesting witness unable to prove document—If can be proved by other evidence.*

The words in the deed of gift duly executed and registered that the donor had put the donee in possession and occupation of the land gifted from the date of its execution, show the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee. Where it is also stated in the deed that the donor stipulated and reduced it to writing that he had no concern of any sort left in the land gifted and that all the rights which he had would hereafter be enjoyed by the donee the gift is not invalid merely for the reason that possession was not delivered. Where a Muhammadan executes a deed of gift of immoveable property in favour of his wife which declares that he had delivered possession over it to her as absolute owner and the deed is handed to and retained by her the gift is valid though the donee has not obtained actual possession until after her husband's death. 136 Ind Cas. 385 (2), relied on. [p. 163, col. 1.]

Where there is evidence that the woman gave her consent to the marriage and that the man agreed to the dower, this was sufficient proposal and acceptance. The Muhammadan Law does not prescribe that the proposal and acceptance should be made in any particular form. Moreover, after the lapse of a long time, all the formalities required should be presumed to have been complied with. [p. 164, col. 2; p. 165, col 1.]

An acknowledgment by a man that a certain woman is his wife, is sufficient in the eyes of the Muhammadan Law to invest the woman with the status of a married wife and the subsequent born children with the status of legitimacy, unless the marriage is shown to have been legally impossible. By reason of the acknowledgment a presumption in favour of the marriage is raised. If direct evidence of marriage is adduced and the Court disbelieved it, the effect of presumption arising from the acknowlengment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption. 60 Ind. Cas. 147 (3), and 125 Ind. Cas. 311 (4), relied on. [p. 165, cols. 1 & 2.]

Where a woman has described herself in deeds executed by her as the wife of one *G* when there was no dispute about her marriage with *G*, the statements made by her in such deeds are admissible and can be proved by her in a subsequent dispute wherein her marriage with *G* is questioned as she had special means of knowledge about her marriage with *G*.

Under s. 68, Evi. Act what is necessary is that an attesting witness if available should be called in evidence. If he is not able to prove the document there is no bar to its being proved by other evidence. [p. 164, cols. 1 & 2.]

F. C. A. against the decree of the Civil

Judge of Bahraich, dated January 30, 1937.

Mr. *S. Mohammad Hafeez*, for the Appellant.

Messrs. *M. Wasim* and *Ali Hasan*, for Respondents Nos. 1 to 3.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant, *Mst.* Bashiran, for possession over certain plots of land measuring 30.49 acres and other reliefs. Her case is that she was married to one Ghulam Mohammad in the year 1907 and that he made a gift of these plots in her favour on February 20, 1935. Ghulam Mohammad died in the month of July 1935 and after his death she was dispossessed from the plots by the defendants in the month of August 1935 though she had obtained possession under the deed of gift. The defendants Nos. 1 to 4 are the heirs of her husband's brother, Tassaduq Husain. She stated that the plots were under-proprietary *muafi* free of rent and if she is not held to be an under-proprietor, she was entitled to possession as the sole heir of Ghulam Mohammad and that in any case she was entitled to one-fourth as her legal share and a decree for the remaining three-fourths on the ground that she was entitled to possession over it as her dower amounting to Rs. 2,100 remained unpaid. She also claimed Rs. 250 on account of mesne profits.

The suit was contested by the defendants Nos. 1 to 3 the sons of Tassaduq Husain, brother of Ghulam Muhammad. They stated that the plaintiff was not married to Ghulam Muhammad and the connection between Ghulam Muhammad and the plaintiff was illegal. They also pleaded that Ghulam Muhammad remained ill from the beginning of 1935 and the deed of gift if executed in favour of the plaintiff was invalid as Ghulam Muhammad at the date of its execution was suffering from *marz-ul-maut* and was under the influence of the plaintiff and her well-wishers and that the land in question was not transferable and so the plaintiff could acquire no rights.

The learned Civil Judge held that the plaintiff's marriage with Ghulam Muhammad was not proved, that Ghulam Muhammad did execute the deed of gift in favour of the plaintiff but as it was not followed by delivery of possession, it was invalid. He further held that it was not proved that when the deed of gift was executed Ghulam Muhammad was suffering from *marz-ul-maut*. The plea of the defendants that the plaintiff got it executed through undue influence was held not proved and the land was held to be transferable. As a result of his findings he dismissed the suit.

The plaintiff has contended in appeal that her marriage was proved and the gift was valid.

The findings on the issues decided by the lower Court in favour of the plaintiff have not been challenged before us. We have therefore to determine two points, (1) whether the deed of gift was valid and (2) whether the plaintiff was married to Ghulam Muhammad.

The deed of gift (Ex. 1) dated February 20, 1935 is a registered document which has been held by the lower Court to be duly executed. It has also been held that the donor was not suffering from *marz-ul-maut* when he executed it, and that it was not obtained through undue influence. It is said that as possession was not delivered under it, it was not valid. Ordinarily a gift by a Muhammadan must be accompanied by delivery of possession of the property gifted. It is stated in this document that the donor made the gift in favour of his wife Bashiran in lieu of her dower debt. We shall discuss later on whether the plaintiff was the married wife of Ghulam Muhammad and whether any dower was due to her. We assume for the present that the plaintiff was married to Ghulam Muhammad and her dower was due from him. If this is so it was not a pure gift but was a *hiba-bil-ewaz*. In the case of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (L. R. 33 I. A. 68) (1) it was held by the Privy Council that under Muhammadan Law the holder of property may alienate it by a deed of gift accompanied by delivery of the thing given so far as it is capable of delivery or by a deed of gift coupled with consideration in which case although delivery of possession is unnecessary, yet actual payment of consideration must be proved and also a *bona fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it upon the donee. The other authorities on the point are Baillie's Muhammadan Law and Mulla's Muhammadan Law. The relevant portion

(1) 33 I A 68; 28 A 439; 10 C W N 706; 3 A L J 405; 8 Bom L R 387; 9 O C 196; 4 C L J 295; 1 M L T 163 (P C).

in Baillie's Muhammadan Law at p. 123 is :—

"The transaction which goes by the name of *hiba-bil-ewaz* in India is therefore in reality not a proper *hiba-bil-ewaz* but a sale and has all the incidents of the latter contract. Accordingly possession is not required to complete the transfer of it though absolutely necessary in gift."

Mulla is also of the same opinion (*vide* para. 141, 11th edition). The words in the deed of gift that the donor had put the donee in possession and occupation of the land gifted from the date of its execution show the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee. It is also stated in the deed that the donor stipulated and reduced it to writing that he had no concern of any sort left in the land gifted and that all the rights which he had would hereafter be enjoyed by the donee. We think that the gift is not invalid for the reason that possession was not delivered.

There is also the evidence of the plaintiff that three days after the execution of the deed (when it was probably returned from the Registrar's Office) the document was handed over to her. We see no reason to disbelieve this statement of the plaintiff. In the case of *Mohammad Sadiq Ali Khan* v. *Fakhr Jahan Beyam* (L. R. 59 I. A., 1) (2) it was held that where a Muhammadan executed a deed of gift of immoveable property in favour of his wife which declared that he had delivered possession over it to her as absolute owner and the deed was handed to and retained by her but there was no mutation of names, the gift was valid though the donee had not obtained actual possession until after her husband's death.

Reliance was placed on a statement made by the plaintiff on August 10, 1935, after her husband's death which took place in July 1935. She stated that the *muafi* land which was in the name of Ghulam Muhammad who died fifteen days before, be entered in her name in the *patwari's* papers as she was the heiress. It is argued that she claimed the property on the ground of her being an heiress and not under the gift. We think that it was merely due to ignorance that the plaintiff claimed mutation on the ground of her being an heiress, and that there was no reason for the donor to keep the plaintiff ignorant of the deed of gift.

(2) 59 I A 1; 136 Ind. Cas. 385; 8 O W N 1378; A I R 1932 P C 13, 36 C W N 137; 62 M L J 320; Ind. Rul. (1932) P C 81; 6 Luck 556; (1932) A L J 663 (P C).

The respondents have produced some *pattas* and *qabuliyats* to prove their possession but they are all of August 1935, after Ghulam Muhammad had died. They also produced the village *patwari* to prove that the plaintiff was never in possession of these plots but it is not necessary for the plaintiff to have obtained actual possession. There was sufficient delivery of possession to make the gift valid.

Now we have to consider whether any dower of the donee, the plaintiff, was outstanding against the husband, the donor. For this we shall first have to consider whether there was any valid marriage between the plaintiff and Ghulam Muhammad.

The plaintiff has produced documentary and oral evidence to prove the factum of marriage. P. W. No. 20 Muhammad Abid Ali produced a register of marriages which shows that the plaintiff was married to Ghulam Muhammad on November 28, 1907. He stated in examination-in-chief that he had entered the details of the marriage in the register but in cross-examination he stated that the entry in question was in the handwriting of his son. He was sixty years old in 1936 and so at the time of the marriage he must have been about 31 years old. His son at that time could not have been sufficiently old to make an entry in the register. The plaintiff's other witness P. W. No. 21 Irshad Ali Khan stated that the son of this witness who is said to have made this entry is thirty years old now. If this is so, he was only a baby in arms at that time. The entry does not show that it is in the handwriting of a boy. The entries in the register do not appear to have been made from day to day but it appears that they have been copied from some other book. The witness Abid Ali admits that he would not have been able to depose about the plaintiff's marriage if the registers had not been before him. We think that the evidence of this witness and the register are not worthy of reliance. But there is other evidence on this point. Mumtaz P. W. No. 11 states that he learnt from his mother, Tassaduq Husain and Ghulam Muhammad that the plaintiff was the wife of Ghulam Muhammad. Irshad Ali Khan P. W. No. 21 states that the marriage was performed in his presence, that he was a witness to the *nikah* and that the dower fixed was Rs. 2,100. Mohammad Baksh P. W. No. 22 Ghulam Nabi P. W. No. 23 and the plaintiff her-

self state the same. The plaintiff executed two sale-deeds one on December 17, 1908 and the other on December 18, 1908 (Exs. P. W. No. 2-30 ought to be P. W. No. 1-30 and P. W. No. 2-31) and in both of them she described herself as the wife of Ghulam Muhammad. The lower Court has refused to rely on these documents on the ground that they are admissions of the plaintiff herself. Under s. 21, cl. (1) of the Indian Evi. Act an admission may be proved by or on behalf of the person making it when it is of such a nature that if the person making it were dead it would be relevant as between third parties under s. 32. Under s. 32 a statement relating to the existence of any relationship by blood, marriage or adoption between the persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised, is relevant. The plaintiff had special means of knowledge about her marriage with Ghulam Muhammad and therefore her statement is admissible and can be proved by her. There is nothing to show that there was any dispute about the plaintiff's marriage with Ghulam Muhammad in 1908.

The next document relied on behalf of the plaintiff is a copy of a mortgage-deed dated September 21, 1915 (Ex. 27). This document was executed by Ghulam Muhammad, his brother Tassaduq Husain, father of the respondents Nos. 1 to 3 *Mst.* Jengala wife of Tassaduq Husain and the plaintiff herself. Almost double of the property now in question was mortgaged under that deed. The plaintiff was described in the deed as the wife of Ghulam Muhammad. One of the defendants Nazir had identified *Mst.* Bashiran, plaintiff at the time of registration. The lower Court's objection is that this document has not been duly proved. The document purports to be witnessed by Ambika Prasad and Sant Baksh and to have been scribed by Suraj Prasad. Ambika Prasad was produced and he stated that he did not recollect anything about the deed. Sant Baksh and Suraj Prasad are dead. The plaintiff produced the mortgagee Mahabir Prasad P. W. No. 16 Ghulam Nabi, P. W. No. 23 and herself to prove it. The learned Civil Judge appears to be of the opinion that a mortgage-deed can be proved only by an attesting witness. Under s. 68 what is necessary is that an attesting witness if available should be called in evidence. If he is not able to prove the document there is no bar to its being proved by other evidence. The document has been proved by the evidence of the plaintiff, Ghulam Nabi and Mahabir Prasad. There is also a proviso to s. 68 of the Indian Evi. Act that it is not necessary to produce an attesting witness when the document is not a will and is registered unless its execution is specifically denied by the executors. This was not done in this case. We therefore think that this document was duly proved. It goes a long way to prove the plaintiff's case. The plaintiff was described in this document as the wife of Ghulam Muhammad and the document was also executed by Ghulam Muhammad himself and his brother Tassaduq Husain father of the respondents Nos. 1 to 3. This document goes to show that Ghulam Muhammad acknowledged the plaintiff as his wife and she consented to it. In the deed of gift also Ghulam Muhammad stated that the donee was his wife whom he married approximately 22 years ago. It is argued that according to the evidence produced by the plaintiff, the marriage took place in 1907 but according to the deed of gift it would be somewhere about the year 1913. We think that Ghulam Muhammad had no correct idea of the date of his marriage with the plaintiff and hence the mistake. The learned Civil Judge has criticised the evidence of the plaintiff's witnesses on the ground that there are certain contradictions in their statements and they have deposed about the details of the plaintiff's marriage and not of others. Contradictions after a lapse of about thirty years are natural. Considering the documentary evidence above discussed, we think there is no reason to disbelieve the plaintiff's witnesses on whom we have relied.

The learned Civil Judge has also remarked that it was not proved that there was a proposal on behalf of one party to the marriage and acceptance on behalf of the other. Irshad Ali Khan P. W. No. 21 has stated that the plaintiff gave her consent to the marriage and Muhammad Baksh P. W. No. 22 has stated that Ghulam Muhammad agreed to the dower. We think this was sufficient proposal and acceptance. The Muhammadan Law does not prescribe that the proposal and acceptance should be made in any particular form. Moreover, under the circumstances of the case and after the lapse of such a long time

all the formalities required should be presumed to have been complied with. More than two male persons were present at the time of the marriage and so the objection of the learned Civil Judge on that ground has no force.

The learned Civil Judge has also remarked that Ghulam Muhammad was the *tabalchi* of the plaintiff and so it seemed improbable that he married her. We do not think there is anything improbable in it. It is also said that Ghulam Muhammad had another wife. But there was nothing to bar him from taking a second wife. We think that the evidence on the record proves the marriage. Besides this the mortgage-deed (Ex. 27) and the deed of gift (Ex. 1) contain acknowledgments by Ghulam Muhammad that the plaintiff was his wife. Under the Muhammadan Law acknowledgment of a man is valid with regard to five persons, his father, mother child, wife and *mowla* (*vide* Baillie's Muhammadan Law, p. 407) and Amir Ali's Muhammadan Law, Vol. 2, p. 230. In the case of *Muhammad Ali Khan* v. *Ghazanfar Ali Khan*, (60 Ind. Cas. 147) (3), it was held that though an acknowledgment may be open to the objection that it might have been made from ulterior motives, to conceal what might otherwise have been a result of shame it is sufficient in the eyes of the Muhammadan Law to invest the woman with the status of a married wife and the subsequent born children with the status of legitimacy, unless the marriage is shown to have been legally impossible. There is nothing in this case to show that there could not be a legal marriage between the plaintiff and Ghulam Muhammad. By reason of these acknowlegdments a presumption in favour of the marriage is raised. The learned Civil Judge has held that the presumption is a weak one because the evidence to prove the marriage is not satisfactory we hold that there is satisfactory evidence to prove the marriage and if there is any presumption at all by reason of the acknowledgment, the burden of proof is shifted to the other side. The evidence on behalf of the respondents on these points consists of the statement of Mohammad Zahir respondent, Shabrati D. W. No. 11, Maqbool Ahmad, D. W. No. 9, Ashraf Ali D. W. No. 7 and Chammi Khan, D. W. No. 5. Mohammad Zahir states that Ghulam Muhammad never married the plaintiff. He is an interested witness. Shabrati states that Ghulam Muhammad was not married to the plaintiff but she had illicit connection with him and that he asked Ghulam Muhammad either to leave the plaintiff or to marry her but he refused to marry her. He admits that Ghulam Muhammad contracted illicit connection with the plaintiff about twenty years ago. Maqbool Ahmad also states that he asked Ghulam Muhammad to marry the plaintiff but he refused. Ashraf Ali states that Ghulam Muhammad had illegal connection with the plaintiff and that Tassaduq Husain had told him that Ghulam Muhammad had not married her Chammi Khan states that Ghulam Muhammad told him that he would not marry the plaintiff but would keep her as his mistress. It appears from the evidence of these witnesses that there was connection between Ghulam Muhammad and the plaintiff but we think that their evidence is not sufficient to rebut the presumption raised by reason of the acknowledgment. The learned Civil Judge did not rely on the presumption raised by their long co-habitation as husband and wife on the ground that the plaintiff was a prostitute but he has given no reason for not relying on the presumption raised by reason of the acknowledgment made by the husband. It was held in *Ahasanulla* v. *Nejabatali*, (A. I. R. 1929 Cal. 682) (4), that if direct evidence of marriage is adduced and the Court disbelieved it, the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption.

After considering all the evidence we are of opinion that the marriage of the plaintiff with Ghulam Muhammad is proved. It is also proved that the dower was fixed at Rs. 2,100. There is nothing to show that the dower was ever paid and so it was outstanding when the deed of gift in favour of the plaintiff was executed.

The result of our findings is that the plaintiff is entitled to a decree for possession of the entire property and to mesne profits from August 1935 when she was dispossessed till the date she gets possession. The appeal is allowed and the plaintiff will get her costs in both Courts on the relief for possession. She will be entitled to have a final decree for mesne profits under O. XX, r. 12, Civil P. C.

S. *Order accordingly.*

(3) 60 Ind. Cas. 147; 7 O L J 474.

(4) A I R 1929 Cal 682; 125 Ind. Cas. 311; Ind Rul. (1930) Cal 535.

LAHORE HIGH COURT

First Appeal No. 158 of 1939
April 5, 1940
BHIDE AND DIN MOHAMMAD, JJ.
Mian KARIM BAKHSH—
PLAINTIFF—APPELLANT
versus
FIRM THAKAR DAS-RAM LAL
AND OTHERS—DEFENDANTS—
RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XVI, r. 1—(Lahore amendment)—Court has discretion to allow examination of witness even if he is not mentioned in the list.

Rule 1 of O. XVI, Civil P. C., is a technical one and in the absence of any prejudice to either party the Court is not justified in refusing to examine the witnesses on the ground that they were not mentioned in the list. The rule gives the Court discretion to allow witnesses to be examined even if they are not mentioned in the list if it is satisfied that there are sufficient reasons for doing so.

F. A. from the decree of the Senior Sub-Judge, Sargodha, dated February 2, 1939.

Dr. *Shuja-ud-din*, Messrs. *Kundan Lal* and *Aslam Khan*, for the Appellant.

Messrs. *M. C. Mahajan*, *R. C. Soni* and *Farrukh Hussain*, for Respondents Nos. 1, 2 and 3, respectively.

Bhide, J.—The plaintiff sued in this case to challenge an alienation of ancestral land made by his father Qadar Baksh in favour of the firms Thakar Das-Ram Lal and Jiwan Das-Ram Singh for a sum of Rs. 15,900. The suit was resisted by the alienees on the grounds that the land was not ancestral, that the members of the Nangiana tribe to which the plaintiff belongs had unrestricted power of alienation and lastly that the alienation was made for consideration and necessity. The suit has been dismissed by the trial Court and from this decision the plaintiff has preferred the present appeal. One of the grounds of appeal was that the plaintiff was not allowed to lead all the evidence that he desired to produce. In support of this ground an affidavit has now been filed by the plaintiff showing the number of witnesses whom he wanted to produce and who were disallowed by the trial Court. The facts bearing on this question appear to be as follows: Issues were framed on June 15, 1938, and the parties were directed to produce their evidence on October 7, 1938. The plaintiff produced some witnesses on the issue relating to the question of the ancestral character of the property of which the onus lay on him and reserved his right of rebuttal on November 21, 1938. The defendant's witnesses were then examined and thereafter the plaintiff produced three witnesses in rebuttal on December 15, 1938. He wanted to examine some more witnesses on that date but these witnesses were not mentioned in the list which had been filed by him in compliance with the provisions of O. XVI, r. 1, Civil P. C., as amended by this Court. The learned Judge therefore, refused to allow these witnesses to be examined although they were apparently present in Court.

The learned Counsel for the appellant has urged that the refusal of the learned Judge of the trial Court to allow these witnesses (the number of the witnesses is stated to be seventeen) has prejudiced the trial of the case and therefore the case ought to be remanded for a re-decision after examination of these witnesses. The learned Counsel for the respondents, on the other hand, contends that as these witnesses were not mentioned in the list put in by the plaintiff before the commencement of the hearing of his evidence on October 7, 1938 the plaintiff was not entitled to examine these witnesses and the order of the learned Judge was correct. Rule 1 of O. XVI, Civil P. C. as amended by this Court, runs as follows:

"At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents:

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which, the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

The language of the proviso which has been added by this Court seems to be rather involved; but, as I understand, the Rule requires each party to put in a list of his witnesses on the date on which the hearing of his evidence commences and before he begins to examine his witnesses. In the present case there is no doubt that the examination of the witnesses of the plaintiff commenced on October 7, 1938, and the plaintiff rightly put in a list of witnesses on that date before the hearing. He did not state at the time that he intended to put in any further list of witnesses to be produced in rebutal, nor

did he make any such statement at the time when he closed his evidence on issue No. 1 and reserved his right of rebuttal: *vide* proceedings of November 21, 1938. It is argued on behalf of the appellant that he was entitled to put in a fresh list when he produced his evidence in rebuttal but the provisions of r. 1 of O. XVI, do not appear to me to confer any such right on him. However, as the language of the Rule is not perhaps as clear as it might have been, and the appellant may have misunderstood his position, the learned Judge should have, in my opinion, allowed the plaintiff an opportunity to produce his witnesses especially as they were in attendance and no adjournment was asked for.

It is not alleged that the production of these witnesses at this stage would have prejudiced the defendants in any way. The Rule is a technical one and in the absence of any prejudice to either party I do not think the learned Judge was justified in refusing to examine the witnesses. The property in dispute was of large value and an important question of custom was also involved. The Rule gives the Court discretion to allow witnesses to be examined even if they are not mentioned in the list if it is satisfied that there are sufficient reasons for doing so. The learned Judge has however not considered the matter from this standpoint at all and seems to have applied the rule mechanically. The decision of the learned Judge of the trial Court proceeds on incomplete evidence. The decree passed by him cannot in the circumstances be allowed to stand. I would accept the appeal and setting aside that decree remand the case for re-decision after taking down the evidence of the witnesses mentioned by the plaintiff in the list accompanying his affidavit in this Court. The costs will follow final decision. The parties are directed to appear before the trial Court on May 1, 1940.

Din Mohammad, J.—I agree.

D. *Appeal allowed.*

LAHORE HIGH COURT

Civil Revision No 380 of 1940
October 2, 1940
BECKETT, J.

MESSRS. PREM NATH-PRAN NATH—
PETITIONER
versus
AMBA PARSHAD—RESPONDENT

Arbitration Act (IX of 1899), s. 19—Proceeding within the meaning of s. 19, when commences—Defendant supplied with copy of plaint—Grant of time by Court for filing written statement, whether step taken by defendant in proceedings.

Having regard to the provisions of O. V, r. 2, Civil P. C., the proceedings cannot be said to have commenced within the meaning of s. 19, Arbitration Act until the defendant has been supplied with a copy of the plaint. The fixing of time by the Court for filing a written statement when the defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings inasmuch as time for filing written statement is necessarily given by the Court. 81 Ind. Cas. 846 (1), distinguished.

C. R. from the order of the Judge, Small Cause Court, Amritsar, dated April 30, 1940.

Mr. *Girdhari Lal Malhotra*, for the Petitioner.

Mr. *Sant Singh*, for the Respondent.

Order.—The facts of the present case are simple. A suit was brought against the defendant in the Small Cause Court at Amritsar. By some mistake no copy of the plaint was attached to the summons as required by O. V, r. 2, Civil P. C. The defendant appeared on the date fixed and brought the defect to the notice of the Court. He was supplied with a copy of the plaint. The case was adjourned in order to give him time to prepare a written statement. On the date fixed for the submission of the written statement the defendant applied for stay of proceedings under s. 19, Arbitration Act, 1899.

The learned Judge of the Small Cause Court has rejected the application on the ground that the grant of the adjournment meant that the defendant had taken a step in the proceedings. In coming to this decision he relied on *Karnani Industrial Bank Ltd* v. *Satya Niranjan* (1). The facts of that case were slightly different. The defendant in that case had received full notice of the suit and only asked for a further adjournment after the time for putting in a written statement had expired. Since the provisions of the Civil P. C. require that a copy of the plaint should be attached to the summons, as it may obviously be impossible for a defend-

(1) A I R 1924 Cal. 789; 81 Ind. Cas. 846; 28 C W N 771.

ant to know what the case is about until this is done. The proceedings cannot be said to have commenced until the defendant has been supplied with a copy of the plaint and if time is then fixed for the preparation of the written statement, the time for this purpose is necessarily given by the Court and I do not think that it can be regarded in any sense as a step taken in the proceedings by the defendant. It is quite a different matter if, when he has had time to prepare a written statement, he then asks for a further adjournment for his own convenience. For the reasons given above, I think that the Court acted with material irregularity in the exercise of its jurisdiction by refusing to stay the proceedings under s. 19, Arbitration Act. The petition for revision is accepted and the proceedings are returned to the Small Cause Court with a direction that the proceedings be stayed as requested by the defendant. The costs of the hearing of this petition will be borne by the plaintiff.

D. *Petition accepted.*

CALCUTTA HIGH COURT

Appeal No. 1712 of 1935
August 19, 1940
HENDERSON, J.

LALIT KUMAR DAS CHAUDHURY AND OTHERS—APPELLANTS
versus
NOGENDRA LAL DAS AND OTHERS—RESPONDENTS

Adverse possession—Minor—Possession against, when becomes adverse—Limitation Act (IX of 1908), Art. 44, s. 28—Art. 44, scope of—Ward's failure to sue within time prescribed by Art. 44—Effect—Whether extinguishes right to property under s. 28—Manager loosely described as de facto guardian is no guardian at all—Applicability of Art. 44—Minor—Voidable transaction—Repudiation by minor—Whether should institute suit—Failure to sue within three years of his majority—Whether ipso facto perfects title of person claiming under voidable transaction.

Possession against minor does not become adverse until he attains majority.

Article 44, Lim. Act has nothing whatever to do with suits for possession. The only thing which becomes barred at the expiry of time prescribed by Art. 44, is the ward's right to set aside a transfer. The failure to sue within the time prescribed does not extinguish the right to the property under the provisions of s. 28 of the Act.

Article 44 refers to the relationship of guardian and ward. A manager, loosely, described as a *de facto* guardian, is not a guardian at all. The article applies only if the transfer is binding unless it is set aside by a suit.

A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it. It is not necessary that he should bring a suit. Hence the minor's failure to institute a suit within three years of his majority does not *ipso facto* perfect the title of the person claiming under the voidable transaction. 70 Ind. Cas. 990 (1), distinguished.

A. from the appellate decree of the Sub-Judge, Third Court, Chittagong, dated July 11, 1938.

Messrs. *Narendra Kumar Das, Durgesh Prosad Das* and *Brahmananda Chatterjee*, for the Appellants.

Mr. *Rohinibenode Rakshit*, for the Respondents.

Judgment.—This appeal has arisen in connection with a dispute to four annas share in a certain tank. Eight annas of this tank originally belonged to one Durga Charan which was inherited by his sons Khagendra and Jogendra, *pro forma* defendants Nos. 6 and 7. Khagendra sold it to the plaintiffs' father during the minority of Jogendra. Subsequently, Jogendra sold it to the appellants after attaining his majority. The question in dispute therefore is which of these sales is to prevail. The Munsif dismissed the plaintiffs' claim on the ground that Khagendra was not the guardian of Jogendra. The Subordinate Judge reversed this finding holding that Khagendra was the *de facto* guardian. He allowed the plaintiffs' claim on two grounds: (1) that Jogendra's title was extinguished by adverse possession and (2) that the sale was for legal necessity.

These findings have been challenged here, firstly, because no such cause was made in the pleadings and secondly because there is no evidence upon which they can be supported. It is quite true that neither of these cases was made in the plaint and no issues were framed to deal with them. It was asserted in the written statement that there was no legal necessity for the transfer. The plaintiffs should therefore have raised an issue if they wished to press it. Inasmuch as I am going to allow the appellants to call evidence on another matter I shall allow the plaintiff to call evidence on this question. Then in the second place the evidence is quite insufficient to justify either finding. This of course is not unnatural in view of the fact that no issues were framed. Furthermore the possession of the plaintiffs could not be adverse to Jogendra until he

attained his majority. There is a finding of fact that he attained his majority in 1926. Accordingly twelve years had not elapsed when the suit was filed and the appellants had entered into possession at a still earlier date. The result is that the judgment of the lower Appellate Court as it stands cannot be supported.

Mr. Rakshit, however, attempted to support the decree on another ground which was overruled by the Munsif and not decided by the Subordinate Judge. His contention is that the plaintiffs' title was perfected by the failure of Jogendra to take proceedings within three years of his majority in view of Art. 44, Lim. Act. Article 44 prescribes the period of limitation of suits by a ward who has attained majority to set aside a transfer of property by his guardian. The first argument advanced is that after this period of three years has elapsed Jogendra's title would be extinguished under the provisions of s. 28. Section 28 provides for the extinguishment of a right to property at the termination of the period limited for instituting suits for possession. Article 44 has nothing whatever to do with suits for possession. The only thing which will become barred at the expiry of that time would be Jogendra's right to set aside a transfer. I am aware that it is sometimes said that when a person is bound to set aside a document before he can obtain possession, the failure to sue within the time prescribed will extinguish the right to the property under the provisions of this section. I am bound to say that this appears to me to be due to some confusion of thought. A suit by the appellants after their purchase to recover possession would not have been barred by limitation. A suit by their vendor to set aside the transfer was already barred before their purchase. In such circumstances the appellants' suit would fail not because their right was extinguished under s. 28 but because their conveyance was defeated by an earlier conveyance which could no longer be impugned. It is really only after the lapse of 12 years from Jogendra's attainment of majority that this section would come into play at all. Then in the second place Art. 44 has no application either. This article refers to the relationship of guardian and ward. A manager, loosely, described as a *de facto* guardian, is not a guardian at all. Further the article would only apply if the transfer was binding unless it was set aside by a suit.

This brings in the second argument to the effect that altogether apart from s. 28 the failure of Jogendra to institute a suit within three years of his majority *ipso facto* perfected the title of the plaintiffs. This argument would be unanswerable if a suit is the only method of repudiating a transaction. In this connection Mr Rakshit very fairly drew my attention to Trevelyan's Law relating to Minors. At p. 202 the learned author says this :

"A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it.....It is not necesary that he should bring a suit....."

Reliance was however placed on the decision in *Dwijendra Mohan* v. *Monorama Dassi* (1). In that case however the learned Judges were dealing with quite a different question. They were not considering a repudiation by the late minor. They were considering the effect of s. 30, Guardians and Wards Act. Consequently it throws no light upon the present question.

Finally Mr. Rakshit pointed out that the appellants could not succeed unless there is a finding that Jogendra did repudiate the former sale. No issue was raised on this question and there is no evidence. The conveyance in favour of the appellants does not refer to the former transaction at all. It may be that Jogendra had never heard of it and unless he knew of it, he could not repudiate it. The decree of the lower Appellate Court is accordingly set aside and the case is remanded for rehearing in accordance with these directions. The learned Judge will remit to the first Court the following two issues : (1) Was there legal necessity to justify the *kobala* by Khagendra in favour of the plaintiffs' father ? and (2) Did Jogendra after attaining majority repudiate this transaction ? Both sides will be at liberty to adduce evidence. The Munsif will then submit the evidence with his findings to the lower Appellate Court for final determination. If the former issue is answered in the affirmative the defendant's appeal will be dismissed. If it is answered in the negative the learned Judge will then proceed to come to a finding on issue No. 2. If this is answered in the affirmative the appeal in the Court below will be allowed, otherwise it will be dismissed. I make no order as to costs in this Court. Other costs

(1) 28 C W N 57; 70 Ind. Cas. 990; A I R 1922 Cal. 150; 49 C 911; 36 C L J 326.

will be in the discretion of the lower Appellate Court.

D. *Order accordingly.*

LAHORE HIGH COURT

Criminal Appeal No. 725 of 1940
June 10, 1940
YOUNG, C. J. AND SALE, J.
MOHAMMAD TAHIR, EX-DIRECTOR, KANWAL MOVIETONE Co., LTD., LAHORE—APPELLANT
versus
EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 476—Company Judge, if Court—Preliminary inquiry, if essential.

Company Judge conducting proceedings under s. 195, Companies Act is a "Court" within the meaning of s. 476, Criminal P. C.

Section 476, Criminal P. C., does not make a preliminary enquiry essential in law, and the proceeding under s. 476 without such enquiry would not be illegal. If the Court does not think it necessary, it may not order such an inquiry.

Cr. A. from the order of Mr. Justice Monroe, Liquidation Judge, Lahore, dated May 10, 1940.

Mr. *Jowala Parshad*, for the Appellant.

Messrs. *Nazir Ahmad*, Special Official Receiver and *R. L. Anand*, for the Respondent.

Young, C. J.—This is an appeal from the order of Monroe, J., ordering the prosecution of *K. S.* Saadat Ali Khan and Mohammad Tahir under ss. 192, 193, 465, 471 and 477, I. P. C. *Rai Bahadur* Jowala Parshad appears for Mohammad Tahir and *Khwaja* Feroze-ud-Din appears for *Khan Sahib* Saadat Ali Khan. It appears that the Kanwal Movietone Co., Ltd., was ordered to be wound up by the Court. In proceedings under s. 195, Companies Act, evidence was led before the learned Company Judge that these two officers of the company had forged a resolution appearing in the minute book of the directors. The original resolution was to the effect that the managing agent, that is Mohammad Tahir, could accept advances from the share-holders only at 6 per cent. per annum. It is alleged that in order to support a claim for Rs. 20,000 on behalf of Mohammad Tahir's firm, namely the Soho House Ltd., the words "or their firms" were inserted in this resolution after the words "share-holder". In addition to the documents in the case there was before the learned company Judge the evidence of *K. S.* Saadat Ali Khan himself taken before the Official Liquidator of the Company to the effect that the resolution originally dealt only with 'share-holders' and not with 'their firms.' There was other evidence also and on this evidence the learned Company Judge thought fit to act under s 476, Criminal P. C.

In the grounds of appeal it is alleged that the learned Company Judge was not a Court within the meanin of s. 476. In our opinion there is no force in this ground and Counsel on behalf of Mohammad Tahir or *K. S.* Saadat Ali Khan has not pressed this ground of appeal. It was next argued that the learned Company Judge should have ordered a preliminary enquiry before making an order under s. 476. The terms of s. 476, however, are perfectly clear. The relevant words are "such Court may, after such preliminary inquiry, if any, as it thinks necessary." It is quite clear from the words of the section itself that the Court need not order a preliminary enquiry if it does not think it necessary to do so. Counsel for the appellants relied on the authority reported in *Imam Ali* v. *Emperor* (1) a decision by Sulaiman, J. in which he says an enquiry under the circumstances of that particular case might be desirable. There is no authority which lays down that a proper construction of this section makes an enquiry essential in law and that the proceeding under s. 476 without such enquiry would be illegal. In our opinion any such decision would be impossible in view of the clear wording of the section itself. We therefore find there is no force in this argument. Further, we do say in this case that we agree with the learned Company Judge that the material on which he ordered the prosecution was ample to establish a *prima facie* case and that we also agree with him that in the circumstances of this case a preliminary enquiry was not necessary.

As regards the case of Mohammad Tahir, therefore we find that the action of the learned Company Judge was entirely proper and justified and we dismiss his appeal. With regard to *K. S.* Saadat Ali Khan, it is argued by Counsel on his behalf that he had no interest whatever in the Soho House Ltd., or in their claim and that he was probably deceived into initialling this alteration by his relative Mohammad Tahir who was benefited by the alteration. Counsel asks

(1) A I R 1924 All. 435; 77 Ind. Cas. 888; 25 Cr. L J 488.

that his client should appear before this Court and be allowed to explain his action in initialling this alteration. We are influenced by the fact that *K. S.* Saadat Ali Khan on the face of it obtained no benefit by this alteration. We therefore allow the prayer of his Counsel and give an opportunity to *K. S* Saadat Ali Khan to appear before this Court on Monday July 1, 1940 at 10, o'clock in the morning. His appeal is kept pending meanwhile. The proceedings against *K. S.* Saadat Ali Khan will in the meantime be stayed.

D. *Order accordingly.*

MADRAS HIGH COURT

Civil Revision Petition No. 113 of 1939
August 21, 1940
WADSWORTH AND PATANJALI SASTRI, JJ.
NEELAPPA REDDIAR—PETITIONER
versus
SOLAIMUTHU UDAYAN AND ANOTHER
—RESPONDENTS

Madras Agriculturists' Relief Act (IV of 1938), s. 8 Explanation—Whether covers case in which debt due by A is discharged on debt due by B to same creditor being substituted for it.

Explanation to s. 8, Mad. Agri Relief Act was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of *X* or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. It does not cover a case in which a debt due by *A* is discharged on a debt due by *B* to the same creditor being substituted for it. 186 Ind. Cas 722 (1), relied on, C. R. P. No. 1962 of 1939, distinguished.

C. R. P. to revise an order of the District Munsif, Ariyalur, dated August 29, 1938.

Mr. *K. Aravamudha Aiyangar*, for the Petitioner.

Mr. *Y. Venkatasubramanian*, for the Respondents.

Wadsworth, J.—This revision petition raises the question of the meaning of the explanation to s. 8 of Mad. Act IV of 1938. Does the term "renewed or included in a fresh document" cover the case in which a debt due by *A* is dicharged on a debt due by *B* to the same creditor being substituted for it? The facts are that one Arunachala was indebted to the plaintiff under a promissory note Ex. E of the year 1918. That promissory note was discharged and in lieu of it on the same day (October 3, 1934) a promissory note Ex. D was executed by the defendant who is a distant relative of Arunachala. This has been renewed by a series of documents terminating the suit promissory note by defendant to the plaintiff dated August 19, 1936. There is a missing link in 1925, but the lower Court has found that the evidence is sufficient to prove that the missing promissory note of 1925 was part of the chain of renewals. It follows therefore that in scaling down the debt the defendant is at least entitled to go back to Ex. D of 1924. The lower Court has found that he is also entitled to go back to Ex. E of 1918 executed by his relative Arunachala and the plaintiff seeks to revise this order.

It was held by Somayya, J., in *In re Ramaswami Chettiar* (1), that when *B* takes over a debt due by *A*. the new document is not a renewal of *A's* debt nor is it an inclusion in a fresh document so as to bring in the explanation to s. 8. There is a very brief judgment of Stodart, J., in C. R. P. No. 1962 of 1939 where our learned brother held that in the case of a debt by *A* renewed by his legal representative *B* the explanation to s. 8 applies and that *B's* debt was a renewal of that of *A*. It is possible that different considerations may govern the case of two debts, one incurred by the legal representative of the debtor under the earlier debt. We are not however concerned with such a case here. The defendant was not the legal representative of Arunachala. The fact seems to be that by some private arrangement the debt due by the defendant was substituted for the debt due by his relative Arunachala. Can it be said in such circumstances that the defendant's debt is a renewal of the debt of Arunachala? We have no doubt that in ordinary parlance, when we speak of a renewal of a debt, we ordinarily mean the substitution of a fresh contract between the same parties for the same amount or the same amount plus accrued interest. That is the view taken by the Court of Appeal in *Barber* v. *Mackrell* (2) Lindley, L. J., says :

"A bill is renewed when another bill is taken in its place, the parties to the bill and the amount of it being the same, though perhaps in some cases the interest due on the one bill is added."

It seems to us clear that this is the sense in which the word 'renewed' is employed by the Legislature in the explanation to s. 8. It has been contended that though the defendant's debt may not be a renewal of the debt of Arunachala, it may be

(1) (1939) 2 M L J 609; 186 Ind. Cas. 722; A I R 1940 Mad. 53; (1939) M W N 990; 50 L W 523 ; 12 R M 667.

(2) (1893) 68 L T 29; 2 R 72; 41 W R 341.

said to be an inclusion in a fresh document of Arunachala's debt and that the explanation can therefore be applied. We consider that this interpretation of the explanation to s. 8 involves violence to the language. Reading that explanation as a whole, we have no doubt that it was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of *X* or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. This view is confirmed by reference to the later words of the explanation regarding the principal originally advanced with such sums, if any, as have been subsequently advanced and especially by reference to the final words 'principal sum repayable by the agriculturist.' Obviously, the Legislature was dealing with the same debtor throughout. We say nothing on the question whether when *A* dies and *B* inherits his liability and executes a new promissory note in substitution for that executed by *A*, the explanation would or would not apply.

In the result therefore we hold that the defendant will be entitled in scaling down the debt to go back only to the promissory note Ex. D, dated October 3, 1924. There is one other point with respect to which the lower Court's order appears to be defective. No provision is made in the lower Court's order for the costs in the suit. This is not a case to which s. 18 (1) applies as the suit appears to have been filed before October 1, 1937. The omission to provide for the costs in the suit seems to have been due to inadvertance. This will be remedied by the trial Court if the petitioner's statement that the suit was filed before October 1, 1937, is found to be correct. The civil revision petition is therefore allowed with costs and the application is remitted to the trial Court for disposal in the light of this judgment.

N.-S. *Petition allowed.*

PATNA HIGH COURT

Appeals from Appellate Decrees Nos. 575 and 576 of 1939

September 9, 1940

AGARWALA, J.

BRAHAMDEO NARAIN RAI AND OTHERS—APPELLANTS

versus

JAIKISHUN CHAUDHURY AND OTHERS—RESPONDENTS

Limitation Act (IX of 1908), Arts. 111, 116, 83—Sale and mortgage of lands by A in favour of B—Sale consideration left with B to be paid to A's creditor for debts due under mortgage and handnotes—Default by B—Handnotes paid by A—Same lands subsequently sold in execution of decree against A—Suit for possession and recovery of consideration—Suit held governed by Art. 111, read with Art. 116 and time-barred—Time held began to run when handnotes were paid by A—Mortgage—Mortgagee put into possession under registered sudbharna bond but no consideration paid—Suit by mortgagor after expiry of term of mortgage for possession—Suit should be treated as for redemption after taking accounts—Mortgagee is liable to account for income of property.

The plaintiffs owed some amount to *R* on two mortgages and two handnotes. They executed in favour of the defendants a sale deed and a *sudbharna* bond and the defendants were put in possession of the land thus sold and mortgaged to them. The consideration was left with the defendants for payment to *R*. Defendants failed to pay to *R*. Plaintiffs themselves paid off the handnotes on March 25, 1929, and *R* sued them on the mortgages and obtained a decree. Subsequently the plaintiffs executed a sale deed in favour of *X* in respect both of the lands which had been sold to the defendants and mortgaged to them. Subsequently the same lands were put up for sale in execution of a money decree against the plaintiffs and purchased by *Y*. The suit was instituted on September 24, 1935, to recover possession of the land covered by the sale deed and mortgage of the defendants and the consideration which the defendants had failed to pay:

Held, that the consideration for the sale deed in favour of the defendants could not be split up into two parts, namely, the amount payable on the handnotes and the amount payable on the mortgages of *R*. That as the mortgage debts had fallen due prior to the execution of the sale deed there was a breach on the part of the defendants to pay the consideration money for the sale deed when they declined to pay the debts on the handnote. As there was an express agreement to pay the consideration money and as this agreement was contained in a registered document the period of limitation was that provided by Art. 111 read with Art. 116, namely 6 years and the suit having been filed beyond such period the plaintiffs' claim to recover the unpaid consideration money for the sale deed was barred. Even if the suit was viewed as a suit on a contract of indemnity to which case Art 83 would apply, the suit was barred as the plaintiffs were damnified on March 25, 1929. [p. 174, cols. 1 & 2.]

[Case-law referred to]

The term "successive breaches" in Art. 115, Lim. Act refers only to cases in which there is a promise to pay periodically, as for instance, payment

of rent, annuities, interest, maintenance, etc. [p. 174, col. 2; p. 175, col. 1.]

Where under a registered *sudbharna* bond the mortgagees were actually given possession but the consideration was never paid by the mortgagees, a suit brought by the mortgagor for possession, after the expiry of the term of the mortgage should be regarded, as a suit for redemption after taking of accounts. In such a suit the mortgagor would be entitled to possession on payment of the consideration and such other sums as might be due to him after taking of the accounts. In such a case as nothing is payable by the mortgagor on account of the principal, for the consideration was never paid by the mortgagee, the mortgagee is liable to account for the income of the property during the time he was in possession as mortgagee. [p. 175, col. 1]

As. from a decision of the Additional Subordinate Judge of Darbhanga, dated December 19, 1938, modifying a decision of the Munsif of Samastipur, dated June 19, 1937.

Mr. *Rati Kanta Chaudhury*, for the Appellants.

Messrs. *Janak Kishore* and *Ramnandan Prasad*, for the Respondents.

Judgment.—These are two appeals by the defendants. The facts are as follows :— The plaintiffs 2nd party owed Rs. 495-9-6 to Puran Rai on two mortgages and two handnotes. Being pressed by their creditor to repay their debts they executed in favour of the defendants two documents in order to raise the necessary money on July 2, 1928. One was a sale deed for Rs. 300 and the other a *sudbharna* bond for Rs. 195-9-6. The defendants were put in possession of the land thus sold to them and of the land mortgaged to them. The consideration for the sale of the land and the mortgage was not paid to the plaintiffs 2nd party but left with the defendants for payment to Puran Rai. Defendants failed to pay to Puran Rai. Plaintiffs 2nd party themselves paid off the handnotes on March 25, 1929 and Puran Rai sued them on the mortgages and obtained a decree on February 7, 1934. On August 6, of the same year, in order to meet the costs of this litigation, the plaintiffs executed a sale deed in favour of the plaintiffs 1st party for a consideration of Rs. 700 in respect both of the lands which had been sold to the defendants and of the land which had been mortgaged to them in 1928. Subsequently the lands mortgaged in 1928 to the defendants were put up for sale in execution of a money decree against the plaintiffs 2nd party and purchased by plaintiffs 3rd party. The present suit was instituted on September 24, 1935. The plaintiffs sought to recover possession of the land covered by the sale deed and mortgage of 1928 and the consideration which the defendants had failed to pay.

The defence was that Puran Rai's handnotes had been paid off by the defendants and that the money due on Puran Rai's mortgages had been paid to the plaintiffs 2nd party at their request when they were in need of money for the expenses of a *sradh* ceremony. Neither of the Courts below has accepted either of these defences. So far as the lands sold to the defendants in 1928 are concerned the first Court held that as the title had passed to the defendants the plaintiffs were not entitled to recover them. So far as the lands mortgaged with the defendants in 1928 are concerned, the trial Court gave the plaintiffs a decree for possession and mesne profits. Against the decision of the trial Court two appeals were preferred. Plaintiffs appealed against the decree disallowing their claim to the recovery of the lands which were the subject matter of the sale deed and out of that appeal has arisen Second Appeal No. 575. The defendants appealed with regard to the lands which were the subject-matter of the mortgage and out of that appeal has arisen Second Appeal No. 576. It will be convenient to deal with these two appeals separately.

Second Appeal No. 575 of 1939.

The sale deed of 1928 provided that out of the consideration of Rs. 300, Rs. 185 was to be paid to Puran Rai in respect of the dues on a mortgage of July 6, 1924, Rs. 19-0-9 in respect of a mortgage of April 30, 1922 and Rs. 95-15-3 in respect of the dues on a handnote of *Chaith* 2, 1333 *Fasli*. The dues on the handnote were in fact paid not by the defendants but by the plaintiffs 2nd party on March 25, 1929. Puran Rai obtained a decree in the suit on his mortgages on February 7, 1934. The Appellate Court held that the plaintiffs' claim to recover the consideration was barred so far as the amount on Puran Rai's handnote was concerned but so far as the money due on Puran Rai's mortgages was concerned it was held that the suit was within time. The plaintiffs were, therefore, given a decree "for compensation for breach of the contract in regard to the mortgage bonds" with interest at 6% from July 2, 1928, till September 24, 1935, the date of the suit.

In second appeal it is contended on behalf of the defendants that the plaintiffs' claim in respect of the mortgage money

of Puran Rai was also barred by limitation. The contention is that the consideration for the sale deed of 1928 was one and that there was a breach of the contract to pay Puran Rai as soon as the defendants repudiated their liability to pay his handnotes, or at the latest on March 25, 1929, when these handnotes were discharged by the plaintiffs 2nd party. For the respondents, however, it was contended that the handnotes were payable on demand and that in view of the defence raised there could be no finding of the Courts below that there ever was a demand for the payment of the dues on Puran Rai's handnote. The Appellate Court, however, has accepted the evidence given by the prosecution witness No. 1, who was one of the plaintiffs 2nd party, describing how he asked defendant No. 1 to pay the demands of Puran Rai on the handnote and how the latter put off the matter until the plaintiffs were forced to raise the money elsewhere and to pay Puran Rai. The Appellate Court observed that this evidence was amply corroborated by the evidence of Puran Rai himself and other witnesses. In this view of the matter it must be held that on or before March 25, 1929, there had been a demand made to the defendants to fulfil the obligation which they had undertaken by the terms of the sale deed to pay the money due from the plaintiffs 2nd party to Puran Rai. Nor do I think that it can be held that the consideration for the sale deed can be split up into two parts, namely, the amount payable on the handnotes and the amount payable on the mortgages of Puran Rai. The consideration for the sale deed was Rs. 300 and it is immaterial that part was to be used for the payment of the dues on the handnote and part for the payment of dues on the mortgages. The position would have been different if the due dates of the mortgages in favour of Puran Rai were subsequent to the date on which the payment of the dues on the handnote was demanded ; but it is the admitted case of both parties that the mortgage debts had fallen due prior to the execution of the sale deed of 1928. In my view, therefore, there was a breach on the part of the defendants to pay the consideration money for the sale deed when they declined to pay the debts on the handnote. As there was an express agreement to pay the consideration money and as this agreement was contained in a registered document the period of limitation is that provided by Art. 111 read with Art. 116, namely 6 years. *Ram Rachhya Singh Thakur* v. *Raghunath Prasad Missir* (1). As the present suit was not instituted until September 24, 1935, the result is that the plaintiffs' claim to recover the unpaid consideration money for the sale deed is barred. It was suggested that the suit should be viewed as a suit on a contract of indemnity to which case Art. 83, would apply. Such a contention was negatived in *Keshwar Sao* v. *Guni Singh* (2), but was accepted in *Mehdatunnissa Begum* v. *Halimatunnissa Begum* (3). That article provides for a period of three years from the date when the plaintiffs were actually damnified. Even so regarded, the plaintiffs were damnified on March 25, 1929, *Mehdatunnissa Begum* v. *Halimatunnissa Begum* (3). Whether the plaintiffs' claim in respect of the sale deed of 1928 be viewed as governed by Art. 83 or Art. 97 read with Art. 116, the claim is barred. If Art. 83, applies the plaintiffs were damnified on March 25, 1929 and if Art. 97, applies the defendants must be held to have failed to pay the consideration money on that date, and as that date is more than six years before the institution of the suit, this claim is barred. Similarly, if the claim be viewed as a claim for compensation for breach of a contract the contract was broken on March 25, 1929 and time runs from that date. It was suggested on behalf of the respondents that the date on which Puran Rai instituted the suits on his mortgage should be regarded as the date on which the defendants broke their contract. So far as this part of the consideration of the sale deed was concerned that appears to have been the view taken by the Court below. But as I have already held the consideration for the sale deed was one and it was payable to one person, Puran Rai. As soon as the defendants refused to pay the debts on the handnote there was a breach of the contract and that occurred at the latest on March 25, 1929, *see Keshwar Sao* v. *Guni Singh* (2). A reference was made to the language of the third column of Art. 115, which refers to successive breaches of contract. It has been held that the term "successive breaches" in this article refers only to cases in which there is a promise to pay periodically, as for instance, payment of rent,

(1) 8 Pat. 860; 122 Ind. Cas. 244; A I R 1930 Pat. 46; Ind. Rul. (1930) Pat. 196.

(2) A I R 1938 Pat. 275; 176 Ind. Cas. 269; 17 Pat. 338; 19 P L T 198; 11 R P 75; 4 B R 694.

(3) A I R 1939 Pat. 194; 181 Ind. Cas. 459; 17 Pat. 751; 11 R P 590; 5 B R 588.

annuities, interest, maintenance, etc. The result, therefore, is that Appeal No. 575 must be allowed. In view of the false defence set up by the appellants regarding the payment of the consideration money I disallow costs.

Second Appeal No. 576 of 1939.

Out of the consideration for the *sudbharna* of July 2, 1928, the defendants agreed to pay Rs. 127-8-9 to Puran Rai on account of a mortgage of April 30, 1922 and Rs. 69-0-9 on account of a hand-note of *Baisakh* 15, 1334. The *sudbharna* is a registered document and the defendants were actually given possession. It is, therefore, contended on behalf of the defendants-appellant that the plaintiffs' remedy was by a suit for redemption. On behalf of the plaintiffs-respondent, on the other hand, it is pointed out that the mortgagor was entitled to redeem in 1311 *Fasli*, that is to say, before the date of the present suit and that the consideration for the mortgage not having been paid there was nothing to redeem. From the judgment of the trial Court it appears that at the trial the defendants admitted that if it were found that they had not paid off Puran Rai the plaintiffs would be entitled to possession and mesne profits for 3 years prior to the institution of the suit. Apart from this admission, however, the present suit, I think, should be regarded, in the circumstances of the case, as a suit for redemption after taking of accounts. In such a suit the mortgagor would be entitled to possession on payment of the consideration and such other sums as might be due to him after taking of the accounts. In the present case nothing is payable by the mortgagor on account of the principal, for the consideration was never paid by the mortgagee. As to accounts, as the mortgagee never parted with the consideration, he is not entitled to any interest on it. He was put in possession in lieu of interest; as no interest was payable on account of the consideration not having been paid he is liable to account for the income of the property during the time he was in possession as mortgagee. In other words, he is liable to accounts for the income of the property during the period of his possession. The decree of the Court below awarding mesne profits in effect ensures that the plaintiff will obtain the profits of the property during the time when the defendants were in possession as mortgagees and nothing more. Although, therefore, the form of the decree is wrong, in substance it is not open to objection, for the same result will follow if the decree be in form a decree for redemption on taking accounts, except that such a decree would work out more favourably for the respondents as they would be entitled to bring into account the income for the entire period of the defendants' possession whereas the defendants' liability for mesne profits is limited. The plaintiffs, however, have not appealed against the decree awarding them mesne profits only. Second Appeal No. 576 of 1939 is dismissed with costs.

S. *Appeals dismissed.*

MADRAS HIGH COURT

Civil Revision Petition No. 1622 of 1938

May 1, 1940

HORWILL, J.

Sri Rajah YENUMALA LATCHANNA DORA VARU—PETITIONER

versus

Sri Rajah YENUMALA MALLU DORA VARU—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 151—Interim order—Suit for recovery of certain property alleged to be allotted to plaintiff under agreement—Defendant not admitting that plaintiff is entitled to such property—Court, if can pass interim order of maintenance.

There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some *interim* relief pending disposal of the suit. Where therefore a plaintiff brings a suit for certain property alleging it to have been allotted to him in accordance with certain agreement and the defendant does not admit that the plaintiff is entitled to the property claimed by him, the Court has no jurisdiction to pass an *interim* order of maintenance in favour of the plaintiff. C. R. P. No. 1312 of 1930 and 77 Ind. Cas. 718 (1), relied on.

C. R. P. to revise an order of the District Court, West Godavari at Ellore, dated October 5, 1938.

Mr. *V. Viyanna*, for the Petitioner.

Mr. *Ch. Raghava Rao*, for the Respondent.

Order.—The plaintiff brought the present suit against his brother and his father for the B Schedule properties which, he said, were allotted to him in accordance with an agreement. In the alternative, he prayed for partition. The defendant's case is that the property is for the most part his self-acquired property and that the only property to which the plaintiff is entitled is that in Sch. I. During the

pendency of the suit the plaintiff made an application to the Court for an *interim* maintenance of Rs. 800 a month. The learned District Judge has awarded Rs. 250 a month.

The plaintiff is not entitled to an order of the nature passed. In *Gopal Saran Narayan Singh* v. *Sita Debi*, 77 Ind. Cas. 718 (1), a Divisional Bench of the Patna High Court held that a Court has no inherent power under s. 151 to pass such an order. That case was very like the present, in that the plaintiff sued on a maintenance agreement, and only differed from it in that the defendant there did not admit that the plaintiff was entitled to anything. Here, the defendant does admit that the plaintiff is entitled to something: but he does not admit that the plaintiff is entitled to any part of the land that he claims. Jackson, J. in C. R. P. No. 1312 of 1930, quotes *Gopal Saran Narayan Singh* v. *Sita Debi*, 77 Ind. Cas. 718 (1), as an authority for the position that the Court has no inherent power under s. 151 to pass an *interim* order of maintenance and pertinently adds that

"a Court cannot interfere with a private person's property merely because he happens to be a defendant on behalf of another person merely because he happens to be a plaintiff. There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some *interim* relief pending disposal of the suit."

In the face of the above decisions, I do not feel justified in taking into account the document in the plaintiff's favour, the validity of which is denied by the defendant. The defendant does however admit that the plaintiff is entitled to some property, but it would be inconvenient, I consider, during the pendency of this suit which, I hope, will not be very much longer, to compel the plaintiff to take possession of property which he does not claim and with regard to which he may have some difficulty in collecting rent. Some maintenance in proportion to the property admittedly belonging to the plaintiff can be given; and I think the fairest course would be to reduce the amount granted to the plaintiff by the lower Court to Rs. 50 a month from the date of the last payment. If it is subsequently found that Rs. 50 a month is in excess of the mesne profits from the land to which the Court finds the plaintiff is entitled, the excess will be charged on the land awarded to the plaintiff. The petition is allowed to the extent indicated. There will be no order as to costs.

A memorandum of cross-objections has been filed asking for an enhancement of the allowance. This has to be dismissed, whether on the ground that the plaintiff cannot be given even as much as was granted by the lower Court or on the ground that a memorandum of cross-objections cannot be filed in a revision petition. It could no doubt be treated as a revision petition if it had been filed within three months from the date of the passing of the order. Apparently this was not done. The memorandum has not been argued and it is not necessary to pass any order as to costs. The trial Court should expedite the disposal of the suit.

N.-S. *Petition partly allowed.*

(1) 77 Ind. Cas. 718; A I R 1924 Pat. 69; 5 P L T 560.

PATNA HIGH COURT

Appeal From Appellate Order No. 133 of 1940
Civil Revision No. 250 of 1940
December 10, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

GUNJARI MAHATANI—JUDGMENT-DEBTOR—APPELLANT

versus

NIL KAMAL PANDE—DECREE-HOLDER—RESPONDENT

Bihar Money-lenders' Act (III of 1938), ss. 13, 14—Application under s. 13—Matters required by section determined—Sale under s. 14—Fresh proclamation is essential — Previous waiver before application under s. 13, if gives jurisdiction to hold sale under s. 14, without fresh proclamation.

Section 14, Bihar Money-lenders' Act, makes it clear that after the property has been valued or such portion of it as is sufficient to satisfy the decree, a sale proclamation of the actual property to be sold must be drawn up, and in it must be stated the value of the property as determined by the Court under s. 13. Whatever has happened earlier, once an application is made under s. 13, a fresh sale proclamation must be drawn up under s. 14 after the property actually to be sold has been decided upon and its value fixed. The waiver of a fresh sale proclamation in the earlier stages of the case, before an application under s. 13 was put in cannot possibly be construed as a waiver of an entirely new sale proclamation which s 14 of the Act requires the sale without the issue of a new sale proclamation containing the matters set out in s. 14, is without jurisdiction and must be set aside.

A. from an order of the Additional District Judge, Purulia, dated March 16, 1940.

Messrs. *S. C. Mazumdar*, *Ramanugrah Narayan Sinha* and *V. D. Narayan*, for the Appellant.

Mr. *A. K. Mitra*, for the Respondent.

Harries, C. J.—This miscellaneous second appeal and civil revision are directed against an order of learned Munsif dated June 21, 1939, passed in an execution case directing the immediate sale of certain property. The judgment-debtor-appellant appealed against that order to the Court of the learned Additional District Judge of Purulia, and that appeal was dismissed by an order of the learned Additional District Judge, dated March 16, 1940. Against that order of the learned Additional District Judge this second appeal from order has been preferred, and the application for revision is in the alternative, that is to say, it is an application directed against the order of the learned Munsif in the event of this Court holding that no appeal lies.

In my view it is unnecessary to consider whether an appeal lies or not in this case, because the facts of the case make it necessary that this Court should interfere. If no appeal lies, then we would be bound to interfere in our revisional jurisdiction, and that being so, it is unnecessary definitely to decide whether an appeal or revision lies in this case.

The decree-holder-respondent put into execution a decree for Rs. 1,071-0-3 and attached eleven lots of the appellant's property. The execution case was a protracted one, and the sale proclamation of all the eleven lots was published on May 15, 1939. Thereafter the judgment-debtor applied and obtained two adjournments postponing the sale on payment of small sums on each occasion towards the decretal dues. The judgment-debtor in obtaining these adjournments waived the necessity of the issue of a fresh sale proclamation.

On June 10, 1939, the judgment-debtor filed an application under s. 11, Bihar Money-lenders Act, for permission to pay the decretal sum in instalments; but this application was refused by the learned Munsif. Subsequently on June 16, 1939, she filed another application under s. 13, Bihar Money-lenders Act, claiming that the properties should be valued and only such part of the properties sold as would be sufficient to satisfy the decretal amount. The learned Munsif acceded to this application and proceeded to value the properties, and evidence was given by the parties. The learned Munsif fixed the valuation of lot No. 7 at Rs. 1,100, and the parties agreed that this lot alone should be sold in satisfaction of the decree as its value was sufficient to satisfy that decree. Immediately afterwards on the very same day the learned Munsif put up lot No. 7 for sale, and it was sold to the decree-holder for Rs. 1,069-1-9 in full satisfaction of his dues.

While the sale was going on, the appellant-judgment-debtor filed a petition before the learned Munsif claiming that the property could not be sold until a fresh sale proclamation had been issued. The property, however, was sold in the manner I have stated. The learned Additional District Judge in appeal held that no appeal lay to him and consequently refused to interfere.

It has been urged on behalf of the judgment-debtor that the property which was sold, namely lot No. 7, could not be sold without the issue of a sale proclamation containing the details which are required by s. 14, Bihar Money-lenders Act Section 13 of that Act enjoins the Court when application is made to it to value the property and of that portion of such property the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree. On application being made to the Court, it valued lot No. 7 at Rs. 1,100 which was sufficient to satisfy the decree. When the Court has valued the property under s. 13, then the provisions of s. 14 of the Act come into operation. That section is in these terms:

"Notwithstanding anything to the contrary contrained in any other law or in anything having the force of law the proclamation of the intended sale of property in execution of a decree passed before or after the commencement of this Act in respect of a loan or the interest on a loan shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and shall state the value of the property or portion of the property to be sold, as determined under s. 13; and such property or portion of the property, as the case may be shall not be sold at a price lower than the price specified in the sale proclamation....."

This section makes it clear that after the property has been valued or such portion of it as is sufficient to satisfy the decree, a sale proclamation of the actual property to be sold must be drawn up, and in it must be stated the value of the property as determined by the Court under s. 13. It appears to me that whatever has happened earlier, once an application is made under s. 13, a fresh sale proclamation must be drawn up under s. 14 after the property actually to be sold has been decided upon and its value fixed. In the present case it is common ground

that no such proclamation was drawn up, and the property was in fact straightaway sold to the decree-holder.

It has been urged on behalf of the decree-holder-respondent that the judgment-debtor had waived the necessity of a fresh sale proclamation. As I have stated earlier, the judgment-debtor had obtained two adjournments of the proposed sale of the eleven lots and had waived the necessity of a fresh sale proclamation. Had the sale which actually took place been the sale of these eleven lots, no fresh sale proclamation would be necessary. However, application was made under s. 13 of the Act, and lot No. 7 was valued and that that alone directed to be sold. Once the Court had arrived at that conclusion and valued the property, it was, in my view, bound to issue a fresh sale proclamation of that property and that property alone, and such proclamation was bound to contain the value of that property as ascertained by the Court. The waiver of a fresh sale proclamation in the earlier stages of this case cannot possibly be construed as a waiver of an entirely new sale proclamation which s. 14 of the Act requires. In the earlier stages when a fresh sale proclamation was waived no application under s. 13 of the Act had been made, and the moment that was made the parties' rights was governed by the statute. It was urged at one stage that the judgment debtor had no right to apply for valuation under s. 13 of the Act because she had obtained adjournments of the earlier sale and waived the need of a fresh sale proclamation. Whatever be the merits or demerits of such a contention it is unnecessary to consider. An application was made, and this point was never raised in opposition. An order was passed by the learned Munsif fixing a valuation and directing what property should be sold, and that order has never been challenged by the decree-holder. In my view the learned Munsif was bound to direct the issue of a new sale proclamation containing the matters set out in s. 14, and he had no right or jurisdiction whatsoever to direct an immediate sale without first directing the issue of a fresh sale proclamation. In my view the order of the learned Munsif dated June 21, 1939, directing an immediate sale cannot be sustained and must be set aside.

In the result, therefore, I set aside the order of the learned Munsif and direct that the execution proceedings should be proceeded with from this stage in accordance with law. In the circumstances, I make no order as to costs upon the appeal or the petition for revision.

Manohar Lall, J.—I agree.

D. *Order accordingly.*

NAGPUR HIGH COURT

Civil Revision Application No. 868 of 1938
February 26, 1940
PURANIK, J.

TIKKI LAL—DEFENDANT No. 2—APPLICANT
versus
KOMALCHAND—PLAINTIFFS NOS. 1 TO 4 AND DEFENDANTS NOS. 1, 3 AND 4—OPPOSITE PARTY

Contract—Minor—Minor entering into contract representing to be major—If estopped from proving his minority at date of contract—Contract Act (IX of 1872), ss. 65, 68—Cash payment made under contract with minor, if can be recovered—Funds advanced to Hindu male minor for his own marriage do not fall under s. 68 and cannot be recovered from minor's property—Funds supplied to minor for minor female's marriage can, however, be recovered from his ancestral property—Surety—Liability of—Surety representing principal to be major and agreeing to compensate plaintiff if representation proved false—Principal found to be minor—Liability of surety.

Where a minor misrepresents his age and claims to be a major, and enters into a contract he is not estopped from proving that he was really a minor on the date of the contract. [p. 179, col. 2.]

A contract with a minor being void *ab initio* no cash payment made under such a contract is recoverable from him. 122 Ind. Cas. 266 (1), relied on. [p. 179, col. 2; p. 180, col. 1.]

[Case-law referred to.]

Advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with necessaries suited to his condition in life within the meaning of s. 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor. The Hindu Law does not enjoin the marriage of a Hindu male before the age of majority. The case of Hindu females is, however, different. If funds are supplied to a minor owning ancestral property, for the marriage of a minor female in the family the person who supplies may be able to get himself reimbursed from the estate of the minor. [p. 180, col. 2; p. 181, col. 1.]

[Case-law discussed.]

Where the sureties represent to the plaintiff that principal is competent to contract and make the plaintiff enter into a transaction, agreeing to compensate if their (sureties') representations proved false or any defect was discovered in the contract thereafter the sureties must under the terms of their contract compensate the plaintiff. The suretyship contract is a collateral and almost an independent contract and can be enforced. *Kashiba* v. *Sripat Narshiv* (18), relied on. [p. 183, col. 1.]

C. R. App. of an order of the Court of Small Causes, Seoni, dated November 4, 1938.

Mr. *C. B. Parakh*, for the Applicant.
Messrs. *S. P. Kotval* and *R. N. Padhye*, for Non-Applicants Nos. 1 to 4.
Mr. *W. B. Pendharkar* with Mr. *G. T. Bhide*, for Non-Applicant No. 5.

Order.—The plaintiffs sued the defendants for recovery of Rs. 987. Their case is that defendant No. 1 Gulabchand with the other defendants as sureties sold to them a half share in a house in Seoni for a consideration of Rs. 600 on November 5, 1932, under a sale-deed (Ex. P-1) and placed them in possession thereof after receiving Rs. 150, on the date of registration and Rs. 50 on May 6, 1932, the balance remaining in deposit with them; the defendant No. 1 and his sureties represented to the plaintiffs that defendant No. 1 was a major when the sale-deed was executed, and acting on that representation the plaintiffs parted with Rs. 200 and became the purchasers. The plaintiff allowed defendant No. 1 to remain in possession of the house as their licensee, but taking advantage of his possession he sold the house to one Hukumchand on April 7, 1937, and it was then that the plaintiffs learnt on enquiry that the defendant No. 1 was a minor on the date of the sale in their favour and that a false representation was made to them that he was a major. The plaintiffs now realizing that the sale in their favour was void claim Rs. 200 paid by them to defendant No. 1 together with damages which they suffered on account of the transaction falling through, from all the defendants in the case. They claim Rs. 200 paid by them, Rs. 287 interest on Rs. 200 at 2 per cent. per mensem as provided for in the sale-deed by way of damages, and Rs. 500 on account of the difference in the sale price and the present price of the house. Rupees 987, is the amount of the claim. The plaintiffs assert that Rs. 200 paid as consideration under the sale-deed was paid to defendant No. 1 to meet his marriage expenses and that he is bond to refund the same under s. 68 of the Contract Act.

Defendant No. 1 admits that he was a minor on the date of the sale, but pleads that he thought he was a major and executed the sale-deed under that belief. He wanted the plaintiffs to pay the balance and take possession, but they did not, with the result that he sold the house for Rs. 550, on April 7, 1937, to one Hukumchand. He admitted that he received Rs. 200, for his own marriage and pleaded that it cannot be regarded as a necessity of life under s. 68 and that the plaintiffs cannot recover the same on that ground. He also pleaded that the contract being void, the plaintiffs could not claim to recover anything under it.

The sureties who are the other defendants in the case deny that they misrepresented the age of defendant No. 1 as above 18 and pleaded that they were not sureties for the defect in title and that as the original contract between the plaintiffs and defendant No. 1 was void, there could be no contract of suretyship regarding a void contract. They denied the damages claimed and stated that the claim was not leviable against them. It was also pleaded on behalf of the defendant No. 1 that the plaintiffs' claim was barred by time.

On these facts the lower Court set forth the necessary points for determination and decreed the claim of the plaintiffs for Rs. 212 against the sureties only. The plaintiffs feeling themselves aggrieved have filed an application for revision (Civil Revision No. 869 of 1938), claiming a decree for the full amount claimed against all the defendants, while the surety Tekkilal (defendant No. 2) has filed an application for revision (Civil Revision No. 868 of 1938) claiming that there should be no decree against the sureties and that the plaintiffs' suit should have been dismissed against them also. This order will govern both these revision applications which were argued together before me as arising out of the same suit.

The plaintiffs contend that the trial Court having rightly found that all the defendants represented defendant No. 1 to be a major, though he was a minor on the date of the sale, should have ordered the payment of Rs. 200 not only by the sureties but also by defendant No. 1 who actually received it for his own marriage. The plaintiffs also lay claim to this amount from defendant No. 1's estate on the ground that they supplied funds to the minor for necessaries suited to his condition of life within the meaning of s. 68 of the Contract Act.

Though defendant No. 1 also misrepresented his age and claimed to be a major, he is not estopped from proving that he was really a minor on the date of the contract. This proposition is not disputed by the plaintiffs in this case. That being so, the plaintiffs cannot lay claim to recover anything from him on the basis of a contract which was admittedly void *ab initio*. Defen-

dant No. 1 was incompetent to enter into any contract and as held in *Gulabchand* v. *Chunilal* (1), no cash payment made under such a contract is recoverable from him. I was asked to decree the claim for Rs. 200 admittedly received by defendant No. 1 under s. 65 of the Contract Act, and it was argued that in equity the plaintiffs were entitled to claim refund of what they paid to defendant No. 1 and that he should not be allowed to retain the benefit that he obtained by his own misrepresentation; *Khan Gul* v. *Lakha Singh* (2) and *Appaswami Ayyangar* v. *Narayanaswami Ayyar* (3) and *Asaram* v. *Ludheswar* (4), were relied on.

The case in *Khan Gul* v. *Lakha Singh* (2), was referred to in *Gulabchand* v. *Chunilal* (1), and the view of Harrison, J. was preferred to that of Shadi Lal, C. J. and the suit for refund of money was dismissed.

Appaswami Ayyangar v. *Narayanaswami Ayyar* (3), was a case in which the minor on the date of contract had sued for a declaration that the contract be declared void on the ground of minority, and while speaking of a suit of this kind it was stated that such a plaintiff must be put on terms. It is doubtful if the Madras High Court would have taken the same view if the minor was a defendant who had received cash. Reilly, J. observed that the same result is reached by applying the general principle that no plaintiff can be allowed to make the Court an instrument of fraud. The distinction has been clearly brought out in the judgment of Reilly, J. at pp. 130 and 131*. *Appaswami Ayyangar* v. *Narayanaswami Ayyar* (3), is not thus an authority for decreeing the claim against a minor or an ex-minor for refund of cash consideration though he represented himself to be a major when he was in fact a minor.

Asaram v. *Ludheshwar* (4), was also a case in which the plaintiffs wanted the help of the Court and claimed cancellation of a deed executed by them on the ground that it was forbidden by law, and this Court before giving a decree to the plaintiffs thought it equitable to put such plaintiffs on terms.

None of the cases cited before me lay down a proposition contrary to the decision in *Gulabchand* v. *Chunilal* (1), where it was laid down that a decree against a minor or ex-minor defendant cannot be passed for the refund of money borrowed either on a contract or for money had and received for the use of the minor; such a suit ought to fail.

The view taken in *Gulabchand* v. *Chunilal* (1), was a reiteration of the view taken in *Muliabai* v. *Garud* (5), which in its turn was based on *Mohori Bibi* v. *Dharma Das Ghose* (6), where their Lordships clearly stated that s. 65 of the Contract Act will not apply to a contract which could not be entered into by reason of s. 11 of that Act.

Harimohan v. *Dulu Miya* (7) is also a case in point on the same subject. The Court must take care to see that under the guise of restitution the very contract which is void is not virtually enforced against the minor. To permit the plaintiff to recover the money paid to the minor is tantamount to enforcing the contract against the minor, and in the absence of any authority to the contrary, I decline to depart from the rule laid down in *Gulabchand* v. *Chunilal* (1).

This brings me to the consideration of the applicability of s. 68 of the Contract Act. This is incidentally decided by the ruling in *Gulabchand* v. *Chunilal* (1) as is stated there that no decree can be passed against an ex-minor for money had and received for the use of the minor. I am further clearly of the opinion that advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with necessaries suited to his condition in life within the meaning of s. 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor.

Marriage under Hindu Law is no doubt a sacrament and a holy union, but I am not aware of any Hindu Law text which enjoins the marriage of a Hindu male before the age of majority. The case of Hindu females is different. The marriage of a daughter or a sister born in a Hindu family ought to be performed before she attains the age of puberty according to Hindu Law texts, and if it be not so

(1) 25 N L R 85; 122 Ind. Cas. 266; A I R 1929 Nag. 156; Ind. Rul. (1930) Nag. 138.

(2) 9 L 701 (715); 111 Ind. Cas. 175; A I R 1928 Lah. 609; 30 P L R 60; 10 L L J 413 (F B).

(3) 54 M 112; 129 Ind. Cas. 51; A I R 1930 Mad. 945; 60 M L J 117; 32 L W 963; Ind. Rul. (1931) Mad. 195.

(4) I L R (1939) Nag. 1; 177 Ind. Cas. 6; A I R 1938 Nag. 335; 11 R N 109 (F B).

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(5) 15 N L R 149; 53 Ind. Cas. 65; A I R 1919 Nag. 76.

(6) 30 C 539; 30 I A 114; 7 C W N 441; 8 Sar. 374 (P C).

(7) 61 C 1075; 155 Ind. Cas. 1017; A I R 1935 Cal. 198; 7 R C 659.

performed, those whose duty it is to perform it, *viz.* mother, father or brother, go to the infernal region (see Yama 22 and 23). In such a case, if funds are supplied to a minor owing ancestral property, the person who supplies may be able to get himself reimbursed from the estate of the minor, but I cannot persuade myself to apply the provisions of s. 68 of the Contract Act when funds are supplied to a male minor or the guardian of such a minor for the marriage of the minor himself. My attention is invited to the observations in *Sadasheo* v. *Firm Hiralal Ramgopal* (8), *Makundi* v. *Sarabsukh* (9) and *Pathak Kali Charan*, v. *Ram Devi Ram* (10).

Sadasheo v. *Firm Hiralal Ramgopal* (8) refers to *Makundi* v. *Sarabsukh* (9), and Bose, J. stated in general terms that reasonable marriage expenses of a minor have been upheld in *Makundi* v. *Sarabsukh* (9) and *Juggessur Sircar* v. *Nilambur Biswas* (11). I also agree that they are necessaries. With due respect I cannot concur in this. *Makundi* v. *Sarabsukh* (9), relied on, only baldly states that under the peculiarities of the Hindu Law, the marriage of a minor may be perhaps a legitimate cause for the alienation of the property by his guardian. This is hardly a statement which tackles the point.

Pathak Kali Charan v. *Ram Devi Ram* (10) is a case in which funds were supplied for the marriage of the brother of a minor owning ancestral property, and it was held that the funds could be recovered from the estate under s. 68 of the Contract Act though the amount was advanced really as an earnest money for a contract of sale. This was dissented from in *Raghunathan* v. *Ravuthakanni* (12) on the ground that money paid as earnest money could not fall under s. 68 of the Contract Act. *Pathak Kali Charan* v. *Ram Devi Ram* (10) is based on *Vaikuntam Ammangar* v. *Kallipiram Ayyangar* (13) which was a case where funds were advanced for a daughter's marriage to a Brahmin widow and were held recoverable by such a widow from the estate of her husband in the hands of her husband's brother under s. 69 of the Contract Act. It did not lay down that if funds are advanced for a brother's marriage or the marriage of a minor himself, the case would be covered by s. 68. This shows that *Pathak Kali Charan* v. *Ram Devi Ram* (10). was wrongly decided.

Sundrabai v *Shivnarayan* (14), *Bhagirathi* v. *Jokhu Bam Upadhia* (15) and *Gopalakrishnam Raju* v. *Venkatanarasa Raju* (16) relied on by the plaintiffs, do not apply to the facts of the present case. *Sundrabai* v. *Shivnarayana* (14) lays down that one who cannot lead the life of a celibate ought to get himself married, otherwise he is a *patita*, but no text is cited enjoining marriage even before the age of majority. This was also a case of an alienation for legal necessity. It may be necessary for the manager of a joint Hindu family to get co-parceners in the family married out of the funds of the family even by alienating family property, but to say that even the marriage of a minor co-parcener is one of the necessaries of life is stating the law very widely. Chandavarkar, J. adverts to this at p. 96*, but sums up by saying that though the Shastras discourage early marriage, they do not prohibit it and that usage has sanctioned such marriages. I do not think this view can be accepted when even the law of the land makes it an offence to get a minor male married. *Bhagirathi* v. *Jokhu Ram Upadhia* (15) follows *Sundrabai* v. *Shivnarayana* (14), and was a case of second marriage of a major male member of the family for which family property was alienated, and it was held to be a legal necessity in the peculiar circumstances of that case. *Gopalakrishna Raju* v. *Venkatanarasa Raju* (16) was also a case of alienation of family property for the marriage of a major male, and it was held that the alienation was justified. These are all cases of alienation and the alienation of the minor's property was sought to be justified. Bose, J. in *Sadasheo* v. *Firm Hiralal Ramgopal* (8) has pointed out the distinction between cases of alienation justified by legal necessity and cases of supply for necessaries. It is not permissible to confuse the two kinds of cases. Moreover the view taken in these cases is very much shaken by the decision in *Ramjas Agarwalla* v. *Chand*

(8) A I R 1938 Nag. 65; 175 Ind. Cas. 149; 10 R N 437.
(9) 6 A 417(421); A W N 1884, 144.
(10) 2 P L J 627; 42 Ind. Cas. 963; A I R 1917 Pat. 332.
(11) 3 W R 217.
(12) I L R (1938) Mad. 928; 182 Ind. Cas. 654; A I R 1938 Mad. 765; (1938) 2 M L J 277; 48 L W 112; (1938) M W N 779; 12 R M 119.
(13) 26 M 497; 13 M L J 25.
(14) 32 B 81; 9 Bom. L R 1366.
(15) 32 A 575; 6 Ind. Cas. 465; 7 A L J 667.
(16) 37 M 273; 17 Ind. Cas. 308; A I R 1914 Mad. 432; 23 M L J 288; 12 M L T 292; (1912) M W N 903.

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Mandal (17), where it was laid down, differing from *Sundrabai* v. *Shivnarayana* (14) (and presumably similar cases), that a marriage of a minor male is not a legal necessity justifying his guardian to alienate his property. *Ramjas Agarwalla* v. *Chand Mandal* (17) refers to Manu, Chap. IX verse 94 :

"Let a man of 30 years marry an agreeable girl or a man of 38 years a girl of 8 years ; one marrying earlier deviates from his duty."

If the personal law of the Hindus nowhere lays down that the marriage of a Hindu male before he attains the age of majority is a duty enjoined on such a person, and if marriage of a male before the age of majority is not approved of by social usage and the law of the land (*viz.* the Child Marriage Restraint Act), it will be wrong to hold that a person supplying funds for such marriage of a minor male Hindu supplies the same for necessaries of life. It is the duty of Courts to discourage breach of the laws of land, but if Courts were to decree a claim of this nature under s. 68, of the Contract Act, it will be putting a premium on a breach of the law of restraint of child marriage.

Cases decided before the Child Marriage Restraint Act ought not to be held as guides in deciding the cases of necessaries after the Act came into force in British India.

When the law of the land does not permit a minor Hindu male to marry before the age of 18 and on the contrary holds him guilty if he were to contract a marriage before the age of 18, and when his personal law does not cast a duty on him to get himself married before the age of 18, I fail to understand how such a marriage can be regarded as one of the necessaries of life suitable to his status in life. Though Courts have widened the definition of the term "necessaries" within the meaning of s. 68, of the Contract Act, it will be travesty of justice to include in the term a marriage which is prohibited by law and thus not permitted by social usage.

I hold that the sum of Rs. 200 advanced by the plaintiffs to defendant No. 1, though advanced and spent for his own marriage, cannot be recovered by the plaintiffs from the minor's estate under s. 68, of the Contract Act. The plaintiff's suit was thus rightly dismissed against defendant No. 1.

The plaintiff's further contention is that their claim against the sureties at any rate ought to have been decreed fully, while the sureties contend that the plaintiff's suit against them should fail as it is barred by time and that they could not be held liable when in fact there was no contrart between their principal and the plaintiffs, their principal being a minor. The finding of the trial Court that the minor and the sureties represented to the plaintiffs at the time of the transaction that defendant No. 1 was a major was not challenged in argument before me. The finding that the plaintiffs discovered on April 7, 1937, that the defendant No. 1 was a minor on the date of the transaction is not also challenged.

The sureties, however, contend that the cause of action for the suit accrued when the plaintiffs paid Rs 200 to defendant No. 1, and that as the suit was filed more than three years after that date, it was barred. There is, however, a clear finding by the Court below that these sureties represented to the plaintiffs when they paid Rs. 200 that the defendant No. 1 was a major, and that the plaintiffs discovered this to be false when defendant No. 1 sold the house to another on April 7, 1937, and made enquiries thereafter and learned that the defendant No. 1 was in fact a minor on the date of the transaction. On these findings the cause of action for recovery of compensation for breach of contract or even for refund of the amount paid to defendant No. 1 under the suretyship of the sureties accrued when the fraud was discovered. The plaintiff's claim is thus within three years from April 7, 1937, and well within time. I need not enter into an elaborate discussion about the article of the Lim. Act applicable to the case as the suit has been filed within three years of the accrual of the case of action.

The contention of the sureties that as the defendant No. 1 was incompetent to contract and his contract is void, the suretyship which is fastened on it also falls through, cannot be accepted. Defendant No. 1 was incompentent to contract and may not be liable under the contract, but the recital of the stipulation in the sale deed by the sureties that if there after anything was found wrong with the contract of defendant No. 1 and the plaintiffs suffered any damage, the sureties would compensate the plaintiffs with interest at 2 per cent. per mensem, makes the sureties liable to the plaintiffs. The sureties were competent to contract though defendant No. 1 was not and it is the sureties who

(17) 41 C W N 1176; I L R (1937) 2 Cal. 764; 65 C L J 557.

represented to the plaintiffs that defendant No. 1 was competent to contract and made them enter into this transaction, agreeing to compensate them if their (sureties') representations proved false or any defect was discovered in the contract thereafter. The sureties must under the terms of their contract compensate the plaintiffs. The suretyship contract is a collateral and almost an independent contract and can be enforced: *Kashiba* v. *Shripat Narshiv* (18), I hold that the sureties are liable.

The only other point left for decision is whether the plaintiffs are entitled to claim damages to the full extent of the claim as laid. The trial Court has granted them a decree for Rs. 200 and interest thereon at 6 per cent. per annum from the date of the accrual of the cause of action. The plaintiffs failed to prove that the house fetched better price than they had agreed to pay. In fact the portion purchased by the plaintiffs was sold by defendant No. 1 for Rs. 550 *i. e.*, Rs. 50 less than the price agreed to be paid by the plaintiffs. The plaintiffs did not pay the entire consideration but paid only Rs. 150 first and Rs. 50 afterwards. The rest of the amount remained with them. They did not suffer any damage in price. They are thus entitled to get back Rs. 200 which they paid to defendant No. 1 and some compensation on this amount by way of interest. Though the sureties stipulated to compensate at 2 per cent. per mensem, it is not obligatory on the Court to grant full compensation as stipulated. The condition of 2 per cent. per mensem is by way of penalty under s. 74 of the Contract Act. I am of the opinion that in the circumstances of the case the Court was right in allowing only 6 per cent. per annum by way of compensation to the plaintiffs in addition to a refund of Rs. 200 as against the sureties.

The result is that the decision of the the Court below is maintained though for slightly different reasons, and the applications for revision filed in this Court are dismissed with costs. Pleader's fee Rs. 25 for each contesting party.

Application dismissed.

(18) 19 B 697.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 30 of 1938
March 4, 1940
DAVIS, J. C. AND WESTON, J.

WADERO SHAHBAZKHAN WADERO FATEHKHAN—APPELLANT

versus

KAKALMAL BUDHUMAL AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 15 (1) and (2)—Execution application by one of two joint decree-holders — Adjustment binding on both decree-holders, if can be recorded where executing decree-holder proves express authority — Absence of authority —Provisions of O. XXI, r. 15 must be looked into—Application by one decree-holder stating that other decree-holder will be produced at time of recovery of money — Application, if on behalf of both—Where other decree-holder is produced at time of payment of money, the payment is binding on him — Fact that payment was made out of Court is immaterial.

In the case of an execution application by one of the joint decree-holders if express authority of the executing decree-holder to receive the decretal amount on behalf of all joint decree-holders is proved or if it is established that in fact all decree-holders have received their shares of the amount then an adjustment binding all decree-holders can and should be recorded. But when no express authority or receipt by other joint decree-holders has been established then the provisions of O. XXI, r. 15, Civil P. C., have to be looked to. 35 Ind. Cas. 157 (1) and 148 Ind. Cas. 860 (2), relied on.

Rule 15 of O. XXI, Civil P. C., does not require that any particular form of words should be used to express the undertaking required by cl. 1 of that Rule.

Where one of the two decree-holders make an execution application stating that the other decree-holder will be produced at the time of the recovery of the money the application must be held to be on behalf of the both. If that undertaking is observed, and if the other decree-holder produced when the money is paid, all necessary protection of his interest would be secured. It would make no difference if payment under these conditions is made out of Court; and provided that the other decree-holder is produced at the time of any payment or adjustment and is aware that the payment or adjustment is made in satisfaction of the decree, the payment or adjustment would be binding upon him.

S. A. from the judgment of the First Class Sub-Judge, Shikarpur, dated March 5, 1938.

Mr. *Kundanmal Dayaram*, for the Appellant.

Weston, J.—The facts necessary to be stated for disposal of this second appeal are as follows: By Suit No. 111 of 1929 in the Court of the Subordinate Judge, Jacobabad, a final decree for sale of mortgaged property was obtained on May 17, 1933 by the two mortgagees Chugomal and Kakomal, the defendant in the suit being present appellant Shabazkhan, and on the same

day one of the two decree-holders, Chugomal, filed an execution application for sale of the mortgaged property. In the execution application so filed there appeared the following statement :

"Plaintiff No. 1 (Chugomal filed this execution application, and he will produce plaintiff No. 2 at the time of the recovery of the money."

On May 19, 1933 the Subordinate Judge passed an order directing registration of the execution application and as defendant was an agriculturist transferring the decree for execution to the Deputy Commissioner. On January 6, 1936 before execution had been effected by the Deputy Commissioner, Shahbazkhan, the judgment-debtor filed an application under O. XXI, r. 2 before the Subordinate Judge stating that the 'plaintiff' (Chugomal) with another person on July 25, 1935 had taken a lease of all the lands of applicant at Rs. 7 a *jireb* and Chugomal had agreed to credit his share of the lease money in satisfaction of the decree, that the decree had been fully satisfied in this manner, that the adjustment of the decree should be recorded and the execution application dismissed. On this applictaion notice was issued to Chugomal and also to the joint decree-holder Kakomal. Both appeared. Chugomal denied the adjustment and Kakomal claimed that he was not a party to it and was not bound by it. The learned Subordinate Judge held that an adjustment of the form alleged was a valid adjustment, that Chugomal had taken the lease on the terms alleged by Shahbazkhan, that he acted as agent and partner of Kakomal, that the amount of lease money applied to payment of the decree exceeded the amount due under the decree, that Kakomal was bound by the adjustment and that the decree was fully satisfied. In appeal by Kakomal, the First Class Subordinate Judge, Shikarpur, with appellate powers, held that it was not established that Chugomal and Kakomal were partners in the suit mortgage, and that even if they were partners the adjustment of the decree was not shown to have been done by Chugomal in his capacity as a partner, that payment to one decree-holder does not amount to an acquittance by all the decree-holders, and that Kakomal was not bound by the adjustment. He therefore set aside the order of the original Court and directed further execution proceedings to continue so far as the half of the decretal amount due to Kakomal was concerned.

The learned Advocate for respondent Kakomal has contended before us that the agreement or lease deed of July 25, 1935 relied upon by appellant Shahbazkhan in his application under O. XXI, r. 2 as the adjustment of the decree was made more than ninety days before the application was made, that the agreement shows that immediate credit was to be given to the judgmen-debtor for the amount of the lease money, and that the adjustment not having been certified by the judgment-debtor within the period allowed by Art. 174, Lim. Act, it cannot be recognized by the executing Court. This point does not seem to have been urged in either of the Courts below, and the reason for this probably is, as pointed out by the learned Advocate for appellant, that s. 71, Dekkhan Agriculturists' Relief Act, is a complete answer to it. This section is as follows :

"The last clause of s. 258, Civil P. C. [O. XXI, r. 2 (3)] shall not apply to payments out of Court made in any proceeding under this Act, in any case where an acknowledgment by the judgment-creditor for the same is produced, or when payment is either admitted by him or proved."

It is admitted that the execution proceedings were proceedings under this Act. The payment to Chugomal although denied by him has been held proved, and Shahbazkhan could plead it at any time. It has not been suggested before us that the adjustment pleaded by Shahbazkhan was not a valid adjustment, and there can be no doubt that it was a valid adjustment. The question we have to decide is whether it is binding upon respondent Kakomal. It is admitted that it is binding to the extent of Chugomal's share, and that this share is one-half. We think that the lower Courts were wrong in basing their decisions upon considerations of the power of one partner to bind other partners. We would agree with the following observations made in *Mahomed Silar* v. *Nabikhan* (1) quoted with approval in *Muthusamy Ayyar* v. *Narasimha Ayyar* (2), at page 702 :

"The right of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree so as to bind the third partner has no bearing on the decision of the question whether when the three partners have become joint decree-holders (and are not merely joint private creditors) two of them as such decree-holders can receive the joint decree debt so as to release the judgment-debtor from liability in execution for even a portion of the decree debt."

In *Muthusamy Ayyar* v. *Narasimha Ayyar* (2) at p. 702 it was held that if satisfaction

(1) 31 M L J 93; 35 Ind. Cas. 157; A I R 1917 Mad. 988.

(2) 57 M 696 (703) 148 Ind. Cas. 860; A I R 1934 Mad 330; 66 M L J 656; 39 L W 383; 6 R M 547; (1934) M W N 286.

of a decree should be entered on the report of one of the join decree-holders it would amount to a violation of the provisions of O. XXI, r. 15, Civil P. C. We think that if express authority of the executing decree-holder to receive the decretal amount on behalf of all joint decree-holders is proved or if it is established that in fact all decree holders have received their shares of the amount then an adjustment binding all decree-holders can and should be recorded. But when as in the present case no express authority or receipt by other joint decree-holders has been established then the provisions of O. XXI, r. 15, Civil P. C., have to be looked to. This rule is as follows :

"15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased."

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application."

In the present case it is not contended for Kakomal that the execution application filed by Chugomal was other than an application for the benfit of all, and no doubt the learned Advocate has been influenced by the necessity of supporting the application as being in accordance with law' in order that the benefit of that application may be available to him under Art. 182, Lim. Act. But apart from his admission we think the statement in the application set out in the earlier part of our judgment that Kakomal will be produced at the time of recovery of the money shows sufficiently that Chugomal purported to make the application on his own behalf and on behalf of Kakomal. Rule 15 of O. XXI, Civil P. C., does not require that any particular form of words should be used to express the undertaking required by cl., of that Rule. Clause 2 imposes a duty upon the Court to make such order as it deems necessary for protecting the intersts of the persons who have not joined with the applicant in applying for execution. In the present case no express order was made by the Court, but we think when ordering execution to proceed on the undertaking given by Chugomal to produce Kakomal, the Court must be taken to have accepted that undertaking and to have made it a condition of the execution of the decree. If that undertaing was observed, and if Kakomal was produced when the money was paid, all necessary protection of his interest would be secured. We do not think it would make any difference if payment under these conditions was made out of Court: and provided that Kakomal had been produced at the time of any payment and was aware that the payment was made in satisfaction of the decree, this payment would be a payment binding upon him.

It has been held by the first Appellate Court and by that finding we are bound, that Kakomal was not present when the agreement of July 25, 1935 was made. There was therefore no compliance with the protective order impliedly made under cl. (2) of r. 15 and Kakomal cannot be held bound by the adjustment pleaded by the present appellant. We therefore agree with the first Appellate Court, although for somewhat different reasons, that satisfaction of the decree to the extent of one-half share of Chugomal only can be recognized. We think, however, that the proper order to be made in the execution proceedings is that the execution application of Chugomal should be dismissed. Kakomal has not applied that his name should be brought on the record in the application, and if he wishes to proceed by execution he should be required to file an execution application. It may be that he will prefer to take the alternative and possibly the more honest remedy by a suit against Chugomal for his share in the benefits secured from the judgment-debtor by the lease dated July 25, 1935, although we should not be understood to express any opinion as to the maintainability of such a suit. While upholding the order that the one-half share of Chugomal in the decree only has been satisfied, we order that the execution application filed by Chugomal should be dismissed. As to costs, we think, the present parties should bear their own costs throughout. Order accordingly.

D. *Order accordingly.*

LAHORE HIGH COURT

Second Appeal No. 500 of 1940
October 4, 1940
BECKETT J.

JALAL DIN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
NAWAB AND OTHERS PLAINTIFFS AND ANOTHER, DEFENDANT—RESPONDENTS

Practice—Pleadings—Technicalities should not be insisted—Legal effect of facts stated by both sides should be determined—Evidence Act (I of 1872), s. 18—Witness—Party, if bound by statement of his witness—Custom (Punjab) — Alienation—Widow—Reversioners' suit for declaration that widow's alienation cannot affect their reversionry rights—Other reversieners impleaded as defendants along with widow and alienee—Suit compromised and decreed—Plaintiff reversioners to get possession from alienee on certain payment—Defendant reversioners held entitled to benefit of declaration alone and not to share in compromise.

Too much insistence should not be laid on the technicalities of pleadings. If the facts on both sides are stated with sufficient correctness and precision, the legal effects which flow from them are a matter for determination by the Court which conducts the trial or hears any subsequent appeal. [p. 187, col. 1.]

There is no rule of law with regard to the statement of witnesses, that a party must be bound by the statement of his witness though the belief in such a rule is not uncommon and does great harm in judicial trials in some of the Subordinate Courts. [p. 188, col. 1]

The reversioners instituted a suit for a declaration that their reversionary rights were not affected by the alienation made by the widow. Along with the widow and the alienee they impleaded other reversioners as defendants. The suit was compromised and the declaration was granted. By the terms of the compromise the plaintiffs were to take over possession from the alienee on payment of the certain amount by them alone:

Held, that so far as the reversionary rights were concerned, the defendant reversioners were entitled to share in the benefit of the compromise to the extent to which it must be taken as covering the rights of all the reversioners on the death of the widow *i e.*, the extent of the declaration in favour of the plaintiffs but were not entitled to share in any additional benefit which the active reversioners might secure for themselves by inducing a person in lawful possession to forgo his rights in return for a cash payment to be made by themselves alone. The fact that the plainntiff reversioners obtained possession without making actual payment could not affect the rights under the compromise. [p. 187, col. 2; p. 188, col. 1.]

S. A. from the decree of the Senior Sub-Judge, Lahore, dated February 23, 1940.

Mr. *Mehr Chand*, for the Appellants
Mr. *Darbari Lal*, for the Respondents-Plaintiffs.

Judgment.—Nizam Din had three sons, Bura, Chanan Din and Qamar Din. Bura and Qamar Din both left families but Chanan Din died childless and his property passed to his widow *Mst.* Hayat Bibi, for her lifetime. The present suit relates to the land left by Chanan Din. *Mst.* Hayat Bibi sold this land on August 24, 1936 to one Abdul Hakim. Jalal Din and Feroze Din, two of the three sons of Chanan Din's brother Qamar Din, then brought a suit for a declaration that this transfer by *Mst.* Hayat Bibi would not affect their reversionary rights on the termination of her life estate. Their remaining brother, Mehr Din, and the descendants of Bura were also impleaded as defendants. On March 1, 1938 the principal parties stated that they had come to a compromise whereby Jalal Din and Feroze Din were to be granted a decree for possession of the land in suit against Abdul Hakim, with the condition that the plaintiffs were to pay Abdul Hakim a sum of Rs. 300. A week later, Abdul Hakim stated in Court that he had received Rs. 200 out of this sum and had remitted the balance. Possession was to be given up to Jalal Din and Feroze Din after the crops had been cut. It is said that Mehr Din subsequently contributed a sum of Rs. 100 and was given joint possession along with his brothers. The descendants of Bura have now brought the present suit against the three sons of Qamar Din for possession of half the land left by Chanan Din. To this they have added a small claim for Rs. 30 on account of gear said to have been removed from a well. The trial Cout excluded one of the plaintiffs on the ground that he was not in fact one of the parties to the suit and granted the remaining plaintiffs a decree for possession of 3/8ths of the land on payment of Rs. 150. An appeal to the senior Subordinate Judge by Jalal Din and Feroze Din was dismissed. On cross-objeetions by the plaintiffs, they were granted a decree for possession of half the land on payment of Rs. 100 only. Against this decree a second appeal has now been preferred by Jalal Din and Feroze Din.

The case for the appellants, as now argued by Diwan Mehr Chand, is that the plaintiffs in the present suit are not entitled as reversioners to share in the benefit of the decree for possession which was obtained by the appellants in their own favour, but are only entitled to succeed on the death of *Mst.* Hayat Bibi. The same case appears to have been argued before the lower Appellate Court, where it was held this argument could not be entertained in view of the pleadings put in by the parties. It had been claimed in the plaint that the previous suit had been instituted and compromised for the benefit

of the plaintiffs and with their consent. The contesting defendants chose to traverse this plea with the allegation that, on being asked to contribute towards the expenses of the previous litigation, the present plaintiffs had simply relinquished their rights in the land. It has now been held as a matter of fact that the present plaintiffs did not relinquish their rights in the land. On the further question arising whether in that case they are entitled to the benefit of the previous decree for possession granted in favour of Jalal Din and Feroze Din, the learned Senior Subordinate Judge held that the contesting defendants must be held to have admitted this inasmuch as they did not specifically deny that the compromise was to the benefit of the present plaintiffs.

I do not think this view is correct. If the assertion made in the plaint is to be taken as an allegation that the plaintiffs were active parties in the earlier proceedings, then I think it was sufficiently traversed by the counter-statement of fact to the effect that they had relinquished their interest in the subject-matter of the suit. On the other hand, if it is taken as a mere assertion of a legal right to share in the benefit of the compromise by virtue only of their position as reversioners, then it raises purely a legal question, which is a matter for argument rather than for pleadings. It has frequently been held in this country that too much insistence should not be laid on the technicalities of pleadings. If the facts on both sides are stated with sufficient correctness and precisions, the legal effects which flow from them are a matter for determination by the Court which conducts the trial or hears any subsequent appeal. In the present instance I do not think that it can be taken that the plaintiffs intended to assert by their pleadings that if it was not proved that there had been any definite relinquishment of their rights in the land then it should be assumed a matter of law that they were entitled to share the benefit of the compromise as reversioners.

On behalf of the appellants it is not denied that the previous proceedings were instituted by Jalal Din and Feroze Din in a representative capacity and that the other collaterals would have been entitled to benefit by any decree which might be granted in respect of reversionary rights to which the suit was primarily confined. So far as the reversionary rights are concerned, it is even now conceded that the plaintiffs are entitled to share in the benefit of the compromise to the extent to which it must be taken as covering the rights of all the reversioners on the death of *Mst.* Hayat Bibi. What is contended by Diwan Mehr Chand on behalf of the appellants, however, is that this is the limit of the benefit to which the other reversioners are entitled. When Jalal Din and Feroze Din entered into an agreement with Abdul Hakim whereby he agreed to surrender immediate possession on cash payment by them, a relief which was outside the scope of the original suit and which could not have been claimed, on behalf of the reversioners in general, it is contended that this benefit is not one which can be regarded as having been secured in a representative capacity for the sake of other collaterals.

Although the point is one which might be expected to have arisen often enough before now, it does not appear to be governed by any direct authority. In an attempt to meet the argument advanced by Dewan Mehr Chand, Counsel for the plaintiffs has referred me to *Devi Dial* v. *Uttam Devi* (1). That was a case in which certain reversioners brought a similar suit for a declaration that their ultimate rights would not be affected by an alienation made by a widow. The parties entered into a compromise whereby the reversioners obtained immediate possession of certain property but gave up all present or future claims regarding the remainder. Many years afterwards, an attempt was made by the sons of one of the reversioners to upset this arrangement and to set up a title to the land which had thus been surrendered. It was held that they could not do so, as the whole body of the reversioners had entered into the compromise in good faith and had enjoyed the benefit of it for so long, it was held that the arrangement was binding on both reversioners who were parties to the suit and also their successors-in-title. It is clear that the facts of that case were entirely different from the circumstances of the present suit. The earlier proceedings had been brought by all the reversioners who had themselves entered into a compromise and obtained possession. The case was decided on equitable grounds and the parties to the suit in the second instance were regarded as successors-in-title to those persons who had obtained a benefit for themselves in the first instance by surrendering a part of their claim. In such circumstances, the reasons for holding that they were bound

(1) 37 R 1907; 120 P L R 1907; 156 P W R 1907.

by original compromise are obvious. In the present instance, the parties are not in the same position nor do the same equities exist. Whether they relinquished their claim on the land or not it has not been suggested that the present plaintiffs took any active steps to prosecute the original suit. There is no equitable ground for holding that reversioners who are impleaded as defendants in a declaratory suit of that kind are not only entitled to the benefit of any declaration which may be obtained by the active reversioners, but are also entitled to share in any additional benefit which the active reversioners may secure for themselves by inducing a person in lawful possession to forgo his rights in return for a cash payment to be made by themselves alone. If regard is to be had to the equities they would appear to lie on quite the opposite side.

The other rulings to which Counsel for the plaintiffs has referred do not seem to be to the point, inasmuch as they only deal with the application of the rule of *res judicata* to matters decided in declaratory suits of the kind ordinarily brought by reversioner. The rule of *res judicata* can apply only to matters which are in issue. The only matter now in contest between the parties is the right to immediate possession before the death of *Mst.* Hayat Bibi. This right was never in issue in the suit originally brought which was only concerned with the right of succession after her death and it could not have been placed in issue. To this extent the compromise decree went quite beyond the scope of that suit. I do not think it is necessary for the purpose of the present proceedings to decide whether the compromise decree can be properly regarded as a decree relating to the subject-matter of the suit which is all that a Court is entitled to pass under O. XXIII, r. 3. On the ground that the whole includes the part, it may be argued that the decree accepted the right of the plaintiffs to succeed after the death of *Mst.* Hayat Bibi. Even so, the provision which entitled them to possession before her death did not purport to decide that they were entitled to this relief as reversioners which is the only ground on which the reversioners could claim that anything had been decided in their favour.

Moreover, I think that the actual form of the decree itself is not without significance. While it merely includes in a sort of slipshod manner the statement taken down from the mouth of the contesting parties, it distinctly grants a right of possession in favour of Jalal Din and Feroze Din alone and the payment was also to be made by them alone The other collaterals were parties to the suit. When the question was not one of future rights but one of almost immediate possession, a right which was intended to be shared by all the reversioners could and should have been so expressed. If the plaintiffs are telling the truth when they state that they gave their consent to this compromise, the position would be that they gave their consent to the grant of possession to Feroze Din and Jalal Din, on payment by them of the stipulated sum.

Some stress has been laid on the fact that the lower Appellate Court has accepted the story to the effect that no money actually passed, but that Abdul Hakim merely agreed to say that he had received payment under threat of criminal proceedings. Even if this fact were relevant, I am doubtful whether it would be taken as a conclusive finding of fact. The only reason given by the learned Senior Subordinate Judge for accepting this story is that Abdul Hakim has given the story himself, and that as he appeared as a witness for the defendants, they must be bound by his statement. There is no such rule of law with regard to the statement of witnesses, though the belief in such a rule is not uncommon and does great harm in judicial trials in some of the Subordinate Courts. On the face of Abdul Hakim's story, he can have no great reason to love the defendants and there is no reason for supposing that he would be inclined to depose in their favour merely because he was called by them. This fact however does not appear to me to be relevant in view of the legal position indicated above. If the intention and the legal effect of the compromise were to give a right of possession on payment to Jalal Din and Feroze Din alone, that position would not be altered by reason of the fact that they entered into a subsequent agreement with Abdul Hakim whereby they obtained possession without making any actual payment.

For the reasons given above I accept the appeal and dismiss the plaintiffs' suit with the proviso that this decision shall not affect their reversionary rights on the death of *Mst.* Hayat Bibi, so much having been conceded by Counsel for the appellants in the course of his arguments. Since the defen-

dants are to some extent responsible for the costs which the proceedings entailed by their unproved allegation that the plaintiffs had relinquished their rights in the land, the parties are left to bear their own costs throughout. Counsel for the plaintiffs has asked for leave to appeal in Letters Patent. As the point involved is one which may be of considerable importance in other suits and does not appear to be already coverved by authority, leave to appeal is granted.

D. *Appeal accepted.*

ALLAHABAD HIGH COURT

Criminal Revision Application No. 556 of 1939

October 4, 1939

MOHAMMAD ISMAIL, J.

ROSHAN SINGH—APPLICANT

versus

EMPEROR THROUGH SAMPURAN SINGH TANDON—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 482, 486—Trade mark—Infringement—Ingredients of ss. 482 and 486, stated—What prosecution must prove — False and counterfeit trade mark, distinction — Accused, if can be convicted under both ss. 486 and 482—Accused held not guilty under s. 486 but only under s. 482—Order as to costs or confiscation of goods, if can be passed by High Court in revision — Criminal trial—Revision—Finding of facts depending on correct interpretation of law—Case can be examined on merits.

To establish the charge under s. 482, I. P. C., it is necessary to prove that the accused's article is marked in a manner reasonably calculated to be believed that they are the marks of the article manufactured by the complainant. An accused would render himself liable to conviction under s. 482 if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under s. 486 is the sale or exposing or possessing for sale, goods or things with a counterfeit trade mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section it will be necessary that goods should be sold or be possessed or exposed for sale. Therefore, it is perfectly legal to sustain the conviction under both sections provided that the mark on the goods of the accused is a false trade mark and also a counterfeit trade mark. The distinction between false trade mark and counterfeit trade mark is somewhat subtle. It depends on the degree of resemblance between the false and genuine trade marks. 27 Ind. Cas. 902 (1), relied on. [p. 191, col 1.]

Held, that the accused could not be convicted under s. 486 as it could not be said that the No. 301 used by the accused as trade mark upon his goods was a counterfeit of No. 501 the registered mark of the complainant; nor could it be said that words "India" were a counterfeit of "tomco". The accused however could be convicted under s. 482 as the accused's goods were a colourable imitation of the complainant's goods. *Surja Prasad* v. *Mahabir Prasad* (2), distinguished.

[Case-law referred to.]

In the case of an infringement of a trade mark the prosecution must prove that the trade mark on the accused's goods is likely to deceive a purchaser who is acquainted with the complainant's "get-up" but who trusts to his memory. Mere differences in detail do not prevent the two designs being essentially the same. What degree of resemblance is necessary is a matter incapable of definition *a priori*. [p. 192, col. 1.]

In cases of a prosecution for infringement of a trade mark the High Court will not pass any order in revision in respect of costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in Civil Court.

Ordinarily, it is not the practice of the High Court to disturb findings of fact in revision, but where the finding of fact depends on a correct interpretation of the law it can examine the case on the merits: [p. 190, col. 1.]

Cr. R. App. from an order of the Sessions Judge, Agra, dated June 15, 1939.

Mr. *K. D. Malaviya*, for the Applicant.

Messrs. *B. B. Chandra* and *Ram Narain Verma*, for the Opposite Party.

The Deputy Govt. Advocate, for the Crown.

Order.—This is an application in revision against on order of the Court below. The complainant, Messrs. the Tata Oil Mills Company Limited of Bombay, made this complaint through Mr. Tandon, who is the Manager, Tomco Sales Department, Delhi, against the applicant Roshan Singh, who is the proprietor of Agra Soap and Chemical Works, under ss. 482, 483 and 486, I. P. C. The complaint states that the complainant firm is well known at Bombay and carries on business on a large scale in various kinds of soap; that is has got its trade marks which have been duly registered and one of them is "501" which it has been using on a soap in the market known by the name of "501"; that the applicant (Roshan Singh) dishonestly with a view to defraud the public has manufactured a soap similar in shape, size, colour, etc, and is selling it under the name "301": that the general get-up of the soap is designed to deceive the public and to cause loss to the complainant; that the complainant was informed of the fact in the month of July 1938 and thereupon, the applicant was served with a notice on behalf of the firm to desist himself from copying the trade mark of the complainant firm but the applicant paid no heed to it. On these allegations it was prayed that action may be taken against the applicant under the sections mentioned above and that the goods, moulds, etc., found in possession of the accused may be taken possession of.

The applicant pleaded not guilty and stated that his soap had been in the market for several years past; that there was no resemblance between the soap manufactured by the applicant and soap "501" manufactured by the complainant; that no offence in law was committed by the applicant and that the complaint was barred by limitation.

The case was tried by a Magistrate of the second class who found the appticant guilty under ss. 482 and 486, I. P. C. and convicted and sentenced him to a fine under each count. On appeal the Appellate Court affirmed the conviction but reduced the sentence to a fine of Rs. 200 under s. 482 or three months rigorous imprisonment in default and Rs. 25 under s. 486 or three months rigorous imprisonment in default. The applicant went in revision to the Sessions Judge who summarily rejected the application. The applicant has now come up in revision to this Court. It is not disputed that the complainant's soap bears a registered trade mark. The applicant, on the other hand, has no registered trade mark. The Courts below have come to the conclusion that the applicant's soap is a colourable imitation of the complainant's soap and the similarity is reasonably calculated to deceive the intending purchasers.

Ordinarily, it is not the practice of this Court to disturb findings of fact in revision, but in the present case the finding of fact depends on a correct interpretation of the law. It is therefore necessary to examine the case on merits in some detail. In the declaration form registered by the complainant company in Bombay the description of the trade mark is given as follows: The cube soap has six sides. On the first, corresponding and reverse sides of the soap there is imprinted an oirole within which there is rhombus and T, O, M, C, O, being the first letters of the words which form the name of the company. Over the second corresponding and reverse sides of the cube soap, there appears on oirole imprinted therein and this forms and constitutes the number or otherwise the brand of soap referred to above manufactured by the company. Upon the third corresponding and reverse sides of the soap there are words "free from animal fat" imprinted in three lines one beneath the other. The trade mark, number and stamp herein described are particularly used in respect of this brand of scap.

The applicant's soap has got on the first corresponding and reverse sides within the rhombus figure 301 and under the figure the word 'special.' Upon the third corresponding and reverse sides of the soap, there are words "free from animal fat" imprinted in three lines one beneath the other. In place of "TOMCO" the applicant's soap has "India" The only distinguishing feature is that in place of digit No. 5 in the complainant's soap the applicant has got digit 3. The applicant's soap is also a cube soap and has six sides. The sizes of the two soaps are about the same but the colour of the applicant's soap is lighter. The soaps are supplied in wrappers. Each wrapper contains three bars. The complainant's wrapper is of cardboard. The top portion is white and the lower portion has red band all round. The colouring of the applicant's wrapper is similar but the applicant's wrapper is of thin paper. On one side of the complainant's wrapper, there is No. 501 in bold type and underneath are the following words "special household soap, especially made for washing delicate materials." In the left corner are the letters T O M C O. The applicant's wrapper has the number 301 and underneath are the words "special house-hold soap, especially made for washing delicate clothes." In the left corner in place of "TOMCO" "INDIA" is printed. On other sides of the wrapper there is not much similarity, but as stated above the colour scheme is similar. There cannot be the least doubt that at first sight there is great resemblance between the soaps. There is also some resemblance between the wrappers. The question is whether the resemblance amounts to an infringement of the complainant's trade mark and whether the action of the applicant is punishable under ss. 482 and 486, I. P. C. The case has been argued at considerable length and several authorities have been cited in support of their respective contentions by learned Counsel for the parties. I now proceed to examine the statutory provision. Under s. 478, I. P. C. a mark used for denoting that goods are the manufacture of a particular person is called a trade mark. Section 480 of the Act provides:

> "Whoever marks any goods or uses any case package or other receptacle with any mark thereon in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark."

The punishment for using a false trade mark is provided in s. 482. It will be

observed that to establish the charge under s. 482 it is necessary to prove that the applicant's soap is marked in a manner reasonably calculated to be believed that they are the marks of the soap manufactured by the complainant. Section 486 of the Act provides the punishment for selling or exposing for sale any goods or things with a counterfeit trade mark. The expression 'counterfeit' is defined in s. 28 of the Act and runs thus :

"A person is said to counterfeit who causes one thing to resemble another thing intending by means of that resemblance to practice deception or knowing it to be likely that deception will thereby be practised."

Explanation No. 1 to the section says that it is not essential to counterfeiting that the imitation should be exact. It has been argued by learned Counsel for the applicant that the applicant cannot be legally convicted under both sections, namely 482 and 486. In my opinion the contention is not well founded. An accused would render himself liable to conviction under s. 482 if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under s. 486 is the sale or exposing or possessing for sale goods or things with a counterfeit trade mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section it will be necessary that goods should be sold or be possessed or exposed for sale. In my opinion, therefore, it is perfectly legal to sustain the conviction under both sections provided that it is held that the mark on the soap of the applicant is a false trade mark and also that it is a counterfeit trade mark. I am not called upon to consider the scope of s. 483 because the applicant was never convicted under that section. The distinction between false trade mark and counterfeit trade mark is somewhat subtle. In my opinion it depends on the degree of resemblance between the false and genuine trade marks. In *Lokumal* v. *Emperor* 16 Cr. L. J. 230 (1) at p. 231 this question had to be considered. The accused was convicted under s. 482 and 486. The learned Judges observed :

"A counterfeit is strictly an exact imitation but for purposes of the I. P. C. it is not essential that imitations should be exact. But a thing is not ordinarily said to be counterfeit unless it bears on the face of it the semblance of validity and is such as to deceive the average person on ordinary observation. Having regard to the patent differences between Ex. 4 and Ex. 5, differences which would be obvious on ordinary observation even to an unintelligent person who could read either Gujarati or English, and unless he could read on the languages the inscription would convey nothing at all. The conviction under s. 486 cannot in our opinion stand. It is a case of using a false trade mark, not a counterfeit one."

I have already pointed out that the trade mark exhibited on the soap of the applicant bears very strong resemblance to that on the complainant's soap but the trade marks are not identical. If the two soaps are put side by side a literate man will not find any difficulty in noticing the difference, but a purchaser who trusts to his memory may well be led to believe that the applicant's soap was manufactured by the complainant firm. Learned Counsel for the applicant has referred me to several cases. I now proceed to notice some of them. In *Surja Prasad* v. *Mahabir Prasad* (2) the appellant was acquitted under ss. 482 and 486. The accused had applied labels to his bottles which were similar to those used by the complainant, but, on closer examination, great differences in the labels were discernable. The acquittal of the appellant was based on the dissimilarity in the labels used by the appellant to those applied to the bottles of the complainant. This ruling does not assist either party. In *A. M. Malumiar & Co.* v. *Finlay Fleming & Co.*, 30 Cr. L. J. 882 (3) the applicant was convicted under s. 482, I. P. C., only. It was held :

"The proper test for determining whether a trade mark has been infringed is whether the get-up of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's get-up but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought."

On behalf of the opposite party several cases have been cited. In *Swadeshi Mills Co., Ltd. Bombay* v. *Juggilal Kamlapat Cotton Spinning and Weaving Mills Co. Ltd., Cawnpore* (4) the plaintiff manufactured cloth bearing a particular design known as "Kamal Chhap." The defendant set up a rival factory using colourable imitation of the plaintiff's design on his cloth with a different letter press. The Bench after a consideration of large number of case law on the subject held :

"If the goods of a manufacturer from the mark or device he has used have become known in the market by a particular name the adoption by a

(1) 16 Cr. L J 230 (231); 27 Ind. Cas. 902; A I R 1914 Sind 163; 8 S L R 199.

(2) 11 C W N 887; 6 Cr. L J 151.

(3) 30 Cr. L J 882; 118 Ind. Cas. 113; A I R 1929 Rang. 345; 7 R 169; Ind. Rul. (1929) Rang. 225.

(4) 24 A L J 975; 99 Ind. Cas. 353; A I R 1927 All. 81; 49 A 92.

rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of the rival as the copy of his device....

No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution."

This case went up to the Privy Council and their Lordships of the Judicial Committee affirmed the decision of this Court on the main point, although reduced the amount of damages: *see Juggi Lal Kamalapat* v. *Swadesdi Mills Co., Ltd.* (5). In that case it is noticeable that the plaintiff's cloth was associated with the name of lotus and that any lotus device would lead to cloth being able to be palmed off as his cloth which was the cloth of another manufacturer. An illiterate purchaser would look to the design of lotus in selecting the cloth and any minor difference in details would not be noticeable by him. Learned Counsel also cited *Nagendra Nath* v. *Emperor* (6), *Faqir Chand* v. *Emperor* (7) and *Jamal Noor Muhammad Sait & Co.* v. *Abdul Kareem & Co.* (8). There is hardly any difference of opinion in the view of law laid down in the above cases. The *ratio decidendi* deducible from the authorities is that the prosecution must prove that the trade mark on the accused's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get-up" but who trusts to his memory. Mere differences in detail do not prevent the two designs being essentially the same. What degree of resemblance is necessary is a matter incapable of definition *a priori*. It was observed in *Seixo* v. *Pronezende* (9) at p. 196:

"All that the Courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers purchasing with ordinary caution are likely to be misled."

Applying the principles enunciated above, I have to determine whether the applicant has used a false trade mark or has sold goods with a counterfeit trade mark. I have no hesitation in holding that in the present case the applicant cannot be convicted under s. 486, I. P. C. It is impossible to say that the No. 301 is a counterfeit of No. 501, nor can it be said that "India" is a counterfeit of "Tomco". It is true that the imitation need not be exact but there should be close resemblance to constitute an offence under this section. Agreeing with the principle laid down in *Lokumal* v. *Emperor*, 16 Cr. L. J. 230 (1) at p. 231, I hold that the applicant is not guilty under s. 486, I. P. C.

As to the conviction under s. 482, I. P. C., I see no reason to differ from the conclusions of the Courts below. The definition of false mark has already been referred to. The question for determination is whether the appellant has marked his soap in a manner reasonably calculated to be believed that the soap is manufactured by the complainant firm. There cannot be the least doubt that every effort has been made by the applicant to make his brand of soap resemble that of the applicant. The general colour scheme of the applicant's wrapper is the same as that of the complainant. It cannot be a mere accident that there are so many points common between the two wrappers. The writing on five sides of the two wrappers is however dissimilar. It would therefore not be justifiable to hold that the applicant's wrapper is a colourable imitation of the complainant's wrapper. The resemblance of the complainant's soap with Tomco brand is very great indeed. The only distinguishing feature is that in place of digit 5 in Tomco brand there is digit 3 in the applicant's brand. The style and formation of letters in "India," resemble those in 'Tomco.' This resemblance again cannot be an accident. It must be deliberate, and the object is to deceive the public. The question is whether the resemblance is calculated to deceive the intending purchaser. In deciding this question, it is to be assumed that the purchaser will examine the goods with some care. In the present case we are not concerned with the illiterate public. The writing on the wrapper or on the soap will mean very little to a purchaser who is unable to read. We have to confine our attention therefore to a literate purchaser who is acquainted with the "get-up" of Tomco brand but trust to his memory. Ordinarily a purchaser does not keep notes of minute details of a soap, nor does he read every word embossed on the article. The trade mark on both the soaps although not identical

(5) 56 I A 1, 114 Ind. Cas. 30; A I R 1929 P C 11; 29 L W 243; 33 C W N 242; 31 Bom. L R 285; 51 A 182; (1929) A L J 1; 56 M L J 282 (P C).

(6) A I R 1930 Cal. 274; 127 Ind. Cas. 555; 34 C W N 339; 51 C L J 477; 31 Cr. L J 1227; Ind. Rul. (1930) Cal. 859; 57 C 1153; (1930) Cr. Cas. 354.

(7) A I R 1934 Lah. 687; 155 Ind. Cas. 270; 35 P L R 749; (1934) Cr. Cas. 1005; 16 L 114; 36 Cr. L J 776; 7 R L 672.

(8) A I R 1934 Mad. 211; 151 Ind. Cas. 869; 39 L W 319; 66 M L J 440; 57 M 600; 7 R M 139.

(9) (1865) 1 Ch. 192 (196); 12 Jur. (N S) 215; 14 L T 314; 14 W R 357; 149 R R 529.

is so similar that there is every likelihood of a person being induced to purchase the applicant's brand under the belief that he is purchasing Tomco brand. The similarity in the marks may not amount to 'counterfeit' but I am satisfied that one is a colourable imitation of the other. The applicant therefore has rightly been convicted under s. 482, I. P. C.

The next point stressed is that the prosecution is barred by limitation. A prosecution under these sections may be made within three years after the commission of the offence or one year after the discovery thereof by the prosecutor whichever expiration first happens: *see* s. 15, Merchandise Marks Act, 1889. The complaint was made on November 22, 1938. It is alleged in the complaint that the prosecutor received information about the pirated trade mark some time in July 1938. It is not suggested that Mr. Tandon or any of the directors of the Company received direct information of the commission of the offence earlier. It is however contended that Dau Dayal, an agent of the complainant firm at Delhi, had such knowledge on May 8, 1937. It is not proved that Dau Dayal is a general agent of the Company. So far as the evidence shows Dau Dayal is the agent of the Company only for the purpose of the sale of the goods manufactured by the Company. Dau Dayal in his statement denies all knowledge of the commission of the offence in May 1937. The applicant relies upon Ex. P. 11 dated May 8, 1937 to prove that Dau Dayal placed an order with the complainant to purchase soap '301'. This document is not in Dau Dayal's handwriting. There is another document Ex. P. 8. It is in Dau Dayal's handwriting and this makes no reference to soap '301.' It is admitted that according to the terms of the agreement Dau Dayal could not sell soap manufactured by any firm other than the complainant firm. Under the circumstances it is not likely that he would place an order for '301' with the complainant as the terms of the agreement must have been within his knowledge at the time the alleged order was made. Taking all the facts into consideration I am not prepared to hold the complaint as barred by limitation.

Learned Counsel for the opposite party prays that all the goods bearing false trade mark in the possession of the applicant may be confiscated and that the opposite party may be awarded costs. I am unable to accede to the request of learned Counsel. Any order with regard to confiscation that may be passed at this stage will lead to complication as the rights of a third party may be affected thereby. I have no sufficient material on the record before me to assess the costs. Cases of this nature are not free from difficulty and if the complainant has in fact suffered any damage he may seek his remedy in Civil Court In revision I do not consider it proper to pass any order with regard to confiscation or costs. In the result the application is allowed in part. The conviction and sentence under s. 486, I. P. C. are set aside. The fine if paid shall be refunded. The conviction and sentence under s. 482, I. P. C., are maintained.

S. *Application partly allowed.*

CALCUTTA HIGH COURT

Suit No. 1012 of 1939
January 25, 1940
SEN, J.

MITTULAL SINGHANIA AND OTHERS—APPLICANTS
versus
PURSOTOME DEBI BAGLA—RESPONDENT

Civil Procedure Code (Act V of 1908), O. I, r. 8—Suit by reversioner to restrain alienation by limited owner—Procedure under O. I, r. 8, if must be followed—Other reversioners, if necessary parties—Hindu Law—Reversioner—When next reversioner is female getting limited interest, remote reversioner who would get absolute estate can sue for declaration that alienation made by limited owner is bad—Alienation—Legal necessity—Limited owner—Pleadings—Amendment—Defective verification.

Order I, r. 8, Civil P. C., is applicable only when two conditions co-exist, *viz.*: (1) where the parties are numerous and (2) where one of such numerous parties desires to be considered as a representative of the others for the purposes of the suit. It has no application where the parties are not numerous as here, nor has it any application where a person is vested with a representative character by virtue of his status. Order I, r. 8, applies where a person does not normally represent any one else but seeks to be clothed with a representative capacity only for the purposes of the suit. There is, therefore, nothing to prevent a single reversioner from instituting a suit to restrain a limited owner from alienating property without having recourse to the provisions of O. I, r. 8, and without making the other reversioners parties even though there may be other reversioners entitled to the same reliefs. 29 Ind. Cas. 298 (1) and 37 Ind. Cas. 161 (2), explained. [p. 195, col. 2.]

Ordinarily, a remote reversioner is not entitled to institute a suit unless he can show that the next reversioner has precluded himself from instituting a suit or has refused to institute a suit or is in collusion with the limited owner. Where, however, the next reversioner is a female, who would also

get a limited interest, the remote reversioner who would get an absolute interest is entitled to sue for the prevention of waste, or for a declaration that an alienation by the limited owner is bad on the ground that it was made without legal necessity. *Abinash Chunder Majumdar* v. *Harinath Shaha* (4), followed, *Bhupendra Nath* v. *Bhuban Chandra* (5), explained. [p. 196, col. 1.]

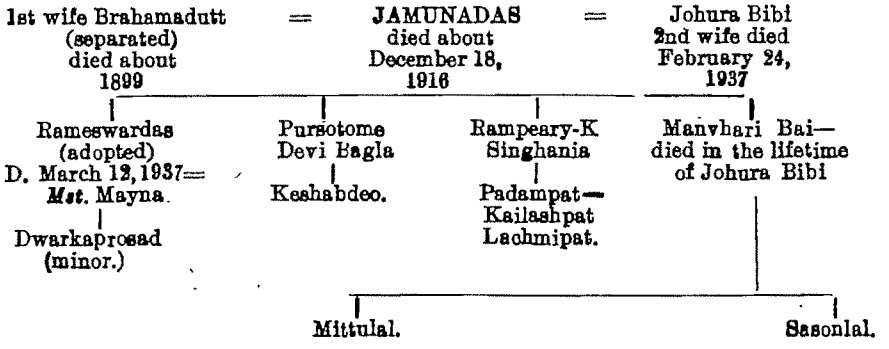
The costs of necessary litigation for the purpose of obtaining property to which a limited owner was entitled would constitute legal necessity but the costs must be reasonable costs. [p. 197, col. 2.]

Where the verification of the plaint is defective amendment should be allowed if the defect is a mere irregularity and has prejudiced nobody. 101 Ind. Cas. 573 (6), relied on.

M. *N. C. Chatterjee*, for the Applicants.

Messrs. *S. N. Banerjee* (Jr.) and *S. C. Sen Gupta*, for the Respondent.

Judgment.—The plaintiffs who claim to be reversioners have instituted this suit in which thay pray that the defendant *Sm.* Pursotome Devi Bagla, be restrained from dealing with certain property on the allegation that she is a limited owner thereof and is threating to waste it. I set out below a geneological table, the accuracy of which is now admitted to show how the parties are related.



The plaintiff's case is that Johura Bibi died possessed of certain *stridhone* property. She left behind her Rameswardas, the adopted son of her co-wife and two daughers Pursotome Devi Bagla and Rampeary. Her daughter Manvhari Bai predeceased her, leaving two sons, Mittulal and Sasonlal. They are the plaintiffs in this suit. Rameswardas died on March 12, 1937, leaving a widow, *Mst.* Moyna and a minor son Dwarkaprosad. In the year 1938 Pursotome Devi Bagla who is the present defendant instituted a suit in this Court against Moyna Bibi, Dwarkaprosad and Rampeary, for a declaration that the properties mentioned in the plaint of that suit constituted the *stridhone* property of her mother, Johura Bibi: she claimed these properties on the footing that she was the *stridhone* heir of her mother as she was an 'indigent daughter' Her allegation was that Rampeary was married to a wealthy husband. In that suit Mittulal and Sasonlal were not parties. Rampeary did not defend the suit. Moyna Bibi and Dwarkaprosad raised various contentions but ultimately the suit was settled between them and Pursotome Devi Bagla. By the terms of settlement, it was declared that the property of Johura Bibi consisted of one 3 per cent. Govt. Promissory Note No. 109681 of the face value of Rs. 2,30,000. The parties compromising agreed that this Govt. Promissory Note should be made over to Pursotome Devi, Bagla, who would be entitled to receive also all the arrears of interest. As Rampeary did not appear, a decree was passed against her *ex parte*, declaring that Pursotome Devi Bagla being an 'indigent daughter' was entitled to succeed to the *stridhone* property of the deceased Johura Bibi.

The present suit is instituted by Mittulal and Sasonlal, two sons of Manvhari Bai, the daughter who predeceased her mother, Johura Bibi. They allege that Pursotome Devi Bagla is entitled to the aforesaid Govt. Promissory Note as limited owner she being the *stridhone* heir of Johura Bibi. They allege further that after the decree was passed in the suit referred to above, Pursotome Devi Bagla is attempting to alienate the Govt. Promissory Note. On these grounds they sue for an injunction restraining her from disposing of the promissory note and in the alternative for a Receiver. The defence taken by Pursotome Devi Bagla may be summarised as follows: 1. The suit as framed is bad inasmuch as the provisions of O. I r. 8, Civil P. C., have not been complied with. 2 The plaintiffs not being the next reversioners are not competent to institute the suit. 3. The verification of the plaint is defective and on that ground the suit should be dismissed. 4 Pursotome Devi

Bagla has an absolute right to the property in suit and has not merely a limited interest.

5 Even if the interest of Pursotome Devi Bagla is that of a *stridhone* heir the plaintiffs have not established any circumstance which would justify the Court in placing any fetter upon her full enjoyment of the property as *stridhone* heir.

In my opinion, there is no substance in the first ground taken. Mr. Khaitan appearing on behalf of the defendant points out that suit of this description by a reversioner is a representative suit and he draws my attention to the fact that in the plaint itself the plaintiffs state that they are suing 'for selves and all the reversionary heirs of *Mst.* Johura Bibi.' Mr. Khaitan's argument is that as the suit is a representative one, it necessarily follows that the plaintiffs should have proceeded in strict accordance with the provisions of O. I, r. 8, Civil P. C., that is to say, they should have applied for the permission of the Court to sue in a representative capacity, and they should have asked the Court to give notice of the institution of suit at their expense to all the persons whom they sought to represent. For the purpose of establishing this proposition, Mr. Khaitan has cited a large number of cases among which may be mentioned the case, in *V. Venkatanarayana Pillai* v. *V. Subbammal*, (1) and *Janaki Ammal* v. *Narayanasami Aiyar* (2). In my opinion, neither of these cases furnish any ground for the proposition that O. I, r. 8 has anything to do with a suit of this nature instituted by a reversioner. These cases are authority for the proposition that a reversioner bringing a suit of this description must be considered as representing the entire reversionary interest and not merely as representing himself and that the decision arrived at in such a suit would be binding on all the reversioners and on the person who would actually inherit the property as reversioner at the time that the reversion opens. They are no authority whatever either for the proposition that all the reversioners, both immediate and remote, should be joined in the suit or for the proposition that a single reversioner suing must follow the procedure laid down in O. I, r. 8, when there are other reversioners.

On the contrary the two Privy Council decisions show that it is permissible for a single reversioner to sue without making the other reversioners parties and without following the procedure laid down in O. I, r. 8. The very language of that rule shows that it is applicable only when two conditions co-exist, *viz.*: (1) where the parties are numerous and (2) where one of such numerous parties desires to be considered as a representative of the others for the purposes of the suit. It has no application where the parties are not numerous as here nor has it any application where a person is vested with a representative character by virtue of his status. O. I, r. 8, applies where a person does not normally represent any one else but seeks to be clothed with a representative capacity only for the purposes of the suit. It is a rule of procedure which has been framed for the purposes of convenience. I hold therefore that this ground is of no substance and that there is nothing to prevent a single reversioner from instituting a suit of this nature without having recourse to the provisions of O. I, r. 8, Civil P. C., and without making the other reversioners parties even though there may be other reversioners entitled to the same reliefs.

The next ground taken namely that the plaintiffs not being immediate reversioners, are not entitled to sue is also not sustainable so far as this province is concerned. There can be no doubt that ordinarily the person entitled to institute a suit of this description is the immediate reversioner and that a remote reversioner is not permitted to institute such a suit unless the immediate reversioner has refused to institute such a suit or is in collusion with the limited owner, or has in some way disentitled himself from instituting such a suit. This rule was laid down in *Rani Anand Kunwar* v. *Court of Wards* (3) where their Lordships say:

"As a general rule such suits must be brought by the presumptive reversioner, that is to say, by the person who will succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in conclusion with the widow or have precluded themselves from interfering."

This Rule was again laid down in *Venkatanarayana Pillai* v. *V. Subbammal* (1) at p. 130*. Ordinarily, therefore a re-

(1) 42 I A 125; 29 Ind. Cas. 298; A I R 1915 P C 124; 38 M 406; 17 M L T 435; 28 M L J 535; 17 Bom. L R 468; 19 C W N 641; 2 L W 596; (1915) M W N 555; 21 C L J 515 (P C).

(2) 43 I A 207; 37 Ind. Cas 161; A I R 1916 P C 117; 39 M 634; 20 M L T 168; 31 M L J 225; 14 A L J 997; (1916) 2 M W N 188; 20 C W N 1313; 18 Bom. L R 855; 24 C L J 309; 4 L W 530 (P C).

(3) 8 I A 14; 6 C 764; 8 C L R 381; 4 Sar. 195 (P C).

*Page of 42 I. A.—[*Ed.*]

mote reversioner is not entitled to institute a suit unless he can show that the next reversioner has precluded himself from instituting a suit or has refused to institute a suit or is in collusion with the limited owner. I do not wish to say that the coditions mentioned by me above are exhaustive or that there may not be other conditions under which the remote reversioner would be entitled to institute such a suit but these are generally the grounds upon which a remote reversioner may be permitted to sue. So far as the province of Bengal is concerned, however there is another circumstance which would entitle the remote reversioner to institute a suit of this description and it is this : Where the next reversioner is a female, who would also get a limited interest the remote reversioner who would get an absolute interest is entitled to sue for the prevention of waste, or for a declaration that an alienation by the limited owner is bad on the ground that it was made without legal necessity. This principle has been laid down in *Abinash Chunder Majumdar* v. *Harinath Shaha* (4). Their Lordships Brett and Mukherjee, JJ. after reviewing a large number of the old decisions of the Courts in Bengal, held that :

"Where the nearest reversioner was a female who would hereelf get a limited interest in the property the remote reversioner, who would get an absolute interest, is entitled to sue the limited owner in order to restrain her from wasting the estate."

Mayne in his well-known treatise on Hindu Law (Edn. 10), in dealing with this question says at p. 813 :

"In Calcutta, Madras, Allahabad and Patna, it has been held that where the nearest reversioner is a female and would only be entitled to a limited interest, the reversioner next to her is competent to sue."

Mr. Khaitan relies upon the case in *Bhupendra Nath* v. *Bhuban Chandra* (5). That case has, in my opinion, no application to the question under discussion. Their Lordships were there dealing with the *locus standi* of certain persons who had applied for revocation of probate of a will and they held that where the nearest reversioners had applied for revocation of probate and had failed, this decision would be binding on the remote reversioners although they had not been made parties to the previous application. I cannot see how the decision n this case can throw any light on the question under discussion. Mr. Khaitan has not been able to show any case of this Court which has affected the decision in *Abinash Chunder Majumdar* v. *Harinath Shaha* (4). That case lays down a principle which has been well established by a series of older decisions and I propose to follow that decision not only because I consider that the principle laid down is well founded but also because I feel that I would not be justified in deviating from a rule of law laid down by a long series of decisions for a considerable period. In the present case the immediate reversioner is Rampeary. She is a female and would acquire only a limited interest in the property; the plaintiffs are therefore entitled to institute this suit although they are remote reversioners.

There is some substance in the ground concerning the defective verification of the plaint. In the plaint, paras. 7, 8 and 9 contain allegations that the defendant is about to alienate the Govt. Promissory Note in order to deprive the reversionary heirs. In the verification the plaintiff Mittulal Singhania states that the statements contained in paras. 7, 8 and 9 are his submissions. Obviously, the statements there are not submissions but allegations of fact upon which the plaint is rested. Learned Counsel for the plaintiffs conceded that the verification is defective and he prayed for leave to amend the verification. In my opinion, this leave should be granted. The defect is a mere irregularity and it has prejudiced nobody. To allow this defect to stand in the way of the plaintiffs' success, if the other facts alleged by them are established would be to defeat the ends of justice. I would repeat the words used by Page, J. in *Ramgopal Ghose* v. *Dhirendra Nath* (6) that :

"I feel strongly that the rights of litigants ought not to be decided upon the splitting of a straw."

In that case his Lordship held that a defect as regards verification was an irregularity that could be cured by amendment. The plaint has now been amended and the plaintiff has stated that he believes the allegations contained in the aforesaid paragraph to be true, and that they are based upon information received from one Girdharilal. I now come to the defence regarding the merits of the case. It is said that the defendant Pursotome Devi Bagla is not a limited owner but the absolute owner of the property in suit which as I said before constitutes a Govt. Promissory Note which formed part of the subject-matter of the suit instituted by her against Dwarkaprosad Moyna Bibi and Rampeary. Mr. Khaitan's contention is that Pursotome

(4) 32 C 62; 9 C W N 25.
(5) 41 C W N 392.
(6) 54 C 380; 101 Ind. Cas. 573; A I R 1927 Cal. 376; 31 C W N 397.

Devi Bagla has obtained this property by way of compromise and therefore this property has become her absolute *stridhone* property. Mr. Khaitan frankly stated that personally he did not feel that he could press this point with any insistence but he placed it before the Court for a decision. He relied upon a passage at p. 133 of Mulla's Principles of Hindu Law, Edn. 8. The learned author states there that property obtained by a woman under a compromise in consideration of her giving up her rights in relation to her *stridhone* is *stridhone* according to all schools, and that property obtained by a widow under compromise with her adopted son is her absolute property. Now in the present case Pursotome Devi Bagla, strictly speaking, did not obtain this property by virtue of a compromise. It is true that two of the defendants compromised the suit but the other daughter Rampeary did not enter into any compromise. She did not defend the suit and the Court declared upon the evidence that Pursotome Devi Bagla was entitled to a limited interest in the property as an indigent daughter in preference to Rampeary who was affluent. Again Pursotome Devi Bagla did not claim an absolute right in the property ; she claimed only a limited interest in the property as a *stridhone* heir. She was awarded the property on that footing. It cannot therefore be said that she got the property as the result of a compromise or that she was given an absolute interest therein.

I now take up for consideration the last ground urged on behalf of the defendant. The evidence adduced on behalf of the plaintiffs is that the defendant has stated that she had obtained the promissory note by instituting a suit with the help of certain persons and that the plaintiffs had no right in the note. She said further that she was going to sell the promissory note and pay the Pleaders and others who had assisted her in her suit, the sum of Rs. 50,000 to Rs. 60,000. (After considering certain evidence his Lordship concluded). I hold upon the evidence that the defendant informed Giridharilal that she intended to dispose of the promissory note as soon as she got possession of it and that her intention was to spend Rs. 50,000 to Rs. 60,000 out of the sale proceeds for the purpose of remunerating the persons who had assisted her in the suit instituted by her.

The next question which arises is whether these circumstances are sufficient to justify an order restraining the defendant from dealing with the property. It is not necessary for me to deal with all the cases which have been cited by Mr. Khaitan to show what amounts to legal necessity and what does not. I am fully aware that the costs of necessary litigation for the purpose of obtaining property to which a limited owner was entitled would constitute legal necessity but the costs must be reasonable costs. The suit instituted by the defendant lasted one day. It was undefended so far as Rampeary was concerned, and it was settled so far as the other defendants were concerned. To suggest that Rs. 50,000 to Rs. 60,000 would be the legitimate expenses of such a suit is ridiculous. The plaintiffs have established to my satisfaction that the defendant is threatening to alienate the property and to distribute a large portion of it amongst certain persons. Admittedly, the defendant is a person in straitened circumstances. Her right as limited owner to the promissory note is based on the fact that she is an indigent daughter. If therefore the defendant spends the sale proceeds of this promissory note it is probable that the reversioners will not be able to get any pecuniary compensation for the invasion of their rights. All the requisites for the issue of a perpetual injunction as provided for in s. 54, Specific Relief Act, are present in this case and I am of opinion that an injunction should issue against the defendant. The following issues were framed.

"(1) Have the plaintiffs any cause of action ?

(2) Are the plaintiffs entitled to any of the reliefs claimed at all or in any representative capacity ?

(3) Has Rampeary got three sons, Padampat Singhania, Kailaspat Singhania and Laksmipat Singhania ?

(4) What is the nature of the interest acquired by the defendant under the decree in Suit No. 2154 of 1938 ?

(5) Are the plaintiffs entitled to rely on any case of fraud as against the defendant ? If so, what case of fraud ? Did the defendant commit any such fraud ?

"(6) Are there any circumstances as alleged justifying the grant of any of the reliefs claimed ? If so, what reliefs are the plaintiffs entitled to ?

They are answered thus : *Issue* Nos. 1, 2 and 3 are answered in the affirmative. *Issue No.* 4. The interest acquired by the defendant was that of limited owner. She was the *stridhone* heir of her mother and she acquired no absolute right to the property in suit. *Issue No.* 5. The plaintiffs at the opening gave up any case of fraud. Issue No. 6. The plaintiffs are entitled to an injunction restraining the defendant from

alienating the promissory note. The suit is decreed with costs. The defendant, her servants and agents are hereby restrained from alienating the 3 per cent. Govt. Promissory Note No. 109681 of 189667, of the face value of Rs. 2,30,000 or of disposing of it in any manner whatsoever. The defendant will be entitled to draw the interest accruing on the said promissory note and there is no restriction placed upon her regarding the spending of the interest. I think I should make some provision for enabling the defendant to apply to the Court for permission to dispose of the promissory note on the ground of legal necessity if and when such necessity arises. I do not think that I would be justified in forcing the defendant if legal necessity ever arose to incur the costs of instituting a suit. She should, in my opinion, be given liberty to apply in the present suit on notice to all the reversioners both immediate and remote, for permission to sell the promissory note when legal necessity arises. I accordingly give her liberty to apply.

S. *Order accordingly.*

LAHORE HIGH COURT

Criminal Appeal No. 410 of 1939
October 26, 1939
YOUNG, C. J. AND TEK CHAND, J.

MOHAMMAD KHAN ABBAS KHAN—
CONVICT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 97, 99—Accused going to certain house to commit offence fully prepared by arming himself with dagger, in case of eventuality—Accused discovered and apprehended—Accused killing deceased—Held there was no right of private defence and that offence was murder.

M had gone to the house of *A* and his son *G* with the intention of committing an offence. *M* knew that the men of the family might discover him, and *M* went prepared for this eventuality. *M* went armed to this adventure with every intention of using his dagger if discovered. He was discovered and was pursued by *A* and *G*. *A* was killed by *M* and when *A's* son *G* tried to catch hold of *M* he was also killed:

Held, that when *M* had killed *A* the right of arrest at that moment would arise. When *G* was exercising that right, no right of self-defence would arise to *M* so as to justify his killing *G*. The killing of *G* therefore amounted to murder.

Held, also that since *M* had gone prepared for any eventuality by arming himself, he could not be said to have right of private defence.

Cr. A. from an order of the Sessions Judge, Attock at Campbellpur, dated March 31, 1939.

Mr. *Ghulam Mohy ud-Din*, for the Appellant.

Mr. *Basant Krishan*, for the Advocate-General, for the Crown.

Young, C. J.—Mohammad Khan has been condemned to death by the learned Sessions Judge of Attock at Campbellpur for the double murder of Abdullah and Gul Mohammad. Mohammad Khan, before the occasion which gave rise to this charge, had had a somewhat chequred career. Gul Mohammad, one of the deceased, had a wife named *Mst.* Aishan. Mohammad Khan for some two years had an illicit intimacy with this woman. It is said that one *Mst.* Basran came to know of this and reprimanded both Mohammad Khan and *Mst.* Aishan. The result of this was that she was murdered by Mohammad Khan about one and half year before these murders. He was however acquitted after trial and continued his illicit connection with *Mst.* Aishan. In addition to the murder of *Mst.* Basran, he was committed for rape on her daughter *Mst.* Began as well. He was acquitted on this charge also. The woman, who was murdered, and the woman, who was raped, were relatives of the deceased. On the night of December 30, 1938 the accused Mohammad Khan came to the enclosure of the two deceased men in order to meet *Mst.* Aishan. He was waiting in a *chhappar*. One of the family of Abdullah went out to ease himself and saw a man lurking in this *chhappar*. He gave an alarm and several members of their family, including the two deceased, ran out of their house. They recognized Mohammad Khan. Mohammad Khan ran away and was chased by the two deceased and some of their relatives. Mohammad Khan ran a short distance and entered into the *pasar* of Mian Ahmad. Abdullah, the father of Gul Mohammad, was the first to get close to Mohammad Khan and endeavoured to catch hold of him. Mohammad Khan immediately produced a dagger and stabbed Abdullah in the chest. Abdullah fell down. Thereupon Gul Mohammad, Abdullah's son, seized Mohammad Khan and was also stabbed with this dagger by Mohammad Khan in the stomach. Both these men died shortly afterwards.

The prosecution called five persons who witnessed this double killing and the learned Sessions Judge has believed their evidence. There is no occasion for us to discuss this evidence, as the appellant here does not challenge the fact that he is responsible

for the deaths of Abdullah and Gul Mohammad. He raised, however, a plea of self-defence when this case first came before a Bench of this Court on June 7, 1939. That Bench was of opinion that the plea of self-defence might depend upon the nature of the building in which Mohammad Khan had been trespassing and the case was adjourned for this to be ascertained. That evidence is now before us but, on the facts of the case, which were not gone into on the last occasion, we are satisfied that this point does not arise. The plea of self-defence is put as follows: Mohammad Khan was in this *chhappar*: the *chhappar* was not a building which would give rise to a charge of lurking house trespass: the offence that he was committing there did not, therefore, give a right of arrest to Abdullah and Gul Mohammad under s. 59, Criminal P. C.: when Mohammad Khan ran away and was pursued he would have every reason to consider that, if he was caught, he would either be killed or would receive grievous hurt, and, therefore, the right of sett-defence, even to the extent of killing, would arise.

Learned Counsel alluded to the two deceased men and their friends as "bloody-minded Pathans" and contended that, if persons of this description had their women interfered with, the person so interfering might reasonably expect to be killed or seriously injured, if caught. On the record, however, there is no evidence to show that the unfortunate Abdullah and Gul Mohammad or their relatives were Pathans at all, or were anything but what they are described to be in the record, namely peaceful weavers: they were, in fact, *kamins*. The accused Mohammad Khan is an Awan, that is, a member of the proprietary body, and we doubt if a man of the past experience and position of the appellant would have any fear of death or of grievous hurt from *kamin* weavers. In fact, the evidence of Mian Ahmad, one of the sons of Abdullah, is that they chased Mohammad Khan with the object of catching him and entreating him not to come to their house or otherwise persecute them in the future. We consider that, in the circumstances of this case, this is believable and we do not think that any serious apprehension, such as of death or grievous hurt, on the facts outlined above would have entered into the mind of Mohammad Khan. In addition, it is in evidence, and the learned Judge below believes it and we see no reason to disagree with him, that the pursuers of Mohammad Khan were all unarmed. This is another reason to show that Mohammad Khan would not reasonably apprehend death or grievous hurt. From this it would appear that, even supposing that Abdullah and Gul Mohammad and the others had no right to arrest Mohammad Khan for the original trespass, once Mohammad Khan had killed Abdullah, either he had no right of self-defence or, as held by the learned Sessions Judge, he had grossly exceeded that right. Under these circumstances when Mohammad Khan had killed Abdullah the right of arrest at that moment would arise. Gul Mohammad was exercising that right and the right of self-defence, therefore, would not then arise to justify the killing of Gul Mohammad by Mohammad Khan. It is in our opinion difficult to argue that the killing of Gul Mohammad at any rate did not amount to murder.

In addition to these points raised by Counsel for the appellant we hold that the right of self-defence under the circumstances of this case could not possibly have arisen. Mohammad Khan had gone that evening to the house of the deceased to commit an offence; he knew that the men of the family might discover him, and Mohammad Khan went prepared for this eventuality. The dagger used in this case is one of the most formidable weapons we have seen. The blade alone measures over a foot in length. We are satisfied from the facts of this case that Mohammad Khan went armed to this adventure with every intention of using his dagger if discovered. Under these circumstances when that which Mohammad Khan anticipated actually occurred, and Mohammad Khan in pursuance of what we consider to be a preconceived intention used that knife, we do not think that under any circumstances can it be said that he had the right of self-defence. The plea of self-defence having, therefore, in our opinion hopelessly broken down, the result is that Mohammad Khan is guilty of murder. With regard to the sentence, the facts and circumstances described above make it clear that the sentence of death in this case is thoroughly justified. We, therefore, confirm the sentence of death and dismiss the appeal.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 891 of 1938
June 17, 1940
SEN, J.

GOBINDA DAS NATH—DEFENDANT—APPELLANT
versus
SHYAMA CHARAN NATH AND OTHERS—RESPONDENTS

Hindu Law—Religious endowment—Shebait—*Position of—If trustee—One* shebait *if can sue others for contribution when obligation on part of others is proved—Co-*shebaits *are co-sharers of* shebaiti *right and not of* debutter *property—Right to contribution among* co-shebaits, *if exists—One* shebait *paying revenue to save property from sale—Other co-*shebaits, *when liable for contribution.*

Shebaits are managers of the *debutter* property and although their rights and duties to some extent resemble those of trustees they are not trustees in the true legal sense of the term inasmuch as the property of the estate is not vested in them as manager of the estate of the idol. One of the *shebaits* can sue the others for expenses incurred in the course of management if it can be established that there was an obligation in the other managers to share in the payment of these expenses. 65 Ind. Cas 161 (1) and *Manindra Deb* v. *Hameswari* (2), relied on, 87 Ind. Cas. 305 (3), referred to, 147 Ind. Cas. 884 (4), explained. [p. 201, cols. 1 & 2.]

The fundamental fact to be remembered in the case of an absolute *debutter* is that the property of the *debutter* estate belongs absolutely to the idol. The *shebait* is not the owner of the property and if there are several *co-shebaits* they are in no sense co-sharers in the property. The *shebait* has not the legal ownership, but only the title of a manager of a religious endowment. Co *shebaits*, are not co-sharers of the *debutter* property. They are co-sharers of the *shebaiti* right. This "possessory title" of a *shebait* is merely a right to possess on behalf of the idol; it is not a title which the *shebait* has by virtue of a right of ownership in the property. 65 Ind. Cas. 161 (1) and *Shibessouree Debia* v. *Mothooranath* (5), relied on, *Manindra Deb* v. *Haneswari* (2) and 141 Ind Cas. 544 (6), explained. [p. 202, col. 2; p. 203, cols. 1 & 2.]

A finding that the parties are co-sharers in the *shebaiti* interest cannot by itself afford sufficient basis for a decree for contribution in proportion to the shares of the parties. Unless some special contract or custom is proved, the right to contribution cannot arise. The property which is saved from sale by the payment of revenue by one of the *co-shebaits* is not the *shebaiti* interest in which the *shebaits* are co-sharers but the property of the idol in which they are not co-sharers. The other *co-shebaits* are not, therefore, liable for contribution in the absence of a special contract or custom. But even if special contract or custom is proved the *co-shebaits* are not liable for contribution, where the revenue is paid by one of them out of the surplus funds in his hands. [p. 203, col. 2.]

A. from the appellate decree of the District Judge, Murshidabad, dated January 31, 193-.

Messrs. *H. L. Chuckerbutty* and *Nalin Ch. Pal*, for the Appellant.

Mr. *Surajit Chandra Lahiri*, for the Respondents.

Mr. *Bireswar Chatterjee*, for the Deputy Registrar.

Judgment.—The plaintiffs who are two in number brought this suit on the following allegations. One Kirti Chandra Dutta the predecessor-in-interest of the plaintiffs and the defendants, dedicated certain property to a deity, Sri Sri Iswar Brindaban Behari Deb. He appointed himself the *shebait* and made provision for the succession to the *shebaitship*. The two plaintiffs and defendant No. 1 who is the principal defendant each possessed 5/12 share of the *shebaiti* right and the *pro forma* defendants possessed the remaining shares. From time immemorial each *shebait* used to perform the worship of the deity according to his *pala* or turn; each *shebait* also used to collect the rent of the *debutter* property in proportion to his share in the *shebaiti* interest and used to pay thereout such portion of the Govt. revenue as corresponded to his share in the *shebaiti*. Defendant No. 1 continually defaulted in making arrangements to pay the share of the Govt. revenue which was payable by him. The plaintiffs, in order to save the estate and to protect their *shebaiti* interest, have paid the entire revenue as there are no separate accounts in the Collectorate. They accordingly sued defendant No. 1 for contribution to the extent of the share of the Govt. revenue payable by him which had already been paid by the plaintiffs. The defendant denied all the statements in the plaint except that he admitted that he has a 5/21 share in the *shebaiti* interest. He says that in spite of his having this share the plaintiffs have kept him out of possession of the *debutter* property and are mismanging and misappropriating it. He alleges that the plaintiffs had ample funds of the *debutter* estate out of which to pay the Govt. revenue and that the suit is not maintainable in the form in which it has been brought. The trial Court gave the plaintiffs a decree. The defendant appealed and his appeal has been dismissed. He now appeals to this Court. On behalf of the appellants two broad contentions were urged; firstly that the suit as framed does not lie and secondly that the judgment of the learned Judge should be set aside as it does not contain any findings regarding the material facts of the case and as it is based on an erroneous conception of the law relating to the rights of *shebaits*.

The first objection taken by learned Advocate for the appellant is based on the assumption that this suit is by the idol re-

presented by some only of the *shebaits* against the other *shebaits*. It is argued that a suit in this form cannot lie, firstly, because on the facts alleged the idol has no cause of action and secondly, because the idol must sue by the entire body of *shebaits* or by a next friend duly appointed for that purpose. There can be no doubt that the facts alleged in the plaint do not disclose any cause of action in the idol. Obviously the idol has no interest in the quarrel between the plaintiffs and defendant No. 1 regarding reimbursement. This is not a case of any complaint being made on behalf of the idol that its estate is being wasted by some of the *shebaits*, nor is the idol claiming anything against any third party. The present case relates to a dispute between two groups of *shebaits*. If the suit is by the idol then clearly it should be dismissed for want of a cause of action so far as the idol is concerned. The suit however is really not by the idol at all. The plaintiffs are described as *shebaits* of the idol, but the idol himself is not made a party and no claim is made on behalf of the idol. It is true that the learned Munsif has described the suit as being a suit for contribution brought by the "plaintiff deity" against the defendant but this description of the suit is erroneous and not supported by the pleadings. The misconception of the learned Munsif is probably due to an entirely confused and wrong view which his judgment shows he entertains regarding the interest which a *shebait* has in *debutter* property. Be that as it may, this suit is really one by some *shebaits* against another *shebait* for the realization of a sum of money paid by the former which ought to have been paid by the latter it is not a suit by the idol. It cannot therefore be said that the suit should fail on the ground that the plaintiff is the idol and that the plaint discloses no cause of action in the idol or on the ground that this is a suit brought by the idol improperly represented by only some of the *shebaits*.

There is another argument in support of the objection against the frame of the suit. It is said that one set of *shebaits* cannot sue another set of *shebaits* as they are in the position of joint trustees. There is no authority so far as I know which lays down such a broad proposition. I am not concerned with what would be the position of trustees. *Shebaits* are managers of the *debutter* property and although their rights and duties to some extent resemble those of trustees it is now well established that they are not trustees in the true legal sense of the term inasmuch as the property of the estate is not vested in them. There is a long string of decisions of the Judicial Committee which lays this down. I need mention only the case in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), at p. 312. This was also the view expressed recently by Mukherjee, J. in *Manindra Deb* v. *Haneswari* (2), at p. 276. I can see no reason why as manager of the estate of the idol, one of the *shebaits* cannot sue the others for expenses incurred in the course of management if it can be established that there was an obligation in the other managers to share in the payment of these expenses. This suit is really not one by some of the *shebaits* for the benefit of the deity against the other *shebaits*. In that case some difficulty may arise on the ground that the deity cannot be considered as being properly represented by some only of its *shebaits* as was pointed out by the Judicial Committee in *Pramatha Nath* v. *Pradyumna Kumar* (3). Nor is this a suit by some *shebaits* for the recovery of a fractional share of the rent due under a lease to the deity, such share representing the *shebait's* share in the *shebaiti* right as was the case in *Baraboni Coal Concern Ltd.* v. *Gokulananda Mohant Thakur* (4). There the Privy Council held that such a suit would not lie for two reasons, *viz.* (1) because the terms of the lease forbade this course and (2) because the plaintiffs being interested in the property demised merely as *shebaits* and not as owners they could not sue for a fractional share of what was due to the deity as a whole. The present suit, however, is of an entirely different character. The deity is not involved in this suit at all. Nothing is claimed for or on behalf of the deity. This suit arises out of an alleged breach of an obligation said to exist

(1) 48 I A 302 (312); 65 Ind. Cas. 161; A I R 1922 P C 123; 44 M 831; (1921) M W N 449; 41 M L J 346; 3 U P L R (P C) 62; 15 L W 78; 30 M L T 66; 3 P L T 215; 26 C W N 537; 24 Bom. L R 629; 20 A L J 497 (P C).

(2) 40 C W N 271 (276); 63 C 629

(3) 52 I A 245; 87 Ind. Cas. 305; A I R 1925 P C 139; 52 C 809; 23 A L J 537; 49 M L J 30; (1925) M W N 431; 41 C L J 551; 2 O W N 557; 27 Bom. L R 1064; 22 L W 492; 30 C W N 25; 3 Pat L R 315 (P C).

(4) 61 I A 35; 147 Ind. Cas. 884; A I R 1934 P C 58; 61 C 313; 6 R P C 85; 11 C W N 225; 39 L W 291; 38 C W N 325; (1934) A L J 295; 36 Bom. L R 390; 66 M L J 399; (1934) M W N 300; 18 R D 112; 59 C L J 257 (P C).

between the two groups of *shebaits*. The plaint in parts is not happily worded but this is really the nature of the suit. In *Baraboni Coal Concern Ltd.* v. *Gokulananda Mohant Thakur* (4), which was relied on by the learned Advocate for the appellants in support of his argument that the suit was not maintainable, the Privy Council did not prohibit a suit like the present one nor did they lay down any principle, which would be offended by the institution of such a suit. I hold, therefore, that the objection to the frame of the suit cannot be supported.

I next take up for consideration the objection that the judgment of the learned Judge is so unsatisfactory that it cannot be upheld. The trial Court held that the dedicated property did not constitute an "absolute *debutter*" estate and that the property was only partially dedicated. It held that it was secular property with merely a charge on it for the expenses of *deb sheba*. In this view the learned Munsif considered that the plaintiffs and defendant No. 1 were co-sharers of the property and that the plaintiffs on this footing were entitled to be reimbursed for the amount of Govt. revenue which they had paid in excess of their share. I do not think anyone could quarrel with this view, if the finding that there was only a partial dedication and the other findings of fact are correct. The learned Munsif, however, went on to express the view that even if this property had been absolutely dedicated to the idol the *shebaits* would have 'some sort of beneficial interest' in the dedicated property and that if one of *shebaits* paid the Govt. revenue he would have the same right of contribution against a co-*shebait* as if they were co-sharers in the property. With this view I entirely disagree for reasons which I shall give later. When the matter came up on appeal before the District Judge the parties admitted that the property constituted an absolute *debutter* and the case was argued on this basis. The appeal was disposed of in a few lines. The judgment is perfunctory and it indicates that the learned Judge has not appreciated the implications which would follow from the finding that the property was an absolute *debutter* and not secular property charged with the expenses of *deb-sheba*. This is what the learned Judge says :

"It is now admitted by both parties that the property is absolute *debutter*. Practically the only point which has been urged before me is that a suit for contribution against a co-*shebait* does not lie. The co-*shebaits* are not co-owners but it appears that in this case the co-*shebaits* were in possession of specific shares in the property for carrying on the *shebapuja* according to their *palas*. They have also a beneficial interest in the property in their hands. That being so it was certainly to the plaintiff's interest to make the payment in order to save the property. The payment was not only to the advantage of the defendant but being in possession of the property on behalf of the idol it was his duty to pay the revenue. In view of these circumstances, I find that the plaintiffs can claim contribution as an equitable relief. I accordingly uphold the decree of the lower Court and dismiss this appeal with costs. The decretal amount will be realised by the appointment of a Receiver so that the corpus of the *debutter* property may not be affected."

This is virtually the whole of the judgment. The fundamental fact to be remembered in the case of an absolute *debutter* is that the property of the *debutter* estate belongs absolutely to the idol. The *shebait* is not the owner of the property and if there are several co-*shebaits* they are in no sense co-sharers in the property. The *shebait* has not the legal ownership, but only the title of a manager of a religious endowment. This was laid down as far back as 1869 by the Privy Council in *Shibessouree Debia* v. *Mothooranath* (5), at p. 273. This view was also laid down by the same high authority in *Vidya Varuthi Thirtha* v. *Balusami* (1), p. 311*. Dealing with gifts to idols their Lordships say :

"When the gift is directly to an idol or a temple the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case why the property conveyed to or vested in him."

It is true that there is a remark by Mitter, J. in the Full Bench decision in *Manohar Mookherjee* v. *Bhupendranath Mookherjee* (6), at p. 68 that the *shebait* has "some sort of beneficial interest in the *debutter* estate" but this does not mean that the *shebait* has any right of ownerships in the property or that he can be considered as a co-sharer of the property in any sense. The Full Bench was considering the rules of succession to the office of *shebait* laid down by the founder of a Hindu *debutter* and it decided that the succession to the office of *shebait* would be governed by the rule laid down in *Jaitindra Mohan Tagore* v.

(5) 13 M I A 270 (273); 13 W R 18; 2 Suther 300; 2 Sar. 528 (P C)

(6) 37 C W N 29 (68); 141 Ind. Cas. 544; A I R 1932 Cal. 791; 60 C 452; 56 C L J 468; Ind. Rul. (1933) Cal. 115 (F B).

*Page of 48 I. A.—[*Ed.*]

Ganendra Mohan Tagore (7), inasmuch as the *shebaiti* right was property and as such it could not be made to devolve upon persons in a manner contrary to the Hindu Law governing succession to property. In coming to this conclusion the learned Judge discussed the question whether a *shebait* was a bare trustee or whether he was something more and they held that the *shebait* was not bare trustee, that the *shebaiti* interest was property inasmuch as the *shebait* derived some benefit from the *debutter* estate in the shape of *bhog* or some similar benefit. They nowhere held that the *shebait* of an absolute *debutter* had any right of ownership in the property dedicated. That right is completely in the deity. The trial Court relied greatly upon the case in *Manindra Deb* v. *Haneswari* (2), where it was said that a *shebait* had "possessory title" to the *debutter* property. From this the learned Munsif seemed to have drawn the inference that the *shebait* was a co-sharer of the property. This inference is not justified. In that case the question raised was whether a sale of *debutter* property for non-payment of revenue was valid. The *shebaits* had opened separate accounts in the Collectorate in their own names in respect to the *touzi* of which the deity was the proprietor. One of the *touzis* created by the separate account was sold for arrears of revenue and purchased by one of the *shebaits*. The suit was for setting aside the sale and one of the grounds taken was that separate accounts could not be opened regarding *debutter* property in the names of different groups of *shebaits* as they were not co-sharers. It was held that although the property belonged to the deity, separate accounts could be opened in the name of the *shebaits* as

"the object of registering the names of proprietors or managers, etc. under the Land Regis. Act is not to make an inquisition into title either in revenue paying or revenue free properties but to keep a proper record of possessory titles in landed properties so as to have a knowledge of the persons who are in actual possession and are responsible for the discharge of their duties."

This "possessory title" of a *shebait* is merely a right to possess on behalf of the idol; it is not a title which the *shebait* has by virtue of a right of ownership in the property. It was held in that case that only for the purposes of paying the revenue the *shebaits* so far as the revenue authorities were concerned were treated as co-sharers. It was not held that the *shebaits* held any right as co-sharers in the property itself. In the case of co-sharers of property one co-sharer who has paid the entire revenue can certainly claim contribution from another to the extent of the Govt. revenue payable for his share in the land irrespective of any special contract or arrangement. This right arises out of the fact that the defaulting co-sharers is the owner of a part of the property for which the revenue is payable and out of the fact that his share in the property has been saved from sale by the co-sharer who paid the entire revenue. When however the parties are not co-sharers of the property the position is quite different. Co-*shebaits*, as I have said before, are not co-sharers of the *debutter* property. They are co-sharers of the *shebaiti* right. The Govt. revenue is payable not for the *shebaiti* right, it is payable for the property which belongs to the idol and not to the *shebaits* the revenue is due not from the *shebaits* but from the idol on whose behalf the *shebaits* as managers make the payment. The property which is saved from sale by the payment of revenue is not the *shebaiti* interest in which the *shebaits* are co-sharers but the property of the idol in which they are not co-sharers.

In these circumstances, unless some special contract or custom is proved, the right to contribution cannot arise. The rights of the parties cannot therefore be ascertained in the summary manner adopted by the learned Judge. A finding that the parties are co-sharers in the *shebaiti* interest cannot by itself afford sufficient basis for a decree for contribution in proportion to the shares of the parties. The Court will have to ascertain whether there was a special contract between the parties whereby a right to contribution was created or whether there was a valid custom which would give rise to such a right. If there was such a contract or custom the Court will then have to ascertain whether the plaintiffs have paid the revenue in accordance with the terms of the contract or custom. It was suggested in the written statement that there were surplus funds in the hands of the plaintiffs out of which the revenue could be paid. If that be correct the plaintiffs cannot get any reimbursement from the defendant even if there was a custom or contract as suggested above. These matters have not been dealt with by the learned Judge. This appeal will therefore have to be re-heard by him and decided in the light of the observations made above. The learned Judge's discretion to remand

(7) 9 Beng. L R 377; I A Sup. Vol. 47; 2 Suther 682; 3 Sar. 85 (P C).

the case to the trial Court, if such remand is necessary, is left unfettered. The decree of the learned Judge is set aside and this appeal is allowed. The costs will abide the result.

S. *Appeal allowed.*

MADRAS HIGH COURT

Appeal No. 323 of 1934
November 16, 1938

VARADACHARIAR AND ABDUL RAHMAN, JJ.

P. S. SATHAPPA CHETTIAR AND ANOTHER —APPELLANTS

versus

N. K. PR. S. PR. CHOCKALINGAM CHETTIAR AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, rr. 17, 57 — Rejection of application under r. 17— Application must be deemed not in accordance with law — Rejection whether dismissal under r. 57— Application not numbered as execution petition— Inference —R. 57, applicability — Deals with case where on petition ultimately dismissed attachment has taken place.

When the Court exercises its power of "rejection" under r. 17, O. XXI, Civil P. C., the legal position is that no execution petition in accordance with law must be deemed to have been filed. This is made clear by cl. 2 of r. 17. There can therefore be no scope for the application of O XXI, r. 57. The circumstance that the application was not even numbered in the ordinary course as an execution petition clearly indicates that the executing Court had not decided to admit the execution petition at all, but merely rejected it *in limine* as not complying with the formal requirements of law. C. M. S. A. No. 31 of 1935, explained.

In interpreting r. 57, O. XXI, Civil P. C, it must be remembered that it deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such a case the execution petition must *ex hypothesi* have been taken cognizance of an execution ordered and it is only at a later stage that it must be dismissed as contemplated by r. 57. The words of the rule must be applied with caution to cases in which the attachment has taken place before judgment or on a prior execution application. It is in this latter class of cases that the distinction between a "rejection" under r. 17 and a "dismissal" under r. 57 will become material.

A. against the decree of the Court of Sub-Judge, Devakottai, dated August 22, 1934.

Mr. *S. Ramachandra Ayyar*, for the Appellants.

Mr. *T. L Venkatarama Iyer*, for the Respondents.

Varadacharlar, J.—This appeal arises out of a mortgagee's suit for sale. The only question for determination in the appeal is whether the lower Court was right in exonerating Item No. 3 from liability to the plaintiff's claim. This item was purchased by defendant No. 2 on January 26, 1933 in execution of the decree which he had obtained against the mortgagors in O. S. No. 406 of 1926 on the file of the District Munsif's Court of Kumbakonam. During the pendency of that suit he had attached this item before judgment on October 5, 1926 and the mortgage in plaintiff's favour was executed only on October 28, 1926. The decree in O. S. No. 406 of 1926 was passed on September 20, 1927. If matters had not been complicated by what happened in connexion with one of the execution applications in the money suit, defendant No. 2's title would of course have prevailed against the mortgage in the plaintiff's favour. It has however been contended on behalf of the plaintiff that by reason of an order passed by the executing Court on August 1, 1932 the attachment came to an end and that defendant No. 2's title was not derived under the attachment which subsisted on the date of the mortgage in the plaintiff's favour. The lower Court has declined to accede to this contention. The same contention has been passed before us. We have come to the conclusion that the lower Court's view is correct. After obtaining the decree in O. S. No. 406 of 1926, the present defendant No. 2 took several steps in execution before we come to the petition on which the order dated August 1, 1932 was passed. But it is unnecessary to refer in detail to the earlier steps, because it has not been contended that anything that happened then has put an end to the attachment. On June 24, 1932, the application for execution marked Ex. 9 in the present case was presented. It was returned on June 30, 1932 with the following endorsement: "Sale papers to be filed. Returned, time two weeks." Two more weeks' time was taken by the petitioner's Advocate and there was a representation: but on July 20, there was a further endorsement by Court "Stamp the application." Then the application was represented on July 25, 1932. It is on this representation that the order dated August 1, 1932 was made. The office note runs in these words:

"Order of return, dated July 20, 1932, has not been complied with. Cause title has not been correctly given. No affidavit put in as to legal representative of defendant No. 1. Sale papers have not been duly put in. Amounts have not been correctly claimed."

The Court's order consists of the word "rejected." The learned Counsel for the plaintiff contends that this amounts to a "dismissal" under O. XXI, r. 57, Civil

P. C., and that the attachment has accordingly come to an end. The lower Court has held that this is only a "rejection" under O. XXI, r. 17, Civil P. C., and such an order does not attract the consequences of a "dismissal" under O. XXI, r. 57. We may mention in passing that the statement relating to the sale papers is inaccurate as pointed out by the learned Subordinate Judge. Sale papers do seem to have been put in as indicated in the docket. This was in fact so stated in the next application Ex. 10 bearing the same date. The other defects pointed out in the office note, namely, as to incorrectness in the cause title and in the amounts claimed and the absence of an affidavit stating that one of the respondents was the legal representative of defendant No. 1, are, as the learned Subordinate Judge has stated, defects of the kind contemplated in r. 17 of O. XXI. That Rule provides that the Court may either allow the defect to be then and there remedied or within a time to be fixed by it or the Court may reject the application. When the Court exercises its power of "rejection" under r. 17, the legal position seems to us to be that no execution petition in accordance with law must be deemed to have been filed. This is made clear by cl. 2 of r. 17, which says that when an application is amended under the provision of r. 1 it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented; the provision in cl. 4 of the same rule says that when the application is admitted, the Court shall enter in the proper register a note of the application and shall order execution of the decree according to the nature of the application.

The learned Counsel for the plaintiff-appellant admits that if the correct view is that there was no proper execution application before the lower Court on August 1, 1932 there will be no scope for the application of O. XXI, r. 57. But he asks us to hold that there was an application which was dealt with by the lower Court as an execution application and was dismissed by it, whether rightly or wrongly, on the ground of the decree-holder's default. We are not prepared to accede to this contention. The circumstance that Ex. 9 was not even numbered in the ordinary course as an execution petition is not without some significance. It clearly indicates that the executing Court had not decided to admit the execution petition at all, but merely rejected it *in limine* as not complying with the formal requirements of law. Our attention has been drawn to the judgment of Burn, J. in C. M. S. A. No. 31 of 1935, where the learned Judge held an order of rejection to amount to an order of dismissal under O. XXI, r. 57, though it appeared even in that case that the execution petition had not been given a number. So far as we can gather from that judgment the application was rejected because the decree-holder failed to supply certain particulars required by the Court. The argument based on the distinction between a "rejection" under r. 17 and a dismissal under r. 57 does not seem to have been urged before the learned Judge. What the particulars called for by the Court in that case were, we are not in a position to gather from the papers available here and we are therefore unable to say whether they merely related to formal defects within the meaning of rr. 11 to 14 of O. XXI, Civil P. C.

In interpreting r. 57, it must be remembered that it deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such a case the execution petition must *ex hypothesi* have been taken cognizance of an execution ordered and it is only at a later stage that it must be dismissed as contemplated by r. 57. The words of the rule must be applied with caution to cases in which the attachment had taken place before judgment or on a prior execution application. It is in this latter class of cases that the distinction between a "rejection" under r. 17 and a "dismissal" under r. 57 will become material. On the facts already stated, we should have felt great hesitation in holding that if in this case there had been an order of dismissal on August 1, 1932 it could have been justified as a dismissal "for default of the decree-holder." We agree with the learned Counsel for the appellant that it may not always be open to the Court in later proceedings to consider whether the dismissal was right or wrong if that order had been allowed to become final. But where an order is passed in ambiguous terms and terms like "reject" or "struck off" are used and the Court is called upon to consider whether there was in fact an order of "dismissal" within the meaning of r. 57, the Court is entitled to take the circumstance into consideration in coming to a conclusion as to whether a dismissal was intended at all or not. We agree that there

has been no dismissal in this case within the meaning of O. XXI, r. 57. The appeal therefore substantially fails. Objection has also been taken to the amount awarded by the lower Court's decree for costs in defendant No. 2's favour. It is stated that the item in which he is interested is worth only about Rs. 3,000 and that there was no justification for the lower Court assessing his costs on the basis of one-half of the plaint claim, which comes to nearly Rs. 13,000. We think this objection is well founded. We accordingly reduce the amount of Pleader's fee allowed to defendant No. 2 in the lower Court to Rs. 200 instead of Rs. 403-13-10. In other respects the lower Court's decree is confirmed and the appeal dismissed. Respondent No. 2 will be entitled to the costs of this appeal.

N.S. *Appeal dismissed.*

LAHORE HIGH COURT

Second Appeal No. 834 of 1939
February 16, 1940

TEK CHAND AND DIN MOHAMMAD, JJ.

KUCKREJA LTD. THROUGH TRILOK NATH MANAGING DIRECTOR—PLAINTIFF—APPELLANT

versus

SAID ALAM—DEFENDANT—RESPONDENT

Contract Act (IX of 1872), s. 60—Principal and surety—Option exercised by creditor—Appropriation of repayments in principal's independent account—Surety, if can claim benefits—Principal and surety—Contract of guarantee—Held, surety's liability was co-extensive with that of principal.

Where a creditor has exercised his option under s. 60, Contract Act and has appropriated the repayments in the account which he had with the principal debtor independently of the contract of guarantee, the surety cannot in law raise any objection to this appropriation and is not entitled to the benefit thereof. 9? Ind. Cas. 947 (9), 29 Ind. Cas 718 (10) and 52 Ind. Cas. 950 (11), relied on. [p. 208, col. 2.]

A contract of guarantee entered into by a surety was in these terms : "If you supply any goods to the firm on credit or on *hundi* and are unable to realize the price thereof from the firm, I and my property will be responsible for that amount" :

Held, that it was impossible to read into those words any condition that it was only if all remedies failed against the principal debtor that his liability would come into operation. That the liability of the surety was co-extensive with that of the principal debtor as in an ordinary contract of guarantee. [p. 207, col. 1.]

[Case-law relied on]

S. A. from the decree of the District Judge, Sialkot, dated May 6, 1939.

Mr. *Shamair Chand*, for the Appellant.

Mr. *M. L. Puri*, for the Respondent.

Din Mohammad, J.—This appeal has arisen in the following circumstances. A firm working under the name of the "Civil and Military Sports," hereinafter known as the firm, used to purchase goods on credit from Messrs. Kuckreja Limited, hereinafter called the plaintiff. On October 16, 1934, one Said Alam stood surety for the firm in the following terms :

"Please note that if you supply any goods to the Civil and Military Sports Works, Sialkot, on credit or on *hundi* and are unable to realize the price thereof from the Civil and Military Sports Works, I and my property will be responsible for that amount."

After this guarantee was given, goods to the amount of Rs. 4,254 were sold to the firm. Out of this sum, the surety had signed vouchers to the amount of Rs. 1,791-9-0. On August 25, 1936 the plaintiff instituted a suit for recovery of Rs. 3,152-12-0 against both the firm and its proprietor, Sayed Mazhar Hussain, as well as against the surety, Said Alam. The suit was resisted on various grounds. The Senior Subordinate Judge after going into the accounts found that Rs. 2,909-4-0 were due to the plaintiff and consequently, he decreed the suit against both the principal debtor and the surety. Further, he made the surety's liability co-extensive with that of the principal debtor. The surety appealed to the District Judge and on March, 16, 1939, he allowed the appeal to the extent of reducing the decretal amount to Rs. 1,162, and further ordered that the liability of the surety would not be co-extensive with that of the principal debtor. Later on an application being made for the amendment of the decree, the District Judge raised this amount to Rs. 1,791-9-0. The plaintiff has preferred an appeal from the order of the District Judge and has claimed Rs. 500 more against the surety and has also challenged the order of the District Judge in not making his liability co-extensive with that of the principal debtor, while the surety has filed cross-objections challenging the decree made against him. The District Judge has made the surety liable only for the price of those goods which were purchased under his signatures; but the appellant's Counsel contends that as other goods, too, were sold to the principal debtor mainly on the basis of the guarantee offered by the surety, he should be held liable for the price of those goods also. We do not agree. The surety had expressly stated in his contract of guarantee that he would be liable only for the price of those goods which were sold under his orders and in the circumstances, it is impossible to hold him

responsible for the price of those goods which were not so supplied. The plaintiff's claim therefore for an additional sum of Rs. 500 fails.

On the question of the surety's liability being co-extensive with that of the principal debtor, however, the plaintiff is on firm ground. Under s. 126, Contract Act, a 'contract of guarantee' is a contract to perform the promise or discharge the liability of a third party in case of his default; and under s. 128, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. The wording of the contract of guarantee, as reproduced above, clearly indicates that no provision, express or implied, was made by the surety to the effect that his liability would not be co-extensive with that of the principal debtor. All that he said was that if the price of goods supplied to the principal debtor under his orders could not be recovered from the principal debtor, he and his property would be responsible for the payment thereof. This is exactly what is implied in a contract of guarantee. It is impossible to read into those words any condition insisted upon by the surety that it was only if all remedies failed against the principal debtor that his liability would come into operation. We are clear therefore that the liability of the surety was co-extensive with that of the principal debtor. Reference in this connection may be made to *Bharat National Bank Ltd., Delhi* v. *Thakar Das Madhok* (1), *Swaminatha Pillai* v. *Lakshmana Ayyar* (2), *Sree Nath* v. *Peary Mohan*, 39 Ind. Cas. 205 (3), *Depak Datt* v. *Secretary of State* (4), *Chokalinga Chettiar* v. *Dandayutha Pani Chettiar* (5), *Parthasarathy Chetty* v. *Narayana Chetty*, 37 Ind. Cas. 401 (6), *Nandlal Chogalal* v. *Suraj mal Gangaram* (7) and *Gokalchand Ramgopal* v. *Laxminarayan* (8). In *Bharat National Bank Ltd., Delhi* v. *Thakur Das Madhok* (1), a Division Bench of this Court observed that the onus in such cases lay upon the surety to prove those circumstances wich took his case out of the ambit of the affirmative portion of s. 128 and if he failed to establish any contract which limited his liability, the inevitable conclusion would be that his liability would be co-extensive with that of the original debtor. In *Swaminatha Pillai* v. *Lakshmana Ayyar* (2), the surety agreed to pay the amounts advanced to the debtors in the following terms :

"If there be default in payment of the said amount and if money be due to you and in case you are not able to recover the amount so due from them, I agree to pay the same to you."

Madhavan Nair, J. held that the language of the letter did not imply a contract contrary to the general principle that a surety's liability was co-extensive with that of the principal debtor and consequently it was not necessary first to exhaust all the remedies against the principal debtor before the surety could be proceeded against. In *Sree Nath* v. *Peary Mohan*, 39 Ind. Cas. 205 (3), the surety had given the following undertaking. "If there be a default in the repayment of the loan, you may look to me for repayment." It was contended that the surety could be proceeded against only if default had taken place. Hill, J. observed that :

"The liability of the surety arises immediately on the failure of the principal debtor to perform his obligation and if the surety then likewise fails in performance, a right of action as against him immediately accrues to the creditor."

An appeal against this order was dismissed by three Judges of the Calcutta High Court. In *Depak Datt* v. *Secretary of State* (4), Jai Lal, J. remarked that in the absence of a clear intention to the contrary, it was at the option of the creditor to decide whether he should proceed against the surety or the principal debtor, inasmuch as the liability of the surety was co-extensive with that of the principal debtor. In *Chokalinga Chettiar* v. *Dandayutha Pani Chettiar* (5), the words of the guarantee were : "If he does not so pay, I shall pay you the principal and interest." A Division Bench of the Madras High Court held that the surety's liability, in the circumstances, was co-extensive with that of the principal debtor. In *Parthasarathy Chetty* v. *Narayana Chetty*, 37 Ind. Cas. 401 (6), a Division Bench of the Madras High Court observed that ss. 128, 137 and 140, Contract Act, make it clear that a creditor has a right to proceed

(1) A I R 1935 Lah. 729; 156 Ind. Cas. 553; 16 L 757; 37 P L R 92; 8 R L 6.
(2) A I R 1935 Mad. 748; 157 Ind. Cas. 979; (1935) M W N 757; 42 L W 291; 8 R M 192.
(3) 39 Ind. Cas. 205; A I R 1917 Cal. 154; 25 C L J 91; 21 C W N 479.
(4) A I R 1929 Lah. 393; 118 Ind. Cas. 443; Ind. Rul. (1929) Lah. 779.
(5) A I R 1928 Mad. 1262; 113 Ind. Cas. 337; (1928) M W N 814.
(6) 37 Ind. Cas. 401; A I R 1917 Mad. 101; 5 L W 161.
(7) A I R 1932 Nag. 62; 138 Ind. Cas. 879; 28 N L R 325; Ind. Rul. (1932) Nag. 88.
(8) A I R 1933 Nag. 287; 150 Ind. Cas. 685; 7 R N 19.

against the surety without exhausting his remedies against the principal debtor. In *Nandlal Chogalal* v. *Surajmal Gangaram* (7) the surety had undertaken to pay the amount borrowed if the original debtors failed to pay. It was urged that those words conveyed the idea of the creditor exhausting all his remedies to recover the amount in the first instance from the principal debtors and that unless he did so, he could not recover it from the surety. Subhedar and Staples, A. A. Cs., repelled this contention. In *Gokulchand Ramgopal* v. *Laxminarayan* (8), the contract of guarantee was couched in the following terms: "If he should fail therein, then any amount so payable shall be realised from the properties hereby mortgaged." Niyogi, A. J. C., held that the non payment necessarily meant voluntary non-payment and the failure by the decree-holder to recover his amount by coercive process such as arrest of the judgment-debtor or attachment and sale of the property could not be treated as being implied by the expression used. We are in respectful agreement with the principle enunciated in these judgments and have no hesitation in holding that, as stated above, in the contract of guarantee now under consideration it was not at all implied that the creditor would be entitled to proceed against the surety only if all remedies known to law were first exhausted against the principal debtor. It was an ordinary contract of guarantee and the creditor was entitled to proceed against the surety when default had been made by the principal debtor in paying the amount within a reasonable time. Coming now to the cross-objections, Counsel for the surety urges that the contract of guarantee expressly stated that the surety would be liable only for the price of those goods which were supplied under his orders and that the documents on the basis of which he is being held liable are not orders but mere voucher except Exs. P-1 and P-2 which are the only two documents which fall under that description. There is no force in this contention. The goods supplied were entered in printed forms used by the plaintiff which may well be described as credit memos. The particulars of the goods supplied as well as the rate and price were mentioned therein and a place was set apart for the signature of the customers. Seventeen out of nineteen vouchers are on these forms. Exs. P 1 and P-2, the two documents which are referred to by Counsel for the surety as the real order forms, are not order forms at all but vouchers intended for the customers belonging to out-stations. Seeing that every one of these documents is signed by the surety, it cannot be urged that the goods mentioned therein were not supplied under his orders. We, therefore, repel this contention. Counsel next contends that the surety's liability even if it was based on the vouchers produced in Court, could not exceed Rs. 915-3-0 in as much as vouchers Exs. P-6 to P-10, P-12, P-13 and P-15 are not included in the sum sued for. Here, too, he is labouring under a misapprehension. Ex. P-7 is clearly included in the account produced by the plaintiff and Exs. P-6, P-8, P-9, P-10, P-12, P-13 and P-15 are included in the item of Rs. 692-8-0 which is shown to have been transferred from the city branch on March 1, 1935.

Counsel finally urges that the surety was entitled to the benefit of the repayments made by the principal debtor in his account. As against this, Counsel for the plaintiff rightly contends that inasmuch as the debtor did not exercise his option under s. 59, Contract Act, it was open to the creditor to exercise his option under s. 60, Contract Act, and as he had appropriated the repayments in the account which he had with the principal debtor independently of the contract of guarantee, the surety cannot in law raise any objection to this appropriation. *Relumal* v. *Ahmad*, (9) *Krupasindhu Sahu* v. *Rajah of Kallikota* 29 Ind. Cas. 718 (10) and *Munuswami* v. *Perumal Mundlay* 52 Ind. Cas. 950 (11), support this contention. The result is that we dismiss the cross-objections with costs and allow the appeal only to this extent that we set aside the order of the District Judge to the effect that the surety's liability will not be co-extensive with that of the principal debtor and restore that of the trial Court in this connection. The appellant will pay three-fourths of the surety's costs in this appeal.

S. *Order accordingly.*

(9) 7 L 17; 92 Ind. Cas. 947; A I R 1926 Lah. 183.

(10) 29 Ind. Cas. 718; A I R 1916 Mad. 1196.

(11) 52 Ind. Cas. 950; A I R 1919 Mad. 534; 37 M L J 367; 10 L W 329.

PRIVY COUNCIL

Appeal from the Rangoon High Court

October 29, 1940

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

ISMAIL AHMED PEEPADI—APPELLANT

versus

MOMIN BI BI AND OTHERS—RESPONDENTS

Evidence Act (I of 1872), ss. 4, 112, 114, illus. (d) —Proof of marriage—Presumption—Discretion of Court under s. 4.

Under s. 4, Evi. Act it is open to the Court upon proof of the marriage on a certain date either to regard as proved the subsistence of the marriage on a certain subsequent date unless and until it is disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of s. 4 in a judicial manner according to the circumstances of the case. [p. 210, col. 1.]

Messrs. *C. S. Rewcastle, K. C.* and *Kenelm Creedy*, for the Appellant.

Messrs. *Wilfred Barton, K. C.* and *W. Wallach*, for the Respondents.

Sir George Rankin.—The appellant Ismail Ahmad Peepadi (herein called "the plaintiff") was born on May 1, 1919. On November 12, 1936—when he was seventeen years old—the suit out of which this appeal arises was brought on his behalf in the District Court of Amherst in Burma. Abdul Guffoor, his mother's elder brother, acted as next friend, and on December 8, 1936, leave was obtained to sue *in forma pauperis*. The purpose of the suit was to establish that the plaintiff was the legitimate son and only child of one Haji Ahmed Peepadi, an inhabitant of Moulmein, who had died there on August 8, 1935, leaving one widow Momin Bibi, the first defendant; and that under the law applicable to Sunni Muhammadans the plaintiff was entitled to a fourteen annas share in the deceased's estate. This claim had been first made, so far as appears, by a lawyer's letter dated February 18, 1936. The estate of the deceased consisted in part of a one-fourth share in the estate of his father who had died on or about January 12, 1935. The defendant to the suit, in addition to the widow, were the deceased's brother Cassim, his step-brother Hashim, and two step-sisters. They all joined in one written statement dated December 21, 1936.

The case made by the plaintiff was that Ahmed Peepadi, the deceased, had married the plaintiff's mother Mariam Bibi on or about October 20, 1916 and that though he had in the end dissolved this marriage by giving her *talak* this divorce had not taken place until after the appellant's birth. Save that the date of the divorce was alleged to be "some time after the birth of the plaintiff" no date was assigned to it by the plaint, but the evidence called for the appellant is to the effect that he was over a year old at the time. It is proved and admitted that on July 3, 1921, at Rangoon Mariam Bibi married again, her second husband being called Ismail. The date of her death is not stated in any of the pleadings, but is put by a witness Maung Ba (D. W. No. 11) and by the learned District Judge as about 1925.

The case made by the pleading and witnesses of the defendants is that though Ahmed Peepadi's marriage to Mariam Bibi had taken place on October 20, 1916, as alleged by the plaint, it was dissolved on November 10, 1916—within a month—by a *talaknama* being served upon her on her husband's behalf.

The single issue framed by the trial Court was: Is the plaintiff the lawful issue of Haji Ahmed Peepadi? Over a score of witnesses were called on each side. After the learned District Judge Mr. A. T. Rajan, who began the trial, had in March, 1937, heard twenty-two of the witnesses for the plaintiff he was succeeded by another learned Judge Mr. Ba Hla Thein, who from June to September, 1937, heard two more witnesses for the plaintiff, the plaintiff's own evidence and the oral evidence for the defendants. Judgment was given by Mr. Ba Hla Thein on October 27, 1937, in favour of the plaintiff, finding him to be the lawful issue of Ahmed Peepadi deceased, and a preliminary decree for administration of the deceased's estate upon that footing was drawn up. This, by some error which is unexplained, directed the defendants to pay to the plaintiff two lakhs of rupees, but its terms need not now be scrutinized. On appeal by the defendants to the High Court at Rangoon the decision of the trial Court was reversed by Goodman Roberts, C. J. and Dunkley, J., who held that the plaintiff had failed to prove that he was the lawful son of Ahmad Peepadi. From their decree of April 6, 1938, dismissing the suit the plaintiff has appealed to His Majesty in Council.

The matter which requires to be determined is the date of the divorce whereby the marriage of Ahmed Peepadi to Mariam Bibi was dissolved. Though the *talaknama* was presumably dated it has not been produced by either side and their Lordships are unable to draw an adverse in-

ference against either party on that account. The marriage of October 20, 1916, is not disputed nor is it disputed that Mariam Bibi gave birth to the plaintiff on May 1, 1919. If the divorce took place after the plaintiff's birth s. 112 of the Indian Evi. Act would conclude the present case in his favour since no case is made of the husband and wife having had no access to each other. A question has been raised whether s. 112, applies only to cases in which the continuance of the marriage is established positively or directly, or whether it can be brought into effect by proof of the marriage and by the consequent presumption that the relationship continued. There is in India at least one authority in favour of the latter view *Bhima* v. *Dhulappa* (1). But as their Lordships have not found it necessary to call upon Counsel for the respondents and as the decision of the appeal does not in their view depend upon any question as to the burden of proof, they do not propose to discuss any general questions of this character. The presumption of continuance is dealt with by the Indian Evi. Act in s. 114 (*cf* Illustration (*d*) thereto). Under s. 4 it was open to the Court in India upon proof of the marriage of October 20, 1916, either to regard as proved the subsistence of the marriage in May 1919, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of s. 4 of the Act in a judicial manner according to the circumstances of the case. The right of the appellant cannot under the Act be put higher, and their Lordships will not assume that the continuance of the marriage requires for the purposes of s. 112 to be shown in any special manner.

Ahmed Peepadi belonged to one of several Moslem families who had migrated to Burma from Surat in Western India, and had settled in Moulmein, where they were known as Soorties (Suratees). His age at the time of his death in 1935 is said by his first cousin (D. W. No. 15) to have been 60 or 65 years, so that in 1916 he would be some forty years old. Mariam Bibi is said by one witness to have been at that time 20 or 22 years old, but neither her mother nor her sister mention her age in their evidence. It appears from evidence which is hazy that Ahmed Peepadi was married four times in all—his wives being taken in succession. The first was Khatiza (a relation of the witness Jeewa) who died, it would seem about 1912. Mariam Bibi would seem to have been the second. It is said by the defendant Cassim in his evidence that Ahmed Peepadi married Ainsha Bibi, daughter of Hashim Bawa Jan, in 1922, and married the first defendant Momin Bibi a year and half before his death—that is about 1933. Ahmed Peepedi seems to have lived throughout at his father's house in the neighbourhood of the Big Bazaar of Moulmein. The home of Mariam Bibi, her mother and sisters was not far away—a house numbered 52 Kwingyaung Street in the Maunggan quarter of the town.

Mariam Bibi, according to the evidence for the plaintiff, lived with her mother in Moulmein for a year or so after her divorce; then re-married and went to live in Rangoon, the plaintiff being kept with her mother at Moulmein on the request of Ahmed Peepadi who said he had no one to look after the child. It is also said by the plaintiff and Ma Halima that they lived with the defendant Cassim for a time, this arrangement being given up only because the plaintiff quarrelled with Cassim's sons, but Cassim and Ghulam Hussein Bangee (D. W. No. 19) his neighbour deny that the plaintiff ever lived with Cassim.

The years between 1921 and 1935 would seem to afford sufficient time for conduct on the part of Ahmed Peepadi showing whether he did or did not regard the plaintiff as his son. It is true that Mariam Bibi being poor and of lower social standing, his marriage with her seems to have been kept to some extent secret and he never seems to have taken her to live at his father's house. Hence the plaintiff's case does not necessarily fail because Ahmed Peepadi is not shown to have treated the plaintiff as one would ordinarily expect an only child to have been treated by his father. Though it is by no means the case made by the plaintiff or his chief witnesses, the learned District Judge thought that the effect of the evidence was that Ahmed Peepadi did not openly acknowledge the plaintiff as his son but treated him as one until his death, while all the other members of the family treated him as an imposter or outcast. Now by far the most important question in such circumstances is whether Ahmed Peepadi maintained and supported the plaintiff during all these years. The plaintiff and Ma Halima give evidence of a very sketchy character of payments made in a casual and uncertain manner, and

(1) 7 Bom. L. R. 95.

though the matter is not given by the learned District Judge the importance which it deserves, his view is that the evidence of the plaintiff and his grandmother on this point is uncorroborated and must be left out of account altogether. The learned Judge rejects in like manner certain witnesses called to show that Ahmed Peepadi used to take the plaintiff and Mariam Bibi to Thaton. On these points the correctness of the findings of the learned Judge can hardly be disputed and the absence of reliable detailed evidence that Ahmed Peepadi was supporting the plaintiff is a great difficulty in the plaintiff's way. Evidence was given that Ahmed Peepadi after the plaintiff's birth continued to visit Mariam Bibi at 52, Kwingyaung Street in the Maunggan quarter of Moulmein, that he took some notice of the plaintiff both in 1920 and in later years, that he attended the head shaving and circumcision ceremonies of the plaintiff. The evidence about Ahmed Peepadi's visit to Mariam Bibi in 1920 is of great importance if it can be relied on; but on the other points the evidence comes to little and is of doubtful credibility in any view. One Eusoof Ebrahim Mayet (P. W. No. 5) spoke to Ahmed Peepadi's visits to Mariam Bibi in 1920 giving as his reason for fixing the date that he was working at the time on the wreck of the vessel "War Puffin," which was sunk near the Amherst lighthouse. This evidence was countered by that of a witness called Karimuddin (D. W. No. 6) who deposed that work on the ship was abandoned in May, 1920, and that Mayet could not have been at work on it until 1923. The learned District Judge who had not seen the witness Mayet accepted his evidence, but their Lordships think that it would be most unsafe to rely upon it. So too with the evidence of a Chinese merchant named Ah Choy (P. W. No. 21) who stated that ten or twelve years before (1925-7) he travelled to Rangoon with Ahmed Peepadi and Ahmed Sulaiman Jeewa; that Ma Halima and the plaintiff (then 8 or 9 years old) had a meal on the train in their company; that Ahmed Peepadi on that occasion told the witness that the boy was his son, and that he could now identify the plaintiff as the boy since the railway compartment was lighted. The occasion of the witness's visit to Rangoon seems to have made but small impression upon so excellent a memory; that it was a Viceroy's visit, and that the Viceroy was Lord Curzon were tentatively suggested, but in the end he could only say that it was some feast. By stating that he went with Ahmed Peepadi and Jeewa by special arrangement this witness does not remove himself from the very well-known category of "chance witness," whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation. Though the "chance witness" is not necessarily a false witness, it is proverbially rash to rely upon such evidence. In the present case the evidence of the plaintiff himself as to staying at the Moulmein Club at Rangoon when Ah Choy was also there fits in ill with Ah Choy's statement, and the witness Jeewa further contradicts it.

Again, a conveyance of the house 52, Kwingyaung Street, dated January 29, 1917, is produced whereby the property is transferred by Ahmed Peepadi for Rs. 600 to Mariam and her two sisters without any mention being made either that Mariam was the wife of the transferor or of any other consideration than Rs. 600. The witness Jeewa says that the property was conveyed after and because of the divorce of November, 1916, and only after some persuasion on his part. Ma Halima says that it was conveyed after the marriage and that Jeewa had promised it at the time the marriage was being arranged. It seems that the house had formerly belonged to Mariam's father and that Ahmed Peepadi had obtained it by paying off certain charges. The learned District Judge thought that this conveyance proved that no divorce had taken place by January, 1917, because it contained no recital to that effect, but in their Lordships' opinion it is at least as cogent to say that had Mariam been the wife of the transferor she would have been so described. The plain fact is that the document of itself does not decide between the rival stories of its origin. On these three matters the evidence of Mayet, the evidence of Ah Choy and the effect of the conveyance of January 29, 1917, their Lordships prefer the view taken in the High Court to that of the learned trial Judge. They see nothing in any of these matters which can be regarded as decisive in the plaintiff's favour.

It remains, however, that a number of witnesses have spoken to the divorce having taken place when the plaintiff was a year

or more old. These need not all be mentioned, but Mariam's mother, brother, sister and brother-in-law say so, and in their case the sole question is as to their truthfulness since they would certainly know the facts. Of other witnesses to this effect Mahomed Esa (P. W. No. 17) who lives in the same street as Ma Halima dates the divorce as in August, 1920, and his brother Mahomed Moosa (P. W. No. 18) says that the divorce was a year after the plaintiff's birth. Similar evidence is given by Ahmed Sultan (P. W. No. 22) but this witness is confused as to dates. This evidence regarded as a whole suffers heavily from the failure—almost, if not quite, complete—to give a specific account of the date and circumstances of the divorce. Its vagueness makes it unimpressive. However, though this and the failure of the plaintiff to afford any reliable proof of Ahmed Peepadi having provided his maintenance are matters which tell against the plaintiff's case, it is necessary to take account of the fact that the defendants' case that Mariam was divorced within a month of marriage is one to which some improbability attaches. As against the story which would put the divorce towards the end of 1920, the evidence of the defendants' witnesses must be carefully scrutinised. The main witness on this point, Ahamed Sulaiman Jeewa, gave evidence on commission in January, 1937, before the trial, and died according to the defendant Cassim on April 3, of that year. That he was a great friend of Ahmed Peepadi is not in doubt in view of Ma Halima's statements. His evidence is that fifteen or twenty days after the marriage Ahmed Peepadi came to him at his shop and complained of Mariam's conduct and said he wanted to divorce her: that two days afterwards Saya Galay (described as "priest" of the mosque) at the witness's shop wrote down at Ahmed Peepadi's dictation a *talaknama* which was signed by the latter. This document was given to two persons Ebrahim Hashim Poo and one Madani, now dead, who went by the name of Lulu. They were asked to go with Mamoo Ko Yacoob and serve it upon Meriam. They returned and said they had done so. Ma Halima who gave her evidence in March, 1937, said that Ko Yacoob and Lulu brought the *talaknama* that they are both dead, that Ebrahim Poo did not come with them, and that the *talaknama* was taken to Rangoon by Mariam to show to her second husband. Ma Sisha (P. W. No. 11), though called for the plaintiff, stated that she was present when the *talaknama* was delivered by Yacoob and two men from the Big Bazaar, that this was before the plaintiff's birth, that Lullu was one of the two men, but she did not know if Ebrahim Poo was the other. The defendant Cassim says that as Ahmed Peepadi had no children he adopted the daughter of Lulu, who was given jewellery and money by him and by his parents. Ebrahim Hashim Poo (D. W. No. 8) corroborates Jeewa and states that he went with Lulu Madani and Yacoob to Mariam's house and gave her the *talaknama* and that Lullu read out its contents. He is cross-examined to suggest that he is not a person who would have been entrusted with the duty of serving a *talaknama*. Moti Rahman (D. W. No. 12) deposed that Lulu *alias* Madani was his aunt's husband, that he lived in Abrew Street and died at the age of 43 about 15 years before. To this is added proof of the death register for 1919 in which is an entry of the death of one Lulu aged 43 years, a Muhammadan trader of 4, Abrew Street on December 8, 1919, and the signature of Moti Rahman as the person reporting the death. Moti Rahman was not cross-examined at all by Counsel for the plaintiff, though the point of his evidence is manifest—*viz.*, that if Lulu died in December, 1919, he could not have taken part in serving the *talaknama* on Mariam Bibi when the plaintiff was a year or a year and a half old—as the trial Judge puts it, towards the end of 1920, or as the plaintiff's witness Mahomed Esa (P. W. No. 17) puts it, in August, 1920. The course adopted towards this evidence by the plaintiff and assented to by the trial judge is to suggest that the Lulu who died in 1919 was a different person from the Lulu who according to the evidence on both sides took part in serving the *talaknama*. This in their Lordships' opinion as in that of the High Court is unreasonable. That the Lulu who served the *talaknama* was called Madani, was spoken to by Jeewa before the trial began as also by Ebrahim Poo and Moti Rahman, who are not cross-examined to suggest the contrary. The person in question was known to Ma Halima and his identification could have been challenged in detail, particularly if he was the father of Amina Bibi who was said by Cassim to be living in the Peepadi's house as having been adopted by Ahmed Peepadi. To wait until the time of argument to

suggest that there were two Madanis called Lulu, without making any attempt to enquire of the witnesses, is not a reasonable way to conduct such a case as the present. On this point their Lordships find themselves in agreement with the High Court in thinking that it must be taken that the entry in the death register relates to the Lulu who took part in effecting Mariam's divorce. The case made by the plaintiff as regards the date of divorce is thus displaced: it cannot have taken place when the plaintiff was a year old or at any time after 1919.

There is a still more serious challenge to the plaintiff's case in the evidence given by Maung Ba and Mrs. Buchanan at the trial, and by U Chit Swe taken on commission in September, 1937. Maung Ba says that from 1918-23 he was clerk to a Pleader called Buchanan who practised at Moulmein, and who in 1923 went to practice at Insein; that in 1920 Mariam Bibi came to Mr. Buchanan with her child and her mother to get him to take steps to obtain maintenance for the child against a barrister U Chit Swe. He says that at first Mr. Buchanan did not like to file a case against a brother lawyer but in the end she came with the witness Korban Ali (D. W. No. 18) and insisted, so that Mr. Buchanan was persuaded to send a notice to U Chit Swe. That notice or letter was typed and served on U Chit Swe by Maung Ba himself according to his evidence, and a carbon copy of it kept by Buchanan in the ordinary course of office practice has been produced by his widow (D. W. No. 1) from among the papers left by him. This is Ex. 8. It is dated April 29, 1921. It mentions that the client is Ma Yan of Maunggan Quarter, Moulmein, and it demands thirty rupees for maintenance for herself and her child. There are also two entries in Buchanan's fee book showing receipt of Rs. 10 and Rs. 5 on April 29, and May 11, of that year from Ma Yan in respect of "criminal case No. 20." Ma Yan is the Burman form of Mariam, and Maung Ba lived near to Kwingyaung Street in Maulmein and knew the plaintiff's mother, though Mrs. Buchanan did not. His evidence is corroborated by Mrs. Buchanan and by Korban Ali, who is a native of Moulmein and claims to have known Ma Halima from his childhood. It seems unnecessary to dwell on their evidence in view of the position of U Chit Swe, who admitted to having been intimate with Mariam Bibi for about a year and a half in 1917-8. He says she claimed to be the divorced wife of Ahmed Peepadi. He says she had no child then. He admits receiving a notice in terms of Ex. 8 from Mr. Buchanan. In cross-examination he stated that he had a child by a girl whom he kept for nine months in 1916, and that his brother made a lump sum payment to her; that he did not reply in writing to Mr. Buchanan's letter but spoke to him denying the claim. The learned trial Judge arrived at the conclusion that :

"It is more likely than not that the Ma Yan referred to in the Exhibit notice was the other woman with whom U Chit Swe got a child and of whose name he says he has no recollection."

Their Lordships bear fully in mind that Mrs. Buchanan said that there was a settlement in Ma Yan's matter before she left for Insein, and also that she said that the child she saw might have been under a year, but they think that the conclusion of the learned Judge is without foundation. It is necessary to alter the dates and facts given by U Chit Swe to fit in with it. That there should be two women of the same name belonging to the same quarter of Moulmein, and with a child about a year old, and that the defendants should be able to get the person alleged to have had relations with the one to pretend to have had relations with the other is very far from probable. The witnesses Maung Ba and Korban Ali may be open to suspicion of partiality and perhaps of something more, but when their evidence is taken in connection with the admitted documents and the evidence of U Chit Swe it cannot be rejected upon a gratuitous supposition as to there having been in 1920 and 1921 another woman of the same name claiming against U Chit Swe. It is true, however, that before arriving at a final conclusion on this point account should be taken of the evidence as to the name under which the plaintiff passed as a schoolboy. In 1927 and 1928 he was entered in the books of his schools as Ismail, son of Peepadi, and from 1931 to 1935 he was at the Govt. High School, Moulmein, under the name of Ismail Peepadi, son of Ahmed Peepadi. In June 1935, he was admitted as a free scholar to a Muslim school at Kandawglay in Rangoon on the request of a Mr. C. E. Dooply (P. W. No. 3) and was taken there by Ma Halima. Both Dooply and the superintendent of the school have given evidence: the former says

that he asked the school to take the boy free as he was poor: the latter says that the reason explicitly given was that the boy was an orphan, and that Abdul Guffoor was dealt with as the boy's guardian. Notwithstanding that Ma Halima says that Ahmed Peepadi sent her and the boy to Dooply, the evidence of Dooply and of the superintendent does not show that Ahmed Peepadi had anything to do with the plaintiff being sent to this school, and it seems certain that he paid nothing on his account. Their Lordships cannot think it impossible that the boy should have been given the name of the mother's husband even if he were born more than two years after divorce; nor do they think it at all likely that the husband would make it his business to object, if he got to know of the name under which the boy was sent to school. Reviewing the evidence as a whole their Lordships agree with Dunkley, J. in holding it proved that in 1920-1921 Mariam Bibi was alleging that U Chit-Swe was the father of the plaintiff.

It is not necessary that any opinion should be expressed as to the reliability of the witness Haju Mahomed Ali, who says that he acted as witness at the second marriage of Mariam in 1921 and that in answer to his question she stated that she had been divorced five or six years before. Nor do their Lordships propose to discuss the value of the entries in the diary (Ex. 4) which are said to be in the handwriting of Ahmed Peepadi, or the question whether the complaint against Mariam Bibi brought in May, 1918, in the Court of the Honarary Magistrate at Moulmein was made by Ahmad Peepadi. They think it right, however, to mention the will dated July 15, 1935, which is spoken to by A. L. Roy (D. W. No. 14), Ahmed Mahomed Peepadi (D. W. No. 15) and A. S. Jeewa. This declares Cassim and Momin Bibi to be the legal heirs of Ahmad Peepadi the trestator, and that he has no other legal heir. Their Lordships agree with the High Court in thinking that no sufficient reason can be shown for treating this document as a forgery, especially in view of the fact that it was presented to the Court of a Magistrate on Septemper 24, 1935, within a few weeks of the death.

In the result their Lordships think that the High Court have taken the right view of the evidence. They do not think that it is shown that the marriage of Mariam with Ahmed Peepadi was a subsisting marriage in 1919, but consider on the contrary that the case of the defendants as to the date of the divorce must be accepted as true. They will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs.

S. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs *Holmes Son* and *Pott.*

Solicitors for the Respondents:—Messrs. *Gard Lyell & Co.*

OUDH CHIEF COURT

Civil Revision Application No. 135 1937

April 15, 1940

HAMILTON AND YORKE, JJ.

LALTA SINGH—APPLICANT

versus

SRIDHAR SUKUL AND OTHERS—OPPOSITE PARTY

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 23—Section does not bar revision against appellate order under the section.

Revision is maintainable against a decision of the District Judge setting aside a decree passed by an Assistant Collector under s. 12 of the U. P. Agri. Relief Act, though an appeal against the appellate order under s. 23 is barred under that section of the Act. *Ghulam Jilani* v. *Muhammad Hassan* (1), 165 Ind. Cas. 469 (2) and 184 Ind. Cas. 768 (3), explained.

C. R. App. of the order of the District Judge of Fyzabad, dated September 11, 1937.

Mr. *H. Husain*, for the Applicant.

Mr. *Naimullah*, for the Opposite Party.

Order.—This is an application in revision against a decision of the District Judge of Fyzabad setting aside a decree passed by an Assistant Collector under s. 12 of the Agri. Relief Act.

A preliminary objection has been raised that no revision lies because under s. 23 of the Agri. Relief Act no appeal shall lie from an appellate order passed under this section. The learned Counsel for the respondent urged that because no appeal lies therefore no revision lies either. He depends on 29 Indian Appeals, page 51, (*Ghulam Jilani* v. *Muhammad Hassan*) (1), a decision of their Lordships of the Privy Council. Their Lordships there said that in so far as an appeal did not lie to set

(1) 29 I A 51; 29 C 167; 4 Bom. L R 161; 12 M L J 77; 6 C W N 226; 8 Sar. 154; 25 P R 1902 (P C.)

aside an award revision also did not lie because if allowed it would have the same effect as an appeal, that is to say, the award would be set aside. It seems clear to us that the decision of their Lordships of the Privy Council was not intended by them to mean that whenever an appeal did not lie, revision also did not lie but was to be restricted to cases of awards. The learned Counsel then relied on 1936. O. W. N. Page 1158 (*Nihal Singh Sardar* v. *Ganesh Das Ram Gopal, Messrs.*) (2), 1939 O. W. N., page 970 *Mahipal Singh Thakur* v. *Kamta Prasad* (3), and 1940 O. W. N., page 169, *Shanti Saroop* v. *Mohammad Abdul Huq* (4), but these cases were cases of s. 5 of the Agri. Relief Act and the words used there are "the decision of the Appellate Court shall be final". It was held by this Court that the word "final" was to be taken as absolutely final and therefore it excluded a revision also. The words that appeear in s. 23 are however "no appeal shall lie from an appellate order passed under this section." It appears to us that if the intention of the Legislature was the same about s. 23 as about s. 5 a similar expression would have been used, so that cl. 2 of s. 23 would have read "an appellate order passed under this section shall be final". As these words were not used but it was only enacted that no appeal would lie we think that the difference in expression was deliberate with the result that revision is not excluded.

Considering the revision on the merits we find that the learned District Judge has held that

"Section 12 of the Agri. Relief Act only speaks of a mortgage and nothing else and a charge is certainly not a mortgage though it may be impossible to point out fully the difference between the two."

Just before he states this he says that in his opinion the difference between a charge and a mortgage is a difficult and an obstruse question which the Legislature cannot have meant to have left to be decided by the Rent Court Officers. The learned District Judge in other words says that s. 12 refers to mortgages and not charges and so charges must be excluded but at the same time he says that the Court that has to apply s. 12 is not meant by the Legislature to distinguish between a charge and a mortgage. We cannot possibly understand how then the Court that has to apply s. 12 can do so when it has to apply s. 12 to mortgages and not to charges but is not allowed to come to a conclusion whether a particular document is a mortgage or creates a charge. If about a document one party alleged that it was a charge and the other party alleged that it was a mortgage, we cannot guess how the learned District Judge would deal with such a case. We can only presume that if both parties admitted a document to be a charge it would have to be treated by the Court as a charge and if both called it a mortgage it would be treated as a mortgage. As we have said, if they did not agree some one would have to decide what in fact it was. In the present case a certain deed has been described as a deed of further charge but this does not mean that it was meant to be regarded as a charge as opposed to a mortgage in the strict technical sense of these words. In fact the deed which has been called a deed of further charge in this case must be considered by the learned District Judge and he must decide whether in his opinion it is really an addition to the original mortgage so that it may be considered in law to be a mortgage or whether this deed is only a charge in the technical sense of the word.

We, therefore, allow this revision and set aside the decision of the lower Appellate Court and order it to decide the appeal after considering the document and then coming to the conclusion whether s. 12 of the Agri. Relief Act applies to such a document or not. The appellants are granted their costs of this appeal.

D. *Revision allowed.*

(2) 1936 O W N 1158; 165 Ind. Cas. 469; 1936 O L R 653; 9 R O 218; 1936 R D 580; A I R 1937 Oudh 124.

(3) 1939 O W N 970; 184 Ind. Cas. 768; 1939 O L R 655; 12 R O 146; A I R 1940 Oudh 33; 1939 R D 614; 15 Luck 163.

(4) 1940 O W N 169; 187 Ind. Cas. 885; 1940 R D 87; A I R 1940 Oudh 194; 12 R O 415; 1940 O L R 284.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 81/29 of 1939

November 7, 1940

ALMOND, J. C. AND MIR AHMAD, J.

Mst. MADARA —APPELLANT

versus

SECRETARY OF STATE—RESPONDENT

Land Acquisition Act (I of 1894), s. 23—Market value of acquired land, how to be determined.

It is wrong to say that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing

from the lands in the vicinity. The market value of the acquired land is to be ascertained from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity. *Fink* v. *Secretary of State* (1), followed.

C. A. from the order of the Additional District and Session Judge, Peshawar at Kohat, dated January 17, 1939.

Messrs. *Abdul Rab Nishtar* and *S. Ajit Singh*, for the Appellant.

Mr. *Abdul Latif Khan*, for the Crown.

Mir Ahmad, J.—Some land has been acquired for the construction of quarters for Indian Commissioned Officers in the Kohat Contonment. The land belongs to *Mst.* Madara and is within the barbed wire. It is situated close to the District Courts. The Collector awarded *Mst.* Madara Rs 3,575 as the price of the land. Rs. 170-4-0 were given to her for trees and Rs. 82-8-0 for standing crops by compromise. She was also given 15 per cent. compensation for forcible acquisition. The total came to Rs. 4,389-8-0. *Musammat* Madara asked for a reference to Court and the case was consequently put up to the District Court at Peshawar and was tried by the Additional District Judge. The land in dispute consists of 13 *kanals*, 19 *marlas chashmi dofasli* and 14 *marlas chashmi yakfasli*. The Collector adopted the rate which was paid in 1926 for obtaining the land for European cemetery in the neighbourhood of the land in dispute. It is situated at 100 paces from it. The land was purchased at Rs. 250 per *kanal*. The Collector fixed this rate so far as the *chashmi dofasli* land was concerned. The price of *chashmi yakfasli* land was assessed at half of this rate, *i. e.*, Rs. 125 per *kanal*. The Additional District Judge after going into detail of the leases and sales put forward by the objector came to the conclusion that the rate accepted by the Collector for *chashmi dofasli* land was correct. He, however, found that *chashmi yakfasli* land should also be paid for at the same rate. The Judge therefore added Rs. 100-8-0 to the price awarded by the Collector and assessed the total price at Rs 4,490 which includes the price of trees, 15 per cent, compensation, etc.

Musammat Madara has come up to this Court and has asked for an increase of Rs. 4,000 in the price of the land. Some sales and leases were referred to but we do not propose to discuss them, because they have no bearing on the case. The only transaction which is relevant is a lease by the Cantonment authorities in favour of one Nadir Ali Shah of 7 *kanals* 12 *marlas* of land. The lease was executed in 1930 for Rs. 265 a year and the lease money was raised to Rs. 270 in 1935. It was not denied before us that this land adjoined the land in dispute. This lease was considered by the learned Additional District Judge. He however rejected it on the ground that the lease money of the land in dispute culd only be taken for calculating its value and not the lease money of the lands in the neighbourhood. No other criticism was offered by the learned Additional District Judge to this piece of evidence. Their Lordships of the Calcutta High Court have held in *Fink* v *Secretary of State* (1) that the market value of the acquired land is to be ascertained

"from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity."

We agree with the view of the Calcutta High Court and think that the learned trial Judge was wrong in holding that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The learned Counsel for the respondent has not been able to impeach the genuineness of the transaction of lease executed by the Cantonment Board in favour of Nadir Ali Shah. We think that this is a correct precedent for us to follow. The learned Counsel for the respondent has argued that the lady, who is the owner of the plot in dispute, has not been able to get as much money out of it as the Cantonment Board have been receiving for the land given to Nadir Ali Shah. In support of this argument he has relied on the statement of the *sadar qanungo*, who has valued the annual income of the land in dispute at a much lower figure than that obtained by the Cantonment Board from Nadir Ali Shah. He has used this argument to prove that the land in dispute is inferior to that given to Nadir Ali Shah.

We do not agree with him in this contention. The plaintiff is a widow and a *pardahnashin* lady. She has perforce to engage a tenant. This disability, is bound to reduce the return which she gets from the land as compared to the income derived by the Cantonment authorities for their piece of land. Capitalising the lease money by taking 20 years income, which is usually done the price of the land leased to Nadir Ali

(1) 34 C 599.

Shah comes to Rs. 5,400, that is to say about Rs. 710 per *kanal*. At this rate the price of the land in dispute is higher than the sum claimed by the appellant. We therefore accept the appeal and enhance the price of the land in dispute from Rs. 4,490 to Rs. 8,490. The appellant shall in addition get 15 per cent. compensation of Rs. 4,000 which will make the total Rs. 9 090. She shall also get her costs on Rs. 4,000 in this Court as well as in the Court below. Pleader's fee Rs. 150.

D. *Appeal allowed.*

BOMBAY HIGH COURT
Full Bench
First Appeal No. 151 of 1939
September 6, 1940
BEAUMONT, C. J., MACKLIN AND WASSOODEW, JJ.

GURAPPA GURUSHIDDAPPA NEELI—DEFENDANT—APPELLANT
versus
AMARANGJI VANICHAND—PLAINTIFF—RESPONDENT

Decree—Consent decree—Construction—Deed directing defendant to pay lump sum to plaintiff by annual instalments—Whole amount made payable on default of two instalments—Charge for decretal amount created upon shares in suit—Plaintiff to recover amount by sale of shares in case of default by defendant—Shares sold on default but sale proceeds insufficient to satisfy decree—Plaintiff, if can proceed against other property to recover balance—Personal decree, if necessary—Object of charge created, stated—Analogy of mortgage decree, whether applicable to consent decree.

The plaintiff made an advance to the defendant, and certain shares were charged to secure the amount. The plaintiff sued to recover the amount due, and there was a consent decree which directed the defendant to pay to the plaintiff a lump sum by yearly instalments. Then there was a default clause making the whole amount payable on default of payment of two instalments. Further on it was provided that a charge in favour of the plaintiff for the decretal amount was kept upon the suit shares, and then the decree went on. "If defendant fails to pay the monies in time, the same should be recovered by sale of the said shares." The defendant failed to pay the instalments on the due dates, and the shares were sold but as the sale proceeds were not sufficient to satisfy the decretal amounts the plaintiff took out the *darkhast* to recover the balance of the debt by attachment and sale of a house belonging to the defendant:

Held, that the charge created by the decree was for the protection of the plaintiff against the rights of intervening creditors, who might attach property of the judgment-debtor whilst the plaintiff's hands were tied by the time given for payment of instalments and its object was not to regulate the order in which the defendant's property was liable to be attached. Clause (1) of the decree, amounted to an order for payment, and could be enforced by any of the methods authorized by the Civil P. C., including attachment and sale of any of the defendant's property. There was nothing in the rest of the decree which expressly took away or limited that right, and the plaintiff could not, therefore, be said to have deprived himself of that right or delayed its enforcement by implication merely because he had protected himself against other creditors by taking a charge on part of the defendant's property. Hence the plaintiff, having failed to realize the whole amount of his debt by sale of the charged shares could proceed under the decree to attach any other property of the judgment-debtor which might be available. No personal decree for the balance, was consequently necessary [p. 218, col. 1.]

Held further, that the analogy of mortgage decree could not be applied to the consent decree which must be construed according to the terms of the language used. 58 Ind. Cas. 377 (1) and *Raychand Jivaji* v. *Basappa Virappa* (2), Overruled, 51 Ind. Cas. 929 (3), approved and distingnished, 190 Ind. Cas. 529 (5), distinguished. [p. 218, col. 2.]

F. A. from the decision of the First Class, Sub-Judge, Dharwar, in Special Darkhast No. 212 of 1936.

Messrs. *S. A. Desai* and *A. G. Desai*, for the Appellant.

Mr. *S. R. Parulekar*, for the Respondent.

Beaumont, C. J.—This is an appeal from a decision of the First Class Subordinate Judge of Dharwar, and it raises a question in execution, which has caused some difference of opinion, in this Court, and is of very common occurrence. In 1928, the plaintiff made an advance of Rs. 8,000 to the defendant, and certain shares were charged to secure the amount. In 1931 the plaintiff sued to recover the amount due, and on November 28, there was a consent decree. The decree recites the plaint, and then (in cl. 1) directs the defendant to pay to the plaintiff a lump sum of Rs. 9,000 by yearly instalments of Rs. 2,000. Then there is a default clause making the whole amount payable on default of payment of two instalments. Then is it provided that a charge in favour of the plaintiff for the decretal amount of Rs. 9,000 is kept upon the suit shares, and then the decree goes on: "If defendant fails to pay the monies in time the same should be recovered by sale of the said shares." The defendant failed to pay the instalments on the due dates, and in 1934 the shares were sold and realized Rs. 4,350. In 1936 the plaintiff took out the present Darkhast to recover the balance of the debt by attachment and sale of a house belonging to the defendant. It is contended by the defendant that the plaintiff, having taken a charge on specific shares, has abandoned his right to recover the money by any other means. Alternatively, it is said that if he desires to recover

the money by any other means, and has a right to do so, he must first of all proceed to get a personal decree for payment. The learned Subordinate Judge decided in favour of the plaintiff.

Now, taking the decree as it stands, and without reference to authorities in the first instance, I should have thought that its meaning was perfectly plain. It is very common to have a consent decree for payment of money making the amount payable by instalments; but if the creditor agrees to instalments, he is, of conrse, abandoning his present right to execute the decree for the full amount due, and to compensate him for that it is very common for the debtor to give him a charge on property. In the present case, property, namely the shares, had been charged beforehand, but I think the same principle would apply if the charge had been created in the first instance by the decree. But in taking a charge it seems to me that what the creditor is looking to is his protection against the rights of intervening creditors, who may attach property of the judgment-debtor whilst the plaintiff's hands are tied by the time given for payment of instalments. That seems to me to be the object of a charge; not to regulate the order in which the defendant's property is liable to be attached. Taking cl. (1) of this decree, it is perfectly plain that it amounts to an order for payment, and if such clause stood alone, it could be enforced by any of the methods authorized by the Civil P. C., including attachment and sale of anv of the defendant's property. There is nothing in the rest of the decree which expressly takes away or limits that right, and I can see no reason why it should be held that the plaintiff by implication has deprived himself of that right or delayed its enforcement, merely because he has protected himself against other creditors by taking a charge on part of the defendant's property. Therefore, if I had to construe the decree without reference to authorities, I should say that there was no doubt whatever that the plaintiff, having failed to realize the whole amount of his debt by sale of the charged shares, can proceed under the decree to attach any other property of the judgment-debtor which may be available. However, there are undoubtedly two cases of this Court, which are against that view. There is, first of all, a decision of an Appellate Bench in *Janardan* v. *Krishnaji* (1). The learned trial Judge distinguished that case by pointing out that it was a mortgage suit, as no doubt it was, but in that mortgage suit there was a consent decree, very much in the same terms as the decree in the present suit. Shah, J. in the Court of first instance, said this (p. 956*):

"I see no reason to limit the plain meaning of the decree as to the payment of the full amount in instalments by the provision as to the realisation of the full amount by the sale of the mortgaged property in default of the payment of any two instalments. The decree directs the defendants to pay the full amount, and the obligation is not in my opinion limited by the provision relating to the sale of the mortgaged property."

I think that is right; but in appeal Sir Norman Macleod, C. J. said (p. 958*):

"It seems clear to me that there must be a decree personally made against the mortgagor before it can be executed against property other than the mortgaged property. The decree in this case cannot be said to be a personal decree merely because it directs that the defendants should pay the amount."

With all respects to the learned Chief Justice, I do not follow the last proposition. A decree which directs payment of the amount is *prima facie* a personal decree. The Court in that case purported to act by analogy to O. XXXIV, Civil P. C. Now O. XXXIV, is a Code, which regulates the enforcement by suit of mortgages, and the scheme of the order is that in the preliminary decree there is a direction on the mortgagor to pay the amount found due into Court; on payment there is to be redemption, and on failure to pay, the mortgaged property can be ordered to be sold; and then there is liberty reserved to the mortgagee to apply for a personal decree against the mortgagor for any balance not realized. That is the general scheme of the Code, and where one is dealing with a decree in a mortgage suit relating to immovable property, one must follow that scheme. I agree that one must read the decree as a whole, and if a preliminary mortgage decree provided, in the first instance, that the mortgagor should pay the amount, not into Court but to the mortgage, the Court would not be justified in construing that as an executable decree for payment, because, taking the decree as a whole, it provides that there is not to be a personal decree for payment until the mortgaged property has been sold and a deficit has resulted. But I cannot see any reason why one should apply the analogy of a mortgage decree to a consent decree which must be construed according to the terms of the language used.

Mr. Desai contends that the principles of

(1) 22 Bom. L R 953; 58 Ind. Cas. 377; A I R 1920 Bom. 95.

*Pages of 22 Bom. L. R.—[*Ed.*]

O. XXXIV, should be applied. I do not quite know what is meant by the principles of O. XXXIV. It would have been quite easy to provide in the Code that in the preliminary decree there should be a personal judgment for the balance remaining due after sale of the mortgaged property. There is no principle of equity, which I know of, which would make such a provision improper; but it happens that that is not the scheme of the Code framed by the Legislature. There is however to my mind nothing inequitable in construing an agreement between parties so as to provide that the mortgagor shall pay to the mortgagee anything remaining due after sale of the mortgaged property, or that there shall be a personal decree for payment, which may be enforced before recourse is had to the mortgaged property. There is nothing inequitable in requiring that a debtor shall pay his debt immediately after the liability has been ascertained. In my opinion, the decision of Shah, J. in *Janardan* v. *Krishnaji* (1) was right, and the decision of the Appellate Court was wrong. Then there is another case, to which we have been referred, a very recent decision of this Court in a Letters Patent appeal from a decision of N. J. Wadia, J. [(*Raychand Jivaji* v. *Basappa Virappa* (2).] In that case there was a consent decree under which the defendant was directed to pay a certain sum by instalments; there was no default clause, but certain immovable property was charged for the amount. It may be that the absence of a default clause creates a distinction; the case has not yet been reported, and I do not know the exact facts. But Broomfield, J. in giving the judgment of the Court refers to *Janardan* v. *Krishnaji* (1) and to other cases, and he concludes in these words (p. 1122*):

"In every case it must be essentially a question of construction of the decree, but unless the contrary appears, we think the ordinary rule should be that when a charge is created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only or at any rate against the property charged in the first instance. In my opinion, that is the way in which the decree in this case should be construed."

I am unable to agree with that conclusion. To apply such a rule of construction to a consent decree for payment of money would seem to me to be wrong in principle, and inexpedient in practice. In arranging consent decrees of the nature in question, it is usually the creditor, and not the debtor, who is master of the situation, and I can see no justification for holding that by taking a charge upon specific property, the primary object of which, as I have pointed out, is to secure him against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon. On the other hand, to hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment. The only effect of the latter construction would be to impose further delay and additional expense upon the creditor. In this country experience shows that there are opportunities in plently afforded to a judgment-debtor to delay his creditor, and I am not disposed to add to the number.

We were referred to other cases which can be distinguished. *Ambalál Bapubhai* v. *Narayan Tatyaba* (3) which was followed in *Gurpadappa* v. *Karveerappa* (4) is rather in favour of the view which I take, but is no doubt distinguishable. In both those cases there had been a decree and a charge created by the decree on immovable property, and it was held that the charge could be enforced by execution of the decree without the necessity of filing a separate suit. The cases were both based on the view that the decree, which for practical purposes was in the same terms as the present decree, created a personal liability for payment of the amount due, and to that extent the cases are in favour of the view which I take. The decision of Kania, J. in *Gurupadappa Mallappa* v. *Basappa Shiddappa* (5) is again distinguishable. The learned Judge there held that the particular decree, with which he had to deal, was in the nature of a preliminary mortgage decree, and that being so, the provisions of O. XXXIV, applied to it. It is not necessary to consider whether I should have come to the same conclusion as to the construction of that particular decree, but I agree that if once you find that the decree is in its nature a preliminary mortgage decree, the provisions of O. XXXIV, apply, and there

(2) A I R 1941 Bom. 71; 42 Bom. L R 1113.

*Page of 42 Bom. L R.—[*Ed.*].

(3) 43 B 631; 51 Ind. Cas. 929; A I R 1919 Bom. 56; 21 Bom. L R 698.

(4) 36 Bom. L R 523; 151 Ind. Cas. 96; A I R 1934 Bom. 241; 7 R B 43.

(5) 42 Bom. L R 592; 190 Ind. Cas. 529; A I R 1940 Bom. 276; I L R (1940) Bom. 640; 13 R B 117.

must be a further application for a personal decree But, in my opinion, the decree with which we have to deal is quite plain in its meaning. It does not in terms restrict the right of the creditor to proceed against other property, and it does contain a decree for personal payment. It can therefore be executed against the house of the judgment-debtor. In my opinion therefore the decree appealed from was right. The appeal will be dismissed with costs.

Macklin, J.—I agree and have nothing to add.

Wassoodew, J.—I agree.

S. *Appeal dismissed.*

PRIVY COUNCIL

Appeal from the Calcutta High Court

November 11, 1940

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

Maharaja SRIS CHANDRA NANDY AND ANOTHER—APPELLANTS

versus

RAKHALANANDA THAKUR (DECEASED) AND OTHERS—RESPONDENTS

Grant—Presumption—Britti *granted by founder of estate, in his lifetime — His successors continuing grant for generations —Presumption as to permanent grant or charge on estate, if arises — Evidence Act (I of 1872), s. 2—Repeal by Common Law of evidence — Effect — Hearsay evidence — Admissibility—Discretion of Judge in respect of admissibility of evidence.*

Where the original founder of an estate granted a *britti* in his lifetime ; and his successors from pious motives continued the grant for several generations to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods.

Held, that these facts alone were not sufficient to raise a presumption of any lost grant either for the permanent gift of *britti* or for its being constituted a charge on the estate.

It is entirely erroneous to state that "the principle of exclusion adopted by the Evi. Act, should not be applied so as to exclude matters which may be essential for the ascertainment of truth." This mode of regarding the law of evidence is very unsound and hearsay evidence which does not fall under s. 32, Evi. Act, cannot be admitted upon such principle. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rule of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. [p 223, col. 1.]

Messrs. *J. Nillard Tucker*, *K. C.* and *W. Wallach*, for the Appellants.

Sir. *Thomas Strangman*, *K. C.* and Mr. *C. Bagram*, for the Respondents.

Lord Atkin—This is an appeal from the High Court of Judicature at Fort William in Bengal who affirmed a decree of the Additional District Judge 24-Parganas in favour of the plaintiffs the present respondents. The plaintiffs are a distinguished family of Brahmin priests, Thakurs of Shrikhanda ; and their claim is for a declaration that they are entitled to a charge on the Kasimbazar Raj Estate represented by the defendants for an annual *britti* of Rs. 4,000 payable by half-yearly instalments and for a money decree for arrears amounting to Rs. 13,260. The defences to the suit are in substance that the plaintiffs never had a legal right to the *britti*, and that in any event it was not charged upon the estate. These issues were raised in the proceedings and have been decided in favour of the plaintiffs in both Courts. The history of the claim begins with the founder of the Raj fortunes one Krishna Kanta Nandy. He appears to have been a Hindu of comparatively humble origin who by his abilities attracted the attention of Warren Hastings, became his Diwan, and died in the year 1778 proprietor of large possessions in about twelve different districts and in Calcutta. After his death his son Loknath appears to have been given the title of Maharajah of Kasimbazar by Warren Hastings, and the property to which he and his descendants have succeeded is known as the Kasimbazar Raj Estate. The case of the plaintiffs is that Krishna Kanta Nandy established two deities Radhagovinda and Lakshminarayan at Shrikhanda the plaintiffs' home and granted the plaintiffs a *britti* of Rs. 4,000 for the worship of the two deities: and at the same time charged his Raj estate with the payment of the *britti*. The plaintiffs and their successors it is said became the *gurus* of Krishna Kanta Nandy and his family and its successors:

they have conducted the worship and service of the deities ever since.

The learned Assistant District Judge found that the plaintiffs had established the whole of their case. A permanent grant of *britti* was made by Krishna Kanta Nandy who had established at the home of the plaintiffs the two deities and provided the *britti* for securing their service and worship. To secure the permanent payment he had charged it upon the estate. The learned High Court Judges were not able to find that Krishna Kanta Nandy had established the deities, but they concurred in the finding that he had made a permanent grant, and had charged it upon the Kasimbazar estate.

Their Lordships are of opinion that no evidence was given sufficient to support these findings. As they will point out later both Courts erred in admitting as valid evidence of tradition given by and on behalf of the plaintiffs: and when the admissible evidence is considered there is none to justify the finding of a permanent grant or of a charge. The evidence establishes the following facts: that from the time of Krishna Kanta Nandy the sum of Rs. 4,000 has been paid annually to the plaintiffs and their successors as *britti*: that they have continuously conducted the worship and service of the two deities: and that until about the year 1897 such worship was conducted on behalf of the holder of the Raj and that the plaintiffs were the *gurus* of the family. The succession of the Raj family is relevant. Krishna died in 1778 and was succeeded by his son Loknath who first received the title of Maharajah. There is nothing to indicate that this is an impartible estate. Indeed what little evidence there is on the point indicates the contrary, but in fact there only appears to have been one person at a time entitled in the line of descent. Loknath was succeeded by Harinath who died in 1832, who was succeeded in turn by his son Krishnanath, who died in 1844 without issue. His widow Rani Swarnamayi succeeded to the estate and possessed it for over 50 years until her death in 1897. On her death the estate reverted to Krishnanath's mother Rani Hari Sundari. She, who must have been a very old lady at the time, in the same year transferred her interest to the next successor Manindra Chandra Nandy the son of her daughter Gobinda. The estate thus passed out of the direct male succession. Manindra had for his *gurus* another family the Thakurs of Jogeswardi and had family deities other than Radhagovinda and Lakshminarayan. In 1923 Manindra Chandra Nandy executed a trust deed in favour of the firm of Ogilvy Gillanders & Co. and certain named trustees with the object that the firm should raise a loan for the Maharajah of £6,75,000 and pay off certain scheduled incumbrances and unsecured liabilities. The bulk of the Raj estate was signed to the trustees by way of mortgage or trust to keep down the necessary charges. and create certain reserve funds including a sum of three lacs which the Maharajah estimated would be sufficient for his personal household expenses. The Maharajah covenanted *inter alia* that the property was free from all incumbrances other than those mentioned in the 4th Schedule to the deed which did not include the charge now alleged to exist. In February 1929 on the application of the Maharajah Manindra the estate was taken under the management of the Court of Wards by whom it is now managed subject to the provisions of the deed of trust of 1923. In 1929 the Maharajah Manindra died and was succeeded by the present Maharajah Sris Chandra Nandy. On April 10, 1929 the plaintiffs presented a petition to the General Manager of the Kasimbazar Raj Ward's Estate alleging that they had been receiving for generations from the estate an annual annuity allowance of Rs. 4,000, that they had been spending the said allowance as well as their own income towards the wordship of several deities and other acts of diety: and asking for the payment of one year's arrears. It may be noticed that in this letter there is no suggestion of the establishment by Krishna Kanta Nandy of the two specified deities, or of a permanent grant by him, or of the creation of any charge. This request was refused by the Manager of the Court of Wards and on June 28, 1929, the Maharajah Manindra wrote to him having been told by the plaintiffs of the refusal.

"Kasimbazar Rajbari,
June 28, 1929.

My dear Mr. Burrows,

I have read your letter No. 575 ES16-108 dated May 4, 1929 (a copy of which was forwarded to me) as also another letter No. 1565ES dated June 15, 1929 (shown to me), sent in reply to the letters of Srijut Rakhalananda Thakur of Shrikhanda.

The annual *birtti* payable to our spiritual guides, the Thakurs of Shrikhanda amounting to Rs. 4,000 (four thousand) has been paid by the Raj family of Kasimbazar from generation to generation, and I

have been paying it all along during my management.

During Mr. Lyall's administration as he did not like to meddle with religious and spritiual matters, he left the matter with me of course leaving sufficient fund in my hands.

It is not of the nature of personal charity but has always been regarded as a charge upon the estate. I have nothing to say regarding your decision. You may hold it or alter it if there be good reason for doing so, but this *britti* in my opinion, is legally enforceable against the Kasimbazar Raj Estate.

In this connection I would like to refer you to my latter No. 1/XII-4/2-G dated April 19, 1929 in which I mentioned the recurring permanent grants which in addition to other commitments I am bound to make *viz.* 1. To spiritual guides of Shrikhanda and Jageswardihi, 2. Debkariya and Debsheba &c. and to my letter to the Secretary Board of Revenue dated February 2, 1929 with statements therewith attached, a careful perusal of which will clearly convince you that the above demand is a charge really upon Kasimbazar Raj Estate and incidentally upon me as proprietor of the estate and not in my personal capacity.

The following is an extract of the relevant protion of my letter to Mr. Fawcus, Secretary Board of Revenue dated February 2, 1929 for your easy reference.

'I should like to state, however, in this connection that whereas I have these additional sources of income which are not covered by the Trust Deed I have at the same time additional demands on me for Debkariya, *Brittis* to spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past.'

I shall be glad if you will consider all the facts relating to this matter and recommend to the Court for acceptance of the charge of paying Rs. 4,000 annually to the Thakurs of Shrikhanda which is in reality a charge on the Kasimbazar Raj Estate.

Yours sincerely,
Manindra Chandra Nandy.

L. B. Burrows, Esqr., B. A.,
Manager, Kasimbazar Raj Wards' Estate,
2/1, Russell Street,
Calcutta."

So far from regarding this letter as proof of a legal charge their Lordships are of opinion that it tends to negative such a claim. The Maharajah is obvoiusly seeking to limit his personal liabilities: and is treating the continual payment of this *britti* as an instance of the "additional demands on me for Debkariya and *britti* for spiritual guides and Brahmin Pundits and the maintenance of eductional institutions which have been recognised by the family from generations past." It seems obvious that the continuous recognition is to him another way of saying it has always been regarded as a charge upon the estate. It would not be suggested that the other "additional demands" in which this claim is included involved legal charges upon the property. It seems obvious the letter of the Maharajah, written in the circumstances set out in the letter, could not possibly outweigh the express convenant in the deed of 1923 that there were no incumbrances other than those scheduled.

In the result, therefcre, there is no evidence at all of the establishment of the deities by Krishna, of any permanent grant by him of the *britti*, or of the creation of any charge upon any property. It is very significant that though the plaintiffs appear to have very complete records of their transactions from early times no document is produced making or evidencing the grant or charge: and this alone is sufficiant to cast doubt upon the claim. Moreover while it would not be unusal to assign particular lands as the source from which *britti* was to be paid and in this sense create a charge it would seem to their Lordships very improbable that a vast estate should be charged as a whole with the payment of Rs. 4,000 a year. Their Lordships are not prepared to say that a valid charge could not be created upon what could be defined to be the whole of a man's property at the date of the charge. In the present case it should be noticed that not only is the charge claimed and decreed a charge upon the estate, as it at present exists; but it has been decreed without any condition that the families of the grantor or the plaintiffs should continue to exist, or that the plaintiffs should continue to perform the service and worship, *sheva* and *puja*, of the two named deities. This defect in the decree was admitted by Counsel for the respondents who submitted an amended form of decree which would remedy the mistake. But for present purposes the point is the difficulty the plaintiffs are in establishing any grant or charge with any sufficient certainty. Naturally if the continuous payments could not be explained without asserting some legal origin which would create the rights claimed, any Court would feel inclined to presume the necessary legal origin. But in the present case there are no facts which require a presumption of any lost grant either for the permanent gift of the *britti* or still less for it being constituted a charge. It appears to their Lordships the natural inference from the known facts that the original founder of the estate granted the *britti* in his lifetime: and that his successors from pious motives continued the grant to the plaintiff's successors who continued to be the family spiritual guides, and served and worshipped the family gods. Without assuming any legal obligation it

would in the circumstances have been strange if the *britti* had not been continued. The learned trial Judge working backwards, as it would seem from the fact that the payment was continued for several generations, has imputed to the founder the intention that it should continue for all those generations: and has so drawn the inference that he did in fact grant a permanent *britti*; and took steps to secure its permanence by creating a charge, the uncertainty of the terms of which their Lordships have already discussed. The trial Judge it is true found that Krishna Kanta Nandy established the deities. The High Court have found that it would not be safe on the evidence to hold that the plaintiffs had established the case that the two deities were so established. Nevertheless they go on to say that they cannot express the definite opinion that the trial Judge was not right in his inference that the deities were so established. This conclusion appears to involve some confusion of thought. If it was not safe from the evidence for the Appellate Court to draw a particular inference it was not safe for the trial Judge to draw the inference. Not safe, must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

But the conclusions of the two Indian Courts are not based solely on the evidence of which the substance has been stated above and which their Lordships have held to be insufficient. Both Courts relied on the evidence of some of the plaintiffs' witnesses speaking of a tradition in their family that Krishna Kanta Nandy had established the two deities, had granted the *britti* in perpetuity and had made it a charge upon the estate. Obviously this is hearsay evidence, and it is equally clear that it is not one of the claims of hearsay evidence admissible under the provisions of s. 32 of the Indian Evi. Act. The members of the High Court recognised this but they made a statement as to the law of evidence which their Lordships feel bound to state is entirely erroneous. They say,

"It is to be noticed in this connection that s. 2 (1) of the Indian Evi. Act repeals the whole of the English Common Law on evidence so far as it was in force in British India before the passing of the Indian Evi. Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself."

This is of course correct. But they continue,

"It must be recognised however, that the principle of exclusion adopted by the Indian Evi. Act should not be applied so as to exclude matters which may be essential for the ascertainment of truth."

It seems to their Lordships essential in the interests of the administration of justice in India that this mode of regarding the law of evidence should emphatically be stated to be unsound. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at Common Law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. There is therefore no such principle as is suggested in the passage now under discussion. At the same time their Lordships wish to make it clear that apart from any rule of law the evidence in question so far from leading to the ascertainment of truth in fact for the reasons already given leads away from it. It is not remarkable that the learned Judges who gave leave to appeal in this case did not conceal some uncertainty as to the correctness of this part of the judgment. Their Lordships do not think it necessary to discuss at any length inferences drawn by both Courts from the absence of evidence by the defendants of the contents of their own books. They do not think that in the circumstances the comments are well-founded. In the result therefore, their Lordships are of opinion that this suit

fails, and that the appeal should be allowed and the suit dismissed. Their Lordships will humbly advise His Majesty accordingly. They notice, however, that the late Maharajah Manindra clearly regarded the payment of the *britti* as being a personal obligation of his, and it would seem to follow in their opinion that the Court of Wards would be justified in making payment of the arrears up to the time of his death to the plaintiffs. This is not however a matter for decree in this suit. The respondents must pay the costs in the Indian Courts and of this appeal.

S. *Appeal allowed.*

Solicitor for the Appellants :— *The Solicitor India Office.*

Solicitor for the Respondents :—Messrs. *W. W. Box & Co.*

PATNA HIGH COURT

Appeal from Appellate Order No. 163 of 1939

February 5, 1940

WORT AND VARMA, JJ.

JUGESHWARI PRASAD—JUDGMENT-DEBTOR—APPELLANT

versus

KAMALA PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS

Bihar Money-lenders Act (III of 1938), s. 15—Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 11—Compromise decree under execution—Court's jurisdiction to decide whether judgment-debtor should be allowed to pay decree by instalments.

The judgment-debtor's application under the Bihar Money-lenders Act to be allowed to pay a compromise decree, obtained on August 12, 1936, by instalments was dismissed. The appeal was dismissed by the District Judge on the ground that after the passing of the decree under execution the lower Court had no power to allow the payment of the decretal amount by instalments:

Held, that whether judging by the old s. 15 of Act III of 1938 which was in force at the time the Subordinate Judge made his order, or by the present s. 11 of Act VII of 1939 which was in force on May 1, 1939, the date of the order passed by the District Judge, the Judge was wrong in coming to the conclusion that he had no jurisdiction to enter into the question whether the judgment-debtor should be relieved to the extent of being allowed to pay the decree by instalments.

A. from an order of the District Judge of Gaya, dated May 1, 1939.

Mr. *Tarkeshwar Nath*, for the Appellant.

Messrs. *Jafar Imam*, *R. K. Saran* and *A. C. Roy*, for the Respondents.

Wort, J—This is an appeal from the decision of the District Judge of Gaya dismissing the judgment-debtor's application under the Bihar Money-lenders Act to be allowed to pay a decree, which we are informed was a compromise decree obtained on August 12, 1936, by instalments. The District Judge dismissed summarily the judgment-debtor's appeal from the order of the Subordinate Judge, who also dismissed the application of the judgment-debtor summarily. The reason the learned Judge gave for dismissing the appeal was that after the passing of the decree under execution the lower Court had no power to allow the payment of the decretal amount by instalments.

It is rather difficult to understand what the learned Judge in the Court below meant by that, as at the time that the Subordinate Judge made his order s. 15 of the Bihar Money-lenders Act (III of 1938) was in force. That section has now been replaced by s. 11 of the Bihar Money-lenders Act (VII of 1939). Section 15 of the old Act and s. 11 of the present Act are exactly in the same terms. The wordings are :

'Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract between the money-lender and the person to whom the loan was advanced, the Court may, subject to the provision of s. 12, direct at any time on the application of the judgment-debtor, after notice to the decree-holder that the amount of any decree passed before or after the commencement of this Act, in respect of loan, including any decree in a suit relating to a mortgage by which a loan is secured shall be paid in such number of instalments or subject to such conditions and on such dates as it considers fit."

Therefore, whether judging by the old s. 15 which was in force at the time the Subordinate Judge made his order, or by the present s. 11 which was in force on May 1, 1939, the date of the order passed by the learned District Judge, the learned Judge was wrong in coming to the conclusion that he had no jurisdiction to enter into the question whether the judgment-debtor should be relieved to the extent of being allowed to pay the decree by instalments. That being so, the matter must go back for the Judge to consider that question and to decide it according to law. Nothing that I have said with regard to this matter must be deemed to have fettered the discretion of the learned Judge in coming to such conclusion as he thinks the circumstances warrant.

The appeal must, therefore, be allowed and the matter will be remanded to the learned Judge in the Court below for decision according to law. Costs of this appeal will abide the hearing in the Court below.

Varma, J.—I agree.

S. *Appeal allowed.*

PRVIY COUNCIL

Appeal from the Bombay High Court

September 17, 1940

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN AND MR. M R. JAYAKAR

THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD. —APPELLANTS

versus

JANMAHOMED ABDUL RAHIM— RESPONDENT

Limitation Act (IX of 1908), Art. 68, s. 2 (3)— Limitation Act, construction of — Principles — Hardship no ground for enlarging period—Administration bond is bond subject to condition — It is bond as defined in s. 2 (3)—Nature of administration bond— Art. 68 applies to such bond—Time, when begins to run —Assignment of bond under s. 292, Succession Act (XXXIX of 1925) — Effect — Whether confers on assignee new cause of action and fresh starting point.

Limitation Act ought to receive such a construction as the language in its plain meaning imports. A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State it must, if unambiguous, be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it. Although great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights, yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. 4 Ind. Cas. 449 (2), referred to. [p. 227, col. 2.]

An administration bond falls within the terms of the definition of bond given in s. 2 (3), Lim. Act. [*ibid.*]

An administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants; and such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond becomes statute barred by the operation of Art. 68 of the Lim. Act, that does not affect the rights of the benefices against the administrator. [p. 228, col. 1.]

It is no doubt true that a suit by the assignee of an administration bond is a suit by a person who derives title from the assignment which is authorised by the terms of s. 292 of the Succession Act, but this does not show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not, in any case greater than the rights possessed by the assignor. A suit upon such a bond, if brought by an assignee, is not in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken. The action brought by the assignee being on a bond subject to a condition, Art. 68, Lim. Act applies and time begins to run from the last date on which the condition was broken and no action can therefore, be brought after the expiration of three years. 76 Ind. Cas. 802 (3), approved. 165 Ind. Cas 672 (1), Overruled. [p. 228, cols. 1 & 2.]

An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property. Therefore the administrator cannot be guilty of any default or misconduct in relation to the administration after the date of his death, though, of course, his representatives would continue liable in respect of any such default or misconduct committed by him during his lifetime. The condition of the bond could be said to have been broken by the administrator by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administrator. The condition of the bond according to its terms could therefore be broken at the latest on the death of the administrator and a suit brought by the person to whom the bond is assigned under s. 292, Succession Act beyond three years of such death is barred by time. [p. 228, col. 2; p. 229, col 1.]

Section 292, Succession Act, does not have the effect of conferring a new cause of action on the assignee, and therefore does not provide a fresh starting point for the purposes of limitation. It is wrong to say that the condition of the bond is not broken for the purposes of the Lim. Act until the date of the assignment. 76 Ind. Cas. 802 (3), approved. 165 Ind. Cas 672 (1), Overruled. [p. 229, cols. 1 & 2.]

Sir *Thomas Strangman*, *K. C.* and Mr. *W. W. K. Page*, for the Appellant.

Messrs. *D. N. Pritt*, *K. C.* and *S. P. Khambatta*, for the Respondent.

Viscount Maugham.—There are here two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated March 31, 1938, confirming with a variation a judgment and decree of that Court in its ordinary original civil jurisdiction. The facts are very complex and the questions raised on the appeals are questions of considerable importance. The appellants, however, who were the defendants in the suit, besides disputing liability on a number of grounds have raised the contention that the suit was barred by Art. 68 of the Indian Lim. Act, (IX of 1908). This question was based on substantial grounds and their Lordships thought it right to hear the arguments of both sides upon it before embarking on the other questions raised on the appeal and the cross-appeal; and in the result they have come to the conclusion that the point of limitation raised by the appellants is well founded and accordingly it has not been necessary for them to go into the other matters above referred to.

In order to deal with the question of limitation it is necessary to state the following facts.

On September 18, 1924, Abdul Rahim died intestate at Bombay leaving him surviving a widow, Hawabai, three sons and three unmarried daughters. All his children were then minors. According to the law by which he was governed his three infant sons became entitled to his estate in equal shares subject to the right of his widow to maintenance pending re-marriage or death, and to the rights of his daughters to maintenance until marriage or death, and to their marriage expenses.

On March 17, 1925, the widow of Abdul Rahim (Hawabai), having been duly empowered by the High Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them. It was stated in the schedule to the petition that the movable and immovable properties of Abdul Rahim were valued at Rs. 2,75,791 and for the purposes of probate duty the estate was valued at Rs. 1,99,025 after deducting funeral expenses and debts. On May 6, 1925, it was ordered that on the sureties being justified for the whole of the estate of Abdul Rahim and on filing the necessary administration bond, and on payment of fees and stamp duty, letters of administration should issue as prayed to Hawabai.

On May 14, 1925, Hawabai and the present appellants as sureties executed a bond for Rs. 3,98,060 in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction and the head assistant to the Prothonotary and Registrar of the Court. The conditions of the bond were in the usual form. The obligation was to be void and of no effect if Hawabai

"(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hand, possession or knowledge or to the hands or possession of any other person or persons for her and should exhibit or cause to be exhibited to the High Court such inventory on or before November 14, 1925;

(2) should well and truly administer such property and credits according to law;

(3) should make or cause to be made a true and just account of her administration on or before May 14, 1926; and

(4) All the rest and residue of the property and credits which should be found remaining upon the said account after being first examined and allowed by the High Court should deliver and pay unto such person or persons as shall be lawfully entitled to such residue."

On June 9, 1925, the letters of administration were duly issued to Hawabai on behalf of the three minor sons of the intestate for their use and benefit until one of them should attain his majority.

It is alleged by the plaint that on July 2, 1925, Hawabai, who was a *purdanashin* lady, and illiterate, appointed one Bhatra who was related to her being the son of her maternal uncle, her attorney to act for her in all matters relating to the estate of Abdul Rahim. This person, however, misapplied the property and subsequently (on October 22, 1928) committed suicide Hawabai commenced various proceedings in an endeavour to recover the property forming part of the estate of Abdul Rahim, but on April 27, 1929, she died.

On November 14, 1931, the eldest son of Abdul Rahim, Janmahomed Abdul Rahim (who will be called "the plaintiff") attained his majority.

On March 24, 1932, an order was made by the High Court that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, and it was further ordered that on such assignment the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon as trustee or trustees for all persons interested the full amount recoverable in respect of any breach thereon.

By a deed of assignment dated August 14, 1932, certain officers of the Court appointed for that purpose by an order of the Chief Justice purported to assign the bond to the plaintiff (the present respondent) "to hold the same unto the assignee absolutely with all such powers rights and remedies as are now subsisting thereon." The assignment was effected under s. 292 of the Indian Succession Act of 1925 which is in these terms:—

"The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof."

It should be added that under s. 291 every person to whom any grant of letters of administration, with an exception not material to the present purpose, is committed

must give a bond to the District Judge with one or more surety or sureties engaging in the due collection and administration of the estate of the deceased. The bond is in the usual form. It is the usual practice in such a case to apply s. 292 and to cause the bond to be assigned to the intending plaintiff. It does not appear to be necessary to discuss the older practice under the Letters Patent of 1823 founding the Supreme Court of Bombay.

On November 2, 1932, the plaintiff (respondent) filed the present suit claiming from the defendants, the present appellants, the sum of Rs 3,98,060, or such lesser sum as represents the loss of the estate of Abdul Rahim due to the failure of Hawabai as administratrix, of that estate to carry out her obligations under the administration bond. The plaint alleged four specific breaches of duty by the administratrix which can be shortly stated as follows:—

(1) The appointment of Bhatra as her attorney to manage the estate of the intestate;

(2) allowing the sum of Rs. 50,003 shown in the inventory and accounts filed by her on June 2, 1927, as being in her hands on that date to remain in the hands of Bhatra;

(3) the failure to realise a certain share of the intestate in the estate of his deceased father and allowing such share to remain in the hands of Bhatra and;

(4) the failure to hand over to the Accountant-General of Bombay the estate of Abdul Rahim, all his heirs being minors.

The learned trial Judge and the Appellate Court (Sir John Beaumont, C. J., and Kania, J.) in the course of their judgments held that on the question of limitation they were bound by the decision of the Appellate Court of Bombay in the case of *Manubhai Chunilal* v. *The General Accident Fire and Life Assurance Corporation Ltd.* (1). That case relied to a similar bond, similarly assigned, and the Appellate Court, Sir John Beaumont, C. J. and Rangnekar, J. overruling Blackwell, J. decided that the defence of limitation under Art. 68 of the Indian Lim. Act was not available. In that case as in the present the beneficiaries at the date of grant of letters of administration were infants, and in other respects the facts are not distinguishable from those in the present case. The question, therefore, arises whether the decision in *Manubhai's case* (1) is or is not correct.

Article 68 of the Lim. Act, 1908, is one of a series of 183 articles in a schedule which relate to the limitation of suits, appeals and applications. The articles are introduced by s 3 in the following words:—

"Subject to the provisions contained in s. 4-25 (inclusive): Every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

The provision contained in Art. 68 is to the following effect:—

"On a bond subject to a condition" the period of limitation is to be three years and the time from which the period begins to run is stated to be "when the condition is broken."

Article 120 is stated to relate to any suit "for which no period of limitation is provided elsewhere in this schedule." The period of limitation is in that case six years and the time from which the period begins to run is "when the right to sue accrues." The word "bond" is defined in s. 2 (5). The word is stated to include

"any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be."

It is not in dispute that the bond in this case is a bond within the terms of that definition, and it is clear that Art. 120 has no application if Art. 68 applies to the present case. It may be added that s. 6 of the Act (which deals with suits by infants) clearly has no application.

Before considering the grounds on which the High Court in *Manubhai's case* (1) came to the conclusion above referred to it may be desirable to point out that a Lim. Act ought to receive such a construction as the language in its plain meaning imports. (See the decision of this Board in *Abhiram Goswami* v. *Shyama Charan Nandi* (2)). As was well stated by Mr. Mitra in his Tagore Law Lectures, 6th Ed. (1932) Vol. 1, p. 256:

"A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State.....it must if unambiguous be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it."

Very little reflexion is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights;

(1) 60 B 1027; 165 Ind. Cas. 672; 38 Bom. L R 632; A I R 1936 Bom. 363; 9 R B 162.

(2) 36 I A 148; 4 Ind. Cas. 449; 10 C L J 284; 6 A L J 857; 11 Bom. L R 1234; 19 M L J 530; 36 C 1003 14 C W N 1 (P C).

yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. Their Lordships think it is possible that sympathy for the plaintiff in the case which must now be considered was allowed to effect a pure question of construction. In the present case, however, it may be observed that an administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants; and that such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond become statute barred by the operation of Art. 68 of the Lim. Act that does not affect the rights of the benefices against the administrator. While making these observations their Lordships think it right to repeat that mere considerations of hardship in such a case should not be taken into account.

In *Manubhai's case* (1) Blackwell, J., took the view that the bond being within the definition in the Lim. Act and the action being on a bond subject to a condition, time began to run from the last date on which the condition was broken and no action could therefore be brought after the expiration of three years. In coming to this conclusion he followed the decision of the Appellate Court of Rangoon in *Maung San U* v. *Maung Kyaw Mye* (3) Blackwell, J., in an admirable judgment dealt with the effect of an assignment of a bond under s. 292 of the Indian Succession Act and observed that in his opinion such an assignment merely deals with the question of the title and confers upon the assignee a right to sue which he would otherwise not have had previously to the assignment, and that the section thus merely entitles the assignee to recover as a trustee for all persons interested the full amount recoverable under the bond in respect of any breach of it. On appeal it was not doubted that the bond was a bond upon a condition, but the Court held that a suit to enforce the bond by a person to whom it has been assigned under s. 292 was not a suit upon a bond within the meaning of the article because it was said, the assignment confers substantive rights upon the assignee. Their Lordships with all respect are unable to follow this argument, nor can they agree that there is any difficulty as regards the consideration for the assigment. It is of course true that a suit by the assignee of such a bond is a suit by a person who derives title from the assignment which is authorised by the terms of s. 292 of the Indian Succession Act, 1925; but their Lordships are unable to see how this can be held to show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not in any case suggested to their Lordships, greater than the rights possessed by the assignor. It may be noted that the ordinary security bond which is given by Receivers in India under the provisions of the Civil P. C., O. XL, r. 3 is given to an officer of the Court (see App. F. Form No. 10); yet it has never been suggested that a suit upon such a bond, if brought by an assignee is in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken.

There were two other grounds for the conclusion of the Court. First it was held that, assuming that Art. 68 applied to the case, it was impossible to say that the condition was broken until some person who was able to give a valid discharge for the estate claimed it from the administrator or his representatives and failed to obtain it. The consequence of that view was said to be that the condition was not broken within the meaning of Art. 68 until the plaintiff attained his majority which was less than three years before the suit was filed. In other words the death of the administrator was held not to put an end to his liability as regards future events. Their Lordships cannot agree. An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has any one claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property. It therefore seems to their Lordships impossible to hold that the administratrix in the present case could

(3) 1 R 463; 76 Ind. Cas. 802; A I R 1924 Rang. 68.

possibly have been guilty of any default or misconduct in relation to the administration after the date of her death, though, of course, her representatives would continue liable in respect of any such default or misconduct committed by her during her lifetime. It seems equally impossible to suggest that the condition of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of the administration had ceased to have any operation by reason of the death of administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is, more than three years prior to the suit.

The other and perhaps the main ground for the conclusion of the Court in *Manubhai's case* (1), was that s. 292 of the Indian Succession Act had the effect of conferring a new cause of action on the assignee, and therefore provided a fresh starting point for the purposes of limitation. If the language of s 292 of the Indian Succession Act be examined it is difficult to suppose that the draftsmen intended to provide for the creation of a new cause of action upon the assignment of a bond thereunder. The essential words are taken *verbatim* from s. 83 of the (English) Court of Probate Act, 1857 (20 and 21 Vict. C. 77) which provides that :

"The Court may .....on being satisfied that the condition of any such bond has been broken, order one of the Registrars of the Court to assign the same to some person".....and such person shall thereupon be entitled to sue on the said bond in his own name..... as if the same had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond."

(The modern provision to the same effect is to be found in s. 167 of the Judicature Act, 1925). It has never been suggested that under either of these sections there is upon the assignment being made a fresh cause of action. The origin of the ancient practice of requiring the administration bond to be given to the Judge of the Court of Probate (s. 81 of the Court of Probate Act, 1857) was no doubt to enable that Court to have control over all matters relating to the enforcement of such bonds. It is scarcely necessary to add that it had obviously nothing to do with the English period of limitation as regards the enforcement of such a bond which was twenty years from the breach of the condition. It seems to their Lordships that the words used in s. 292 of the Succession Act like those used in s. 83 of the Court of Probate Act, 1857, are far from assisting the contention that a new cause of action arises upon the assignment. The bond is assigned to a person who is thereupon to be entitled to sue on the bond in his own name :

"As if the same had been *originally* given to him and he is to be entitled to recover thereon ..... the full amount *recoverable* in respect of any breach thereof."

These sentences do not in the least support the view that a fresh cause of action arises and that therefore the condition of the bond is not broken for the purposes of the Lim. Act until the date of the assignment. The judgments of the Appellate Court of Rangoon in *Mauna San U* v. *Maung Kyaw Mye* (3), and of Blackwell, J., in *Manubbai's case* (1), are in the opinion of their Lordships correct and the decision of the Appellate Court in the latter case must be taken to be erroneous.

This view makes it unnecessary to consider any of the other questions raised on the appeal and cross-appeal. The defence of limitation under Art. 68 was a good one, and the suit should have been dismissed with costs.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent to the appeal should pay the costs here and below.

S. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Smiles & Co.*

Solicitor for the Respondent:—Messrs. *T. L. Wilson & Co.*

BOMBAY HIGH COURT

Criminal Revision Application No. 279 of 1940

September 24, 1940

BROOMFIELD AND WASSOODEW, JJ.

VISHNU TATYABA NAIK AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Bombay Local Boards Act (VI of 1923 as amended by Act XIII of 1935), s. 136 (2)—Sub-overseer and chairman of works committee of Local Board taking false measurements and fraudulently obtaining money from Local Board by tendering bill with false measurements sheet signed and countersigned by first and second accused respectively—Acts of accused held protected by s. 136, Local Boards Act and s 197, Criminal Procedure Code (Act V of 1898)—Interpretation of statutes—Similar words in similar enactments—Interpretation.

A sub-overseer of the Local Board was, according to the rules of his employment, bound to supervise the works, to take measurements and to enter them in a measurement book maintained for the purpose and also to report to the District Local Board through the works committee, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The sub-overseer was obliged to sign the bill in authentication of the measurements given in it and the charges made. The duties of the Chairman of the works committee were to take measurements and, in the absence of a completion certificate, countersign the bills of the contractor and see that the payment is made without undue delay. Accused No. 1 who was an overseer of a Local Board and accused No. 2 who was an elected member of that Board and Chairman of the works committee, were prosecuted for offences of cheating and falsification of accounts on the allegation that they had dishonestly taken false measurements of certain work of repairs on the Road under their charge and fraudulently obtained from the president of the District Local Board certain amount by tendering a bill with the measurement sheet containing the false measurements attached to it duly signed by accused No. 1 and countersigned by accused No. 2 :

Held, that the preferring of the bill was an official act and it did not make any difference that in the discharge of the official duty a fraudulent statement was inserted in the bill. Therefore, the act complained of, namely, the fraudulent and dishonest representation by means of the bill and measurement sheet, was protected under s 136, Bom. Local Boards Act. Accused No. 2, as the member was also entitled to protection under s. 197, Criminal P. C. [p. 233, col. 1.]

[Case-law referred to].

When the same or exactly similar words are used in statutory provisions which appear to have a similar object, they should be interpreted in the same way. [p. 233, col. 2.]

Messrs. *P. B. Shingne* and *S. G. Patwardhan*, for the (Accused) Petitioners.

Mr. *R. A. Jahagirdar*, Govt. Pleader, for the Crown.

Wassoodew, J.—The petitioners Vishnu Tatyaba Naik and Shridhar Raoji Patil, who were respectively sub overseer of the District Local Board, Nasik, and elected member of that Board and Chairman of the works committee, were prosecuted before the resident First Class Magistrate of Manmad in the Nasik District for offences of cheating and falsification of accounts and abetment thereof, punishable under ss. 420 and 477A read with s 114, I. P. C. The prosecution alleged that the accused had dishonestly taken false measurements of certain work of repairs on the Kherdisatha-Nagarsul Road in the Yeola Taluka under their charge and fraudulently obtained from the president of the District Local Board Rs. 275-7-0 by tendering a bill with the measurement sheet containing the false measurements attached to it duly signed by accused No. 1 and countersigned by accused No. 2. The accused raised a preliminary objection to the jurisdiction of the Court to try them on the ground that as the act complained of was done or purported to have been done in pursuance of the Bom. Local Boards Act or the rules under that Act for the time being in force, they were protected by the provisions of s. 136 (2), Bom. Local Boards Act, 1923, as amended by Act XIII of 1935 and s. 197, Criminal P. C. It was contended that as one month's previous notice in writing was not given of the intended prosecution, and that inasmuch as the act complained of was done more than three months before the date of the prosecution, the Magistrate could not proceed with the trial under the provisions of s 136 (2), Bom. Local Boards Act. The objection under s. 197, Criminal P. C., related to the charge against the member of the Local Board, and it was contended that he being a statutory public servant not removable from his office save by or with the sanction of the Local Govt. the trial Court could proceed only upon a previous sanction of Govt. in regard to his official acts, and as the act complained of was such an act and as no sanction of Govt. was obtained for his prosecution, the Magistrate had no jurisdiction to try him.

That preliminary objection was disallowed by the learned Magistrate. In revision the learned Sessions Judge thought that the provisions of s. 136 (2), Bom. Local Boards Act, were inapplicable to the facts of this case, although possibly the prosecution under s. 477A, I. P. C., could not proceed without the sanction of the Local Govt. But he also thought that that difficulty could be overcome by obtaining the said sanction in the course of the trial. Accordingly the order of the trial Magistrate was maintained.

It has been urged for the petitioners that the question whether the alleged illegal act was done or purported to have been done in discharge of the official duty of the accused must be determined by reference to the nature of the allegations made in the complaint and the duties of the accused under the Act and the rules framed thereunder. The question whether an act complained of was done or purported to have been done in execution of statutory or official duty must necessarily depend entirely on the facts and circumstances of the case. In considering that question, it will be convenient to deal with the functions and duties of the two accused separately. Dealing with accused No. 1, it is not de-

nied before us that he, as sub-overseer of the Local Board, was, according to the rules of his employment, bound to supervise the works, to take measurements and to enter them in a measurement book maintained for the purpose. He was also to report to the District Local Board through the works committee, of which accused No. 2 was the chairman, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. It appears from the form of the bill, which was to be submitted by the contractor, that the sub-overseer was obliged to sign the bill in authentication of the measurements given in it and the charges made. It is not denied that the work in question was entrusted to a contractor by the Local Board and the contractor had preferred a bill under his signature for the amount stated therein. That bill was signed by the sub-overseer, accused No. 1, and countersigned also by accused No. 2 as chairman of the works committee. That bill was eventually sanctioned and paid by the Board on account of the authentication thereof. There is no doubt therefore that the signing of the bill and attaching a measurement sheet thereto and submitting the bill for payment was part of the official duty of the sub-overseer.

The duties of the chairman of the works committee are laid down under the rules framed by the District Local Board under the Act. The works committee is appointed under the provisions of s. 38, Local Boards Act. The rules provide, among other things, that the chairman should supervise the works that may be going on, fix the order in which the works sanction by the Board should be carried out, demand a programme of the works exceeding Rs. 500 take measurements and, in the absence of a completion certificate, countersign the bills of the contractor and see that the payment is made without undue delay. In his case too the act of countersigning the bill in authentication of the measurement and therefore the charges made was part of the official duty of the chairman; and it cannot be denied that the money said to have been obtained for payment of the bill was in fact obtained upon the guarantee provided by the countersignature and the accompaniment to the bill consisting of the measurements of the actual work done, for which the bill was preferred. Upon those facts, assuming that there has been fraudulent and dishonest entry in the bill and its accompaniment in regard to the measurements of the work actually done and contracted for, the question is whether the accused could claim protection of the provisions of s. 136 (2), Bom. Local Boards Act of 1923. That section says as follows:

"(2) No suit, prosecution or other legal proceeding shall be commenced against any member, officer or servant of a local board, for anything done, or purporting to have been done, in pursuance of this Act, or any other law for the time being in force which entitles or require local board, member, officer, servant as such, . . . to exercise any powers or perform any duties without giving to such local board, member, officer, servant, . . . one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of."

The provisions of that section are in important respects analogous to the povisions of s. 197, sub-s. (1), Criminal P. C., and s. 270, sub-s. (1), Constitution Act. They serve the same object and are intended to protect public servants in the discharge of official duties. The interpretation of the provisions in the different enactments will therefore serve as a guide in the application of the principle which those cases may yield, to the facts of this case.

The authority on which the case was dealt with in the Courts below was *R. K. Naik* v. *Emperor* (1) and I shall refer to that case presently. Among the other cases referred to in argument were *Rudragouda Rachangouda Patil* v. *Emperor* (2), *Gurushidayya Shantivirayya Kulkarni* v. *Emperor* (3) and *Dr. Hori Ram Singh* v. *Emperor* (4). The learned Govt. Pleader has relied upon the case in *R. K. Naik* v. *Emperor* (1) for the view as expressed in one part of the judgment of the learned Chief Justice that where the act complained of is obviously prompted by dishonesty and is done in violation of the official duty, the protection afforded by the provisions of s. 136, Bom. Local Boards Act cannot be extended to it. That case was decided by reference to the provisions of s. 136, Bom. Local Boards Act. There, an administrative officer of a local board was prosecuted for

(1) 41 Bom. L R 1227; 186 Ind. Cas. 133; A I R 1940 Bom. 35; 41 Cr. L J 256; 12 R B 316; I L R (1940) Bom. 29.

(2) 39 Bom. L R 70; 168 Ind. Cas. 956; A I R 1937 Bom. 160; I L R (1937) Bom. 256; 9 R B 413; 38 Cr. L J 654.

(3) 40 Bom. L R 1286; 179 Ind. Cas. 686; A I R 1939 Bom. 63; 11 R B 257 (2); 40 Cr. L J 269; I L R (1939) Bom. 119.

(4) (1939 F C R 159; 181 Ind. Cas. 317; 40 Cr. L J 468; 11 R F C 60; (1939) M W N 497; 5 B R 685; A I R 1939 F C 13; 1939 O L R 366; 50 L W 95; 20 P L J 539; (1939) 2 M L J 23 Sup; 41 P L R 680; 43 C W N F C 50; I L R (1939) Kar. F C 132; I L R (1940) Lah. 400 (F C).

cheating under s. 420, I. P. C., for submitting a false travelling allowance bill to the board, and it was held that the protection under s. 136 did not apply. There, reference was made by the learned Chief Justice to *Dr. Hori Ram Singh* v. *Emperor* (4), which was cited before him on behalf of the accused, but he thought that the case could be distinguished. In *Dr. Hori Ram Singh* v. *Emperor* (4) there were two charges for which protection was claimed, one under s. 409 of criminal breach of trust and the other under s. 477-A, I. P. C. of falsification of accounts. The person charged was a sub-assistant surgeon under the Punjab Govt., and he had dishonestly misappropriated certain medicines entrusted to him in his official capacity and omitted to record certain entries in a stock book of medicines belonging to the hospital in his charge. The Court held that in respect of the charge under s. 409, the protection did not apply because the act complained of was not necessarily performed by the accused in his official capacity, but that as the act complained of under s. 477-A was performed by the accused in his official capacity, the protection applied to the charge under that section. The ratio of the decision was that the maintenance of the accounts being part of the duty of the accused, when the latter in writing those accounts as part of his duty deliberately wrote them falsely or omitted to write them correctly, it was nevertheless an act done in purported execution of a statutory duty. The Court held that even if the act alleged was done in bad faith and was clearly a dereliction of the officer's duty, the officer was not necessarily deprived of the protection provided by the expression "act done or purporting to be done in the execution of his duty" in s. 270 (1), Constitution Act. Sulaiman, J. has made in that connection the following observations (*vide* pp. 178-179*):

"Obviously the section does not mean that the very act which is the gravamen of the charge and constitutes the offence should be the official duty of the servant of the Crown. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The words as used in the section are not 'in respect of any official duty' but 'in respect of any act done or purporting to be done in the execution of his duty' The two expressions are obviously not identical .... The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be done in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say, under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting.

The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in the execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time."

The application of the principle above enunciated is well illustrated by the learned Judge in the following remarks in dealing with the charge of falsification of accounts (*vide* p. 181*):

"Thus, where it is his duty to maintain a record or a register, and in maintaining that register he makes some entries which are false to his knowledge, he is certainly purporting to act, though not actually acting, in the execution of his duty, because, he is making certain entries in the register knowing them to be false. He is ostensibly professing to be discharging his official duty in maintaining the register, which he is bound to maintain correctly. In making the entries he pretends or purports to act in the execution of his duty; but in point of fact he is acting in direct dereliction of it."

In *R. K. Naik* v. *Emperor* (1), the learned Chief Justice was not prepared to follow that case because he thought that the decision of the Federal Court could be distinguished from the case before him, first, because the Court there was dealing with s. 270, Govt. of India Act, whereas the case before him arose under s. 136, Bom. Local Boards Act, 1923, and secondly, because the charge in that case was under s. 420, I. P. C. Another ground for distinction was that the accused before him was not bound to claim any travelling allowance at all, that therefore he was not entitled to the protection under s. 136, Bom. Local Boards Act.

This view adopted by this Court consistently in cases such as *Rudragouda Rachangouda Patil* v *Emperor* (2) and *Gurushidayya Shantivirayya Kulkarni* v. *Emperor* (3) is clearly reconcilable with the view taken by the Federal Court of the protective provisions of the enactment. In the former case the act complained of purported to be in discharge of the accus-

*Pages of 1939 F. C. R.—[*Ed.*]

ed's public duty, for the alleged forged order signed by the accused as president of the Taluka Local Board was an order which was required by the law to be signed by the president in his official capacity. In the latter case an officiating *kulkarni* collected money on account of land revenue and instead of sending it to the Govt. treasury used it for his own purpose. In that case it was an act done purely in his private capacity although by a public servant. It could by no manner of argument be said that using money entrusted to him for the private purpose was a duty cast on him by the rules of his office. Therefore no sanction was considered necessary.

Here, the principal ingredient in the offence of cheating was the false representation made to the District Local Board upon which the latter was induced to part with the money. That representation was made according to the complaint by means of a bill with an appendix containing a false measurement sheet. If that bill was fraudulently and dishonestly made and submitted which was the accused's duty to submit and in submitting it they appended a statement which was false to their knowledge, they were certainly purporting to act, though not actually acting, in pursuance of the Act. It cannot be denied, as I have already said, that under the rules which are made under the Act and which, in my opinion, must be regarded as part of the Act, it was the duty of both the sub-overseer and the chairman to sign and countersign the bill respectively in order to enable the contractor to claim, and the District Local Board to pay, the amount stated in the bill. It is therefore difficult to resist the inference that the preferring of the bill was an official act and it did not make any difference that in the discharge of the official duty a fraudulent statement was inserted in the bill. Therefore, in my opinion, the act complained of, namely the fraudulent and dishonest representation by means of the bill and measurement sheet, would be protected under s. 136, Bom. Local Boards Act. There is no doubt that the member is also entitled to protection under s. 197, Criminal P. C. He is a statutory public servant according to s. 135, Bom. Local Boards Act, and the act complained of was done or purported to be done in the exercise of his official duty. As a member is not removable without the sanction of the Local Govt. under s. 31 of the Act, the sanction of that Govt. would be necessary for his prosecution under s. 197, Criminal P. C. Therefore I think the rule in his revisional application must be made absolute and the proceedings pending before the resident First Class Magistrate of Manmad quashed.

Broomfield, J.—The lower Courts have relied on a dictum of the learned Chief Justice in *R. K. Naik* v. *Emperor* (1). In that case referring to s. 136, Bom. Local Boards Act, he said (p. 1229*):

"In my view these protection clauses, which are so commonly inserted in Acts conferring powers on public authorities or their officers, were never intended to protect a dishonest rascal from the consequences of his rascality. They are only intended to protect people who from excess of zeal or negligence, or other cause exceed their powers.

I doubt if the learned Chief Justice intended to lay this down as a rule to be followed by the Courts in India without qualification. To do so would clearly be contrary not only to the decision of the Federal Court referred to and distinguished by the learned Chief Justice in his judgment, *Dr. Hori Ram Singh* v. *Emperor* (4) but also to several decisions of this Court which have been cited in the argument before us. The Federal Court were dealing not with s. 136, District Local Boards Act nor with s. 197, Criminal P. C., but with s. 270, Govt. of India Act. But when the same or exactly similar words are used in statutory provisions which appear to have a similar object, it would be very difficult to say that they should not be interpreted in the same way. The principle which the Federal Court laid down in *Dr. Hori Ram Singh* v. *Emperor* (4) may be stated to be this. If the act alleged to be criminal is done by a public servant in his official capacity, that is, if it is an act which it is his duty to do as such public servant under the law governing the case, he is protected, although, by reason of the fact that he has done act dishonestly or fraudulenty or in any other manner contrary to the law, he may have committed a criminal offence. On the other hand, if the offence charged involves an act or acts which the accused is not required to do and which are outside his official duties, the liability to prosecution is unfettered.

The cases to which we have been referred in the course of the argument may all be explained, I think, by the application of very much the same principle. In *Gulabmiya Dagumiya* v. *Emperor* (5) it was held that sanction under s. 197, Criminal P. C.,

(5) 32 Bom. L R 1134; 129 Ind. Cas. 344; A I R 1930 Bom. 487; 32 Cr. L J 281; Ind. Rul. (1931) Bom. 152; (1930) Cr. Cas 1023.

*Page of 41 Bom. L. R.—[*Ed.*]

was not necessary for the prosecution of an official liquidator for misappropriation of money coming into his custody as liquiadtor, the reason being that in misappropriating money he did not purport to act as a public servant. The act was outside his duties, In *Nanhesaheb Ahmedsaheb In re* (6) it was held that sanction was necessary for the prosecution of the chairman of a District School Board for the offence of forgery of the minutes of a meeting of the Board. Here the charge was clearly in respect of an official act. In *Rudragouda Rachangouda Patil* v. *Emperor* (2) sanction was held necessary for a prosecution for forgery in respect of an order signed by the president of a Taluka Local Board in his official capacity. There also obviously the prosecution was in respect of an official act. Lastly, in *Gurushidayya Shantvirayya Kalkarni* v. *Emperor* (3) it was held that sanction under s. 197, Criminal P. C., was not necessary for the prosecution of a village *kulkarni* for the offence of breach of trust. That was the same kind of case as *Gulabmiya Dagumiya* v. *Emperor* (5).

But, if the principle laid down by the Federal Court, which as I say appears to have guided this Court in a number of cases in the past, is applied in the present case, it seems to me to be clear that the accused must be held to be protected by s. 136, cl. (2), Bom. Local Boards Act, and in the case of accused No. 2 by s. 197, Criminal P. C. My learned brother has stated what is alleged in the charge-sheet against the accused. The gist of the charge is that by false pretences they induced the District Local Board to part with a certain sum of money. The false pretences consisted of the false measurements and the false bill which were prepared by the accused in their official capacity.

The learned Govt. Pleader, who opposes this application, has conceded that so far as the offence of falsification of accounts under s. 477A, I. P. C. is concerned sanction would be necessary under s. 197, Criminal P. C. He contends, however, that the offence of cheating with which the accused are also charged is a distinct offence and that on the authorities no sanction is necessary for the offence of cheating; nor does s. 136, cl. (2), apply to it. But I am unable to see how the two charges in the present case can be kept distinct. They seem merely to be different aspects of the same transaction. Apart from the entries in the measurement book and the bill which the accused are alleged to have falsified, there would have been no false pretences to support the charge of cheating. It seems to me to be a case in which the official capacity of the accused is involved in the very acts complained of to use the language of Varadachariar, J. in *Dr. Hori Ram Singh* v. *Emperor* (4). That is so in respect of both the charges. I agree therefore with my learned brother that the rule must be made absolute in this case and the procedings against both the accused quashed.

S. *Rule made absolute.*

(6) 38 Bom. L R 956; 165 Ind. Cas. 901; A I R 1936 Bom. 453; 9 R B 176; 38 Cr. L J 16; (1936) Cr. Cas. 1104; I L R (1937) Bom. 78.

RANGOON HIGH COURT

Civil Regular No. 104 of 1940
August 23, 1940
SHARPE, J.

U BA MAUNG—PLAINTIFF
versus
U CHIT HLAING AND ANOTHER—DEFENDANTS

Government of Burma Act, 1935, *ss.* 25 (1), (a), 27 (3) — *Member resigning his post in army —He ceases to hold any office for profit even if resignation is yet subject to His Majesty's approval —Speaker of house of representatives, if subject to High Court's jurisdiction—His right to declare that member's seat has become vacant—Practice—Subsequent events—Cause of action incomplete—If can be completed by anything arising after action.*

Where a member has resigned his appointment in the army he cannot be said to be holding any office for profit under the Crown and is not disqualified for being a member of the House of Representatives even if His Majesty has not yet approved of his being given permission to resign his appointment.

The Speaker of the House of Representatives is subject to the jurisdiction of the High Court. He has no power to declare a member's seat to have become vacant. 193 Ind. Cas. 91 (1), followed.

Nothing arising after action is brought, can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit.

Messrs. *E Hay U E Maung* and *U Maung Maung*, for the Plaintiff.

Messrs. *Kyaw Din* and *P. K. Basu*, for Defendants Nos. 1 and 2, respectively.

Judgment.—The facts of this case are similar to those in *U Lun* v. *U Chit Hlaing* (1). There are however one or two slight differences, one of which is all-important. At all material times the plaintiff,

(1) A I R 1941 Rang. 5; 193 Ind. Cas. 91; 13 R Rang. 311.

U Ba Maung, was the member for Myitkyina, having been chosen at a bye-election in December 1938. He was present in the Chamber when the point was first raised by defendant No. 2, and he, too was also present there during the discussion both on March 29, and April 1, and also when the speaker gave his decision on April 2. Unlike U Lun, however the plaintiff in this, suit did not speak in the Chamber at any time on any of those three days, either in an attempt to defend his own position as a member or otherwise. The other difference, and the all-important one, between the facts of this case and those of *U Lun's case* (1), is that in the *Burma Gazette* for April 13, 1940* it was notified, under date April 6, that the plaintiff in this suit, U Ba Maung had been permitted, subject to His Majesty's approval, to resign his appointment as a Second Lieutenant in the Army in Burma Reserve of Officers, with effect from March 26. The fact that the plaintiff had resigned his appointment on March 26, was mentioned to the speaker by the Advocate-General in the course of the latter's address on April 1. But no mention whatever of this fact was made by the speaker in the course of giving his decision on April 2. The plaintiff, U Ba Maung, filed this suit on the same day that U Lun filed his. The plaints in the two suits are identical, except that the plaint in this suit includes the additional averment (in para. 5) that the plaintiff resigned his appointment on March 26. The two written statements in this suit are in precisely the same terms as the two written statements in *U Lun's suit* (1), there is no additional plea in either of the written statments in this suit to meet the additional allegation in the plaint which I have just mentioned.

In my judgment the fact that this plaintiff resigned his appointment on March 26, disposes of the case. As he had resigned on this date, he was not holding any office of profit under the Crown in Burma when the first ordinance ceased to operate, and it is not suggested that he was doing so at any later date The plaintiff in this suit was therefore never disqualified for being a member of the House of Representatives and so his seat never became vacant. Some slight argument, if I may so describe it, was addressed to me by Mr. Kyaw Din to the effect that, as the plaintiff's resignation was only permitted subject to His Majesty's approval, and as His Majesty has not yet given his approval thereto, the plaintiff's resignation is as yet of no effect. It is enough for me to say that if it was right to say in *U Lun's case* (1), that the fact that His Majesty had not yet approved his appointment as a Second Lieutenant did not prevent the appointment from being effective so far as disqualification for membership of the House of Representatives was concerned, then it is equally right to say that the fact that His Majesty has not yet approved of the present plaintiff being given permission to resign his appointment does not prevent his resignation being effective for the present purpose.

It has been said on behalf of the speaker that he was right not to rely upon the mere statement made in the Chamber by the Advocate-General that the plaintiff had resigned his appointment on March 26, and that the plaintiff ought to have substantiated in some way or another the fact of his resignation, as no notification of his resignation appeared in the *Burma Gazette* until April 13, which was after the speaker announced his decision. It is not to be overlookd in this connection that U Lun, the plaintiff in the other suit, tried to speak in his own defence, and was not allowed to do so when he wanted to. I think that, as regards this plaintiff at any rate, the speaker, having been put on notice of the position, might well have addressed some enquiry either to the plaintiff, or to the defence department, or to both, with a view to ascertaining whether what the Advocate-General had stated was correct or not ; or he might have waited a short while to see if any notification on the subject appeared in the *Burma Gazette*, as in fact it did less than a fortnight after his decision. But the speaker did none of these things, and proceeded to give his decision, in which he did not make any reference at all to even the possibility of this plaintiff having resigned. Nor did he, after the notification had appeared in the *Burma Gazette*, make any statement in the Chamber reviewing his decision. Incidentally, his omission to do that confirms me in my view that the speaker did in fact purport to be "the declaring authority" in this matter, for if the speaker had been legally invested with the power to declare a seat to have become vacant, he could not, as it seems to me, go back on that declaration.

In these circumstances the plaintiff was in my opinion fully justified in instituting this suit on April 24, last, at any rate as against the speaker. On that date the plain-

*Burma Gazette, Part 1, page, 435; Defence Department Notification No 253.

tiff was entitled to the legal character of a member of the House of Representatives of the Burma Legislature, and the speaker had denied his title to that character. For the reasons given in my judgment in *U Lun's case* (1), I am of opinion not only that the speaker is subject to the jurisdiction of this Court but also that he had no power to declare that the plaintiff's seat had become vacant. It is not suggested on behalf of the speaker that the plaintiff is able to seek any further relief than a bare declaration, except the injunction for which he also asks, and so I think that this is a proper case in which to grant relief to the plaintiff under s. 42, Specific Relief Act, 1877. The plaintiff will be granted as against defendant No. 1 a declaration that he (the plaintiff) was on April 25, 1940, a member of the House of Representatives of the Burma Legislature I do not propose to grant the plaintiff a further declaration, as he asks me to do, to the effect that defendant No. 1 had no power to determine the matters disposed of by him in his "ruling" of April 2, 1940, and that defendant No. 1's declarations and findings are of no force or validity. The plaintiff obtains all that really matters to him by being granted the declaration which I do propose to make, while I am not at all sure that the further declaration which he seeks is one which I can properly grant under s. 42, Specific Relief Act. I should be slow to grant the injunction which is asked for, because I feel sure myself that the speaker will not act contrary to the decision of this Court, but (of course subject, if he so desires, to testing the correctness of my judgment on appeal) will loyally abide by it. In fact, at the very end of the hearing of this case Mr. E Maung, on behalf of the plaintiff, said—these are the exact words :

"We have to assume that as speaker of the House of Representatives he (that is, the speaker) would show respect to the decision of this Court. We are not justified in thinking that he would flout the decision of this Court."

In these circumstances I shall not therefore grant the plaintiff an injunction. Defendant No. 1 must pay the plaintiff's costs. Bearing in mind the fact that the two cases were heard together, but also bearing in mind the importance of this case and the amount of preparatory work which has obviously had to be done by the Advocates, I fix an Advocate's feee of twenty gold *mohurs* for the first day, eight gold *mohurs* each for the second, third, fourth, fifth and seventh days of the hearing, five gold *mohurs* for the sixth day (which was not a full one), and two gold *mohurs* for to-day.

I must now deal with the position of defendant No. 2, Mr. E Maung, on behalf of the plaintiff, impressed it upon me, when he first opened his case, that his client was only suing defendant No. 2 in his capacity of a private member of the House, and not in his capacity of deputy speaker. Mr, E Maung has very frankly and properly conceded that, merely by raising this matter in the Chamber in the way in which he did, defendant No. 2 cannot be said to have denied the plaintiff's title to his character of a member of the House of Representatives. Mr. E Maung however relies upon para. 4 of defendant No. 2's written statement, the terms of which are that defendant No. 2 "states that from the date of Gazette Notification plaintiff held an office of profit under the Crown." That is the only thing upon which the plaintiff relies as showing that defendant No. 2 has denied the plaintiff's status as a member. Even if I thought that that did in fact amount to such a denial as is contemplated by s. 42, Specific Relief Act, it would not assist the plaintiff on this point, for, as I pointed out in *Smith* v. *Heptonstall* (2), at p. 18 :

"Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entiling the plaintiff to any relief in that same then existing suit."

Defendant No. 2's statement was, naturally, filed after the suit was instituted, and so the plaintiff cannot rely upon anything in the written statement to complete his admittedly otherwise incomplete cause of action. On this ground alone the suit as against defendant No. 2, must be dismissed with costs, the Advocate's fee to be similar to that which I have fixed as between defendant No. 1 and the plaintiff, and I need not go into the other defence raised by defendant No. 2.

S. *Order accordingly.*

(2) (1938) Rang. 6 (16); 177 Ind. Cas. 63; A I R 1938 Rang. 134; 11 R Rang. 95.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 526 of 1939
October 15, 1940
COLLISTER AND BAJPAI, JJ.
Mst. BHAGWATI—APPLICANT
versus
COMMISSIONER OF INCOME TAX, U. P. & C. P.—OPPOSITE PARTY

Income Tax Act (XI of 1922), s. 14—Widow of Hindu co-parcenary, whether member of undivided family within meaning of s. 14—Widow receiving allowance as member of undivided family—Partition between co-parceners, whether affects her status as member of undivided family—Her allowance if

exempt—Hindu Law—Joint family—Co-parcenery—Family consisting of male and his deceased brother's wife—Widow adopting son—Whether becomes co-parcener with uncle.

The widow of a Hindu co-parcenary, though not herself a member of the co-parcenary body, may nevertheless be a member of the undivided family within the meaning of s. 14, Income Tax Act. The widow of a deceased co-parcener receiving maintenance allowance as member of Hindu undivided family continues to be a member of the undivided family with each of the entities into which the family subsequently disrupts irrespective of whether any such entity consisted of one male member or of several male members because there can be no partition between a co-parcener and a member of the undivided family who is not a co-parcener, as for instance, the widow of a deceased co-parcener. Hence the maintenance allowance received by the widow continues to be exempt under s. 14 even after the disruption of the family. 149 Ind. Cas. 306 (1), not approved. [p. 240, col. 2.]

(Case-law relied on.

There is no co-parcenary body where the family consists of an individual male and for instance his deceased brother's wife; but if the latter, having authority from her late husband, should adopt a son the latter would become a co-parcener with his uncle in the family estate 140 Ind. Cas 17 (2) and *Surendra Nandan* v. *Sailaja Kant Das* (8), relied on. [p. 240, col. 1.]

Misc. Case reference submitted by the Commissioner of Income-tax, Central and United Provinces, Lucknow, dated June 1, 1939.

Mr. *V. D. Bhargava*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

Collister, J.— This is a reference under s. 66 (2), Income Tax Act (XI of 1922). The assessee is *Mst.* Bhagwati, widow of Kalyan Singh, who died on October 18, 1918. On her husband's death, *Mst.* Bhagwati applied for mutation, alleging that Kalyan Singh was a separated Hindu. She was opposed by the collaterals, who contended that Kalyan Singh died a member of the joint family. The mutation Court found in favour of the collaterals; but, ultimately, the matter was compromised, the necessity for litigation in the Civil Courts being thereby obviated. Under a deed of agreement dated October 10, 1919 the assessee accepted the position that her husband had died as *karta* of the undivided family and she gave up all right and interest in the family property except such as was embodied in deed of agreement; and the co-parceners agreed to pay the assessee an allowance of Rs. 1,000 per mensem by way of maintenance for the remainder of her life. They agreed to other conditions also about certain family matters but we are not concerned with them. It was recited in the document that the terms of the agreement were in accordance with the oral instructions of late Kalyan Singh. Thereafter the allowance was regularly paid to and received by the assessee. On April 9, 1923, there was a partition in the family, which disrupted into five separate groups or entities, as follows: (1) Hanuman Prasad and Ram Gopal, sons of a deceased brother of Kalyan Singh, (2) Govind Das, brother of Kalyan Singh, (3) Raghunath Das, (4) Gokul Das, (5) Lachman Das. Raghunath Das is the son of Govind Das and was adopted by Ram Das, a deceased brother of Kalyan Singh and Govind Das, Gokul Das and Lachman Das are both sons of Govind Das. At the disruption, Hanuman Prasad and Ram Gopal on the one side and Govind Das on the other each agreed to contribute Rs. 500 to the assessee's monthly allowance of Rs. 1,000 and this agreement was duly implemented. To all this, of course, the assessee was no party. For the assessment year 1935-36 the Income-tax Officer assessed to tax the sum of Rs. 12,000 being the allowance received by the assessee for the 12 months ending March 31, 1935. This assessment was made under s. 34 read with s. 23 (3) of the Act. The Income-tax Officer held that s. 14 (1) of the Act was not applicable. That section provides:

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The Income-tax Officer says:

"I cannot read into s. 14 (1) that it applies also to a person who may have been once a member of the undivided family The discussion whether she was or was not a member of the family is, therefore futile."

Then he says:

"There is another aspect of this case. *Mst.* Bhagwati had surrendered all her rights, whatever she may have had, by entering into an agreement dated, October 10, 1919. The allowance that she has been getting is only by virtue of the deed of agreement and as such it is not exempt under the Act."

The assessee appealed to the Assistant Commissioner, but her appeal was dismissed. That officer agreed with the view taken by the Income-tax Officer and he also based his order on another ground, which was that under the Mitakshara School of Law:

"A widow cannot be a member of a co parcenary and, therefore, the appellant is not a member of a Hindu undivided family."

As we shall show, this view of the law is incorrect. The assessee then applied to the Commissioner of Income-tax for review under s 33 and alternatively for a reference to this Court under s. 66 (2). The Commissioner declined to give relief under s. 33 but has referred the following question of law to this Court under s. 66 (2).

"Whether the sum of Rs. 1,000 per month received

by the petitioner in the account year 1934-35, was received by her as a member of a Hindu undivided family within the meaning of s. 14 (1) of the Act."

The Commissioner is of opinion that the question should be answered in the negative. He says :

"The Hindu undivided family to which she once belonged became disrupted in 1923, and partitioned itself into five separate entities, in none of which, so far as I can see, she has any legal place. The maintenance allowance which the petitioner is now receiving from two of these entities is not, therefore, being received by her as a member of a Hindu undivided family as there is no undivided family in existence to which she can at present be said to belong.'

The first question that falls to be considered by us is whether a widow can be a member of a Hindu undivided family. In this connection learned Counsel for the assessee has referred us to a number of authorities in support of the proposition. Learned Counsel for the Department at first contested this point, relying mainly on an observation in *In re Maharajkumar of Vizianagram* (1), at p. 1243, where the learned Judges say that

"widows cannot be regarded as members of an undivided Hindu family within the meaning of s. 14 (1) of the Act."

There is, however, a volume of authority to the effect that the widow of a coparcener is a member of the undivided family. In Mulla's Hindu Law, Edn. 9, paragraph 212, we read :

"A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters."

Paragraph 213 says :

"A Hindu co-parcenary is a much narrower body, than the joint family. It includes only those persons who acquire by birth an interest in the joint or co-parcenary property."

In *Vedathanni* v. *Commissioner of Income Tax, Madras* (2), it was held by a Full Bench of the Madras High Court that the widow of a member of a joint Hindu family is herself a member of that family within the meaning of s. 14 (1), Income Tax Act. The learned Judges say : "The object and scope of s. 14 is to prevent the Crown from taxing twice over." Further on they say :

"If widows are not exempted by reason of the above construction, the Crown would undoubtedly be taxing twice over."

This decision was approved by the Bombay High Court in *Commissioner of Income Tax, Bombay* v. *Gomedalli Laxminarayan* (3). In that case the assessee and his father formed a joint Hindu family. They were possessed of ancestral property which, on the death of the father, devolved by survivorship on the assessee, who lived with his wife and mother. He was assessed to income-tax as an individual. He contended that he was entitled to be taxed as a Hindu undivided family, and the High Court found in his favour. At p. 621*, Beaumont, C J. observes :

"The nature of a Hindu undivided family was perfectly well-known to the Legislature when the Income Tax Act was drafted, and it was well-known that the expression 'Hindu undivided family' includes females and is much wider than 'co-parcenary', which includes only the males in whom the joint family property is vested."

At pp. 625 and 626*, Rangnekar, J. says :

"It is clear, therefore, that there is a sharp distinction between what is understood in the Hindu Law by the expressions 'undivided Hindu family' and 'co-parcenary'. Now these two expressions which are known to every Hindu lawyer, were before the Legislature when the Income Tax Act came to be enacted. It is a canon of construction that one cannot impute ignorance to the Legislature of well-known legal expressions. The Legislature must be presumed to be acquainted with not only the actual state of the law but with the legal interpretation put upon technical expressions by the Courts. If then the Legislature chose to adopt a wider expression like 'undivided Hindu family' instead of the narrower one 'co-parcenary,' the Courts have no option left but to construe the wider expression in the way in which it has been construed and understood under the Hindu Law. To put a narrower meaning on the expression 'undivided Hindu family,' as the Crown wants us to do, would, in my opinion be legislating instead of interpreting the section."

Then there is a more recent decision from Bombay, *Commissioner of Income Tax, Bombay Presidency, Sind and Aden* v. *Makanji Lalji* (4). The assessee in that case was a Hindu undivided family. The widow of one of the co-parceners obtained a decree for maintenance from the Court. At the time of assessment the assessee claimed a deduction in respect of the amount which the widow received as maintenance ; but the High Court held that no such deduction was possible. At p. 829† Beaumont, C. J. who delivered the judgment, says :

"Now, inasmuch as the assessee is the Hindu undivided joint family, which includes this widow it is difficult to see how any deduction can be allowed in respect of a share of the income going to one of the members of the joint family."

At p. 840† he says :

"But in this case, the assessment being on a Hindu undivided family, it seems to me that the whole of the income of the Hindu undivided family is liable to assessment and that it is impossible to deduct this sum payable to the widow of a deceased

(1) (1934) A L J 1237 (1243); 149 Ind. Cas. 306; A I R 1934 All. 818; 56 A 1009; 6 R A 884.

(2) 56 M 1; 140 Ind. Cas. 17; 63 M L J 542; 36 L W 536; (1932) M W N 1139; Ind. Rul. (1932) Mad. 817; A I R 1932 Mad. 733 (F B).

(3) 59 B 618; 159 Ind. Cas. 424 (2); A I R 1935 Bom. 412; 37 Bom. L R 692; 8 R B 203.

(4) I L R (1937) Bom. 827; 172 Ind. Cas. 249; A I R 1937 Bom. 479; 39 Bom. L R 907; 10 R B 260.

*Pages of 59 B.—[*Ed*].

†Pages of I. L. R. (1937) Bom.—[*Ed*].

brother, who gets it in her capacity ultimately as a member of the joint family."

The view expressed in the above two cases was followed by this Bench in *Kedar Narain Singh* v. *Commissioner of Income Tax, C. P. & U. P.* (5) and still more recently by a Bench of the Oudh Chief Court in *Commissioner of Income Tax, C. P. & U. P.* v. *Rudh Kumari* (6), where it was held that a mother must be deemed to be a member of a Hindu undivided family with her son. Finally we shall refer to certain observations of the Judicial Committee of the Privy Council in *Kalyanji Vithaldas* v. *Commissioner of Inome-tax Bengal* (7). At p. 412 their Lordships say :

"The phrase 'Hindu undivided family' is used in the statute with reference, not to one school only of Hindu Law, but to all schools, and their Lordships think it a mistake in method to begin by passing over the wider phrase of the Act the words 'Hindu co-parcenary'—all the more that it is not possible to say on the face of the Act that no female can be a member."

Further on, they say that they do not agree that a Hindu joint family necessarily consists of male members only. The law on the subject is, we think, clear and we are of opinion that the widow of a Hindu co-parcenary, though not herself a member of the co-parcenary body, may nevertheless be a member of the undivided family and in view of the authorities, learned Counsel for the Department has had to concede that this is so.

We shall now consider a point which Counsel for the Department has taken in connection with the agreement of October 10, 1919. He contends that between that date and the disruption of the family on April 9, 1923 the assessee was not receiving the allowance of Rs. 10,00 as a widow in a Hindu undivided family the allowance was an annuity for consideration, the said consideration being her admission that Kalyan Singh had died joint with the other members of the family and her surrender of the rights which she was claiming in the family property. The Income-tax Officer and the Assistant Commissioner both held *inter alia* that the assessee can only base her claim on the deed of agreement of October 10, 1919, but the Commissioner has not touched this point. His reference appears to proceed on the assumption that the assessee was receiving the allowance as a member of a Hindu undivided family and that it was only by reason of the disruption in 1923 that she lost the exemption which s. 14 (1) of the Act provides. We shall therefore reply to the question referred to us upon this assumption.

We now come to the most important point in this reference and that is whether, assuming that after October 10, 1919 the assessee was drawing the allowance as a member of a Hindu undivided family, she is or is not now drawing it in that capacity. On behalf of the assessee Mr. P. L. Banerji has argued this matter from aspects. In the first place he contends—and not altogether without force—that, having originally received this allowance as a member of a Hindu undivided family, the capacity in which she was receiving it was unaffected by the subsequent disruption among the co-parceners. He pleads that, even if she is herself no longer a member of a Hindu undivided family, she is nevertheless receiving the allowance in that capacity within the meaning of s. 14 (1); her status *quoad* the right to maintenance is unchanged. The other aspect of the matter which learned Counsel for the assessee has put before us is that she has not ceased to be a member of a Hindu undivided family at all and here we think that the assessee is on firmer ground. There can be no partition between a female who is a member of a Hindu undivided family and the coparceners, and therefore it is contended that the assessee, after the disruption of the co-parcenary body, continued to be a member of a Hindu undivided family with each of the separating entities, which had succeeded by survivorship to her husband's interest in the family property. We have already quoted the passage from Mulla's Hindu Law which says that

"a joint Hindu family consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters ;"

and it has been held that a single individual may form a Hindu undivided family with a member or members of the family entitled to maintenance from the estate. In *Vedathenni* v. *Commissioner of Income Tax, Madras* (2), already referred to in this judgment, there were two brothers Somasundara and Ramalinga. Ramalinga died leaving a widow, and subsequently Somasundara died leaving two widows. After Soma-

(5) 6 I T R 157.

(6) (1940) O W N 853; 190 Ind. Cas. 435; A I R 1941 Oudh 22; 13 R O 150; 1940 O L R 605.

(7) (1937) A L J 408 (412), 166 Ind. Cas. 445; A I R 1937 P C 36; 64 I A 28; I L R (1937) 1 Cal. 653; 1937 O L R 44; 1937 A L R 87; 9 R P C 145; 3 B R 245; 45 L W 109; 18 P L T 67; (1937) M W N 63; 1937 O W N 173; 41 C W N 385; (1937) 1 M L J 312, 65 C L J 64; 39 Bom. R 374 (P C).

sundara's death an adoption was made to him and at the material time the adopted son, who was a minor, was the sole male member of the family. Ramalinga's widow sued him for maintenance and obtained a decree and a question arose as to whether the amount so received as maintenance was chargeable as income-tax. A Full Bench of the Madras High Court held that she was a member of a Hindu undivided family and that the money received by her as maintenance was exempt under s. 14 (1) of the Act. The judgment was delivered by Ramesam, J., and at p. 5* that learned Judge after referring to two reported decisions, one from Calcutta and one of the Privy Council, says :

".....there can be a joint family with a single member provided there are other members entitled to maintenance from the estate."

Further on he observes :

"So far as the case before us is concerned, undoubtedly there is a joint family and also the petitioner in this case is entitled to maintenance as the widow of a deceased co-parcener and received it as a member of an undivided family."

The Court refrained from expressing any view as to what the position would be in a case where the surviving male members effected a partition between themselves while continuing to pay maintenance to widows of deceased co-parceners as in the case with which are now concerned. In *Commissioner of Income Tax, Bombay* v. *Gomedalli Lakshminarayan* (3), to which also we have already referred in another connexion, Beaumont. C. J. on p. 621† says :

"It is clear law that you may have a joint Hindu family consisting of one male member and female members who are entitled to maintenance, although that does not mean that every Hindu who possesses a wife and a mother is necessarily a member of a joint Hindu family....."

There is of course no co-parcenary body where the family consists of an individual male and for instance his deceased brother's wife; but if the latter, having authority from her late husband, should adopt a son, the latter would become a co-parcener with his uncle in the family estate. Authority for this proposition will be found in the two decisions which were referred to by Ramesam, J., in *Vedathenni v. Commissioner of Income Tax, Madras* (2). The first of these is *Surendra Nandan* v. *Sailaja Kant Das* (8). In that case there were two brothers, Raghunath and Bissonath, living as a joint family under the Mitakshara Law. Bissonath died, leaving a widow with the power of adoption. The widow adopted a son and it was held by a Bench of the Calcutta High Court that the latter succeeded to his father's interest in the joint family property notwithstanding that it had already vested in Raghunath. Similarly, in *Bachoo Hurkisondas* v. *Mankorebai* (9), there were two brothers forming a joint family under the Mitakshara Law and possessed of considerable property. On September 14, 1900 one brother died without male issue, but leaving his widow pregnant. The other brother died on December 17, 1900 after authorizing his widow under a will to adopt a son, such authority to hold good even in the event of a son born to the other widow. On December 18 of that same year, the pregnant widow gave birth to a son and on February 17, 1901 the other widow adopted a son. It was held by their Lordships of the Privy Council that the adopted son became on adoption a co-parcener in the family property with the son who was naturally born to the other widow.

In the case which is now before us the assessee was a member of a Hindu undivided family up to 1923; and as we have already said, there can be no partition between a co-parcener and a member of the undivided family who is not a co-parcener, as for instance, the widow of a deceased co-parcener. It seems to us therefore that after the disruption of the family on April 9, 1923, the assessee continued to be a member of a Hindu undivided family with each of the entities into which the family disrupted, irrespective of whether any such entity consisted of one male member or of several male members. Upon this view of the matter, the assessee will be exempted from payment of income-tax under s. 14 (1) of the Act, and this is the conclusion at which we have arrived. On the assumption therefore that up to April 9, 1923 the assessee was receiving her allowance as a widow in a Hindu undivided family, our reply to the question referred to us is in the affirmative. The assessee is entitled to her costs of this reference. Counsel for the Department is entitled to a fee of Rs. 200. A copy of this judgment under the seal of the Court and the signature of the Registrar will be sent to the Commissioner of Income-tax, Central and United Provinces.

S. *Answer accordingly.*

(8) 18 C 385.

(9) 31 B 373; 34 I A 107; 9 Bom. L R 646; 2 M L T 295; 11 C W N 769; 6 C L J 1; 17 M L J 343 (P C).

*Page of 56 M.—[*Ed.*]

†Page of 59 B.—[*Ed.*]

PATNA HIGH COURT

Criminal Revision No. 439 of 1940
September 18, 1940
DHAVLE, J.

JADUNANDAN SINGH AND ANOTHER—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 383, 352, 324—Extortion—What prosecution must prove—Accused assaulting victim and forcibly taking his thumb impression on blank paper—Offence, nature of—Whether amounts to extortion or robbery—Hurt with bhala—*Fact that accused is student, if mitigation of offence.*

The definition of 'extortion' in s. 383, I. P. C. makes it necessary for the prosecution to prove that the victims were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The forcible taking of the victim's thumb impressions on blank piece of paper which can be converted into a valuable security does not necessarily involve inducing the victim to deliver papers with the thumb impressions. Hence, where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than the use of criminal force or an assault punishable under s. 352, I. P. C. Nor does the offence amount to robbery in the absence of proof that the papers were taken from the victim's possession. Cr. Revn. No. 125 of 1931 and Cr. Revn. No. 420 of 1930, relied on, 140 Ind. Cas. 752 (1), distinguished.

The fact that the accused is a student, is no mitigation of the offence of causing hurt with a *bhala*.

Cr. R. from an order of the Additional Sessions Judge, Gaya, dated June 3, 1940.

Messrs. *Nawal Kishore Prasad II, D. P. Sinha* and *R. P. Jaruhar*, for the Petitioners.

The Assistant Govt. Advocate, for the Crown.

Mr. *Raj Kishore*, for the Complainant.

Order.—Narain Dusadh and Sheonandan Singh, the *gorait* and *gomasta* respectively of a landlord, were returning after the inspection of some fields when the two petitioners and others came out of an *ahar* and assaulted them. The petitioner Alakh gave a *bhala* blow to Narain on the right leg, and then other people assaulted him with *lathis*. The petitioner Jadunandan and others then assaulted Sheonandan. Jadunandan after this forcibly took the thumb impressions of Narain on one piece of blank paper, and of Sheonandan on three blank papers. On these findings the two petitioners and two others were convicted by the trying Magistrate, Jadunandan being sentenced under s. 384, I. P. C., to six months' rigorous imprisonment and Alak to four months' rigorous imprisonment under s. 324. Jadunandan was also found guilty under s. 323, but the Magistrate did not consider it necessary to pass any separate sentence on him under that section. Two other men were also convicted by the Magistrate under s 323 and fined. An appeal which was heard by the Additional Sessions Judge of Gaya failed. When the matter came to this Court, Varma, J., rejected the revisional application of the last two men, Raghu Kahar and Chander Singh, but admitted the application of Jadunandan Singh and also, so far as the question of sentence was concerned, that of Alakh. It has been contended on behalf of Jadunandan Singh that no offence under s. 384 has been brought home to him. This contention is rested on the definition of 'extortion' in s. 383 which reads :

"Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'."

It is clear that this definition makes it necessary for the prosecution to prove that the victims Narain and Sheonandan were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The prosecution story in the present case goes no further than that thumb impressions were "forcibly taken" from them. The details of the forcible taking were apparently not put in evidence. The trial Court speaks of the wrists of the victims being caught and of their thumb impressions being then 'taken.' Cases frequently occur which turn on the difference between the giving and the taking of thumb impressions. In Criminal Revision No. 125 of 1931 *Ramyad Singh* v. *Emperor* heard by Sir Courtney-Terrell, C. J., and myself on April 15, 1931, the victim was tied up on refusing to give his thumb impression on a piece of paper. He then consented to put his thumb impression on that piece of paper, and it was by that fear that he was found to have been induced to put his thumb impression, on the paper. The conviction under s. 384 was therefore upheld. This was contrasted with the case which had come before me sitting singly in 1930, Criminal Revision No. 420 of 1930, *Kapildeo Singh* v. *Emperor* decided on August 15, 1933, where the finding of fact was that, helped by two others, the petitioner took by force the thumb impressions of the victim—the man was thrown on the ground,

his mouth and eyes tied with a *gamcha*, his left hand pulled out and the thumb put into a *kajrauta* and then impressions of that thumb taken on certain papers. I had held that in the circumstances there was no inducing the victim to deliver the pieces of paper with his thumb impressions. As to this, the late Chief Justice observed :

"If the facts had been that the complainant's thumb had been forcibly seized by one of the petitioners and had been applied to the piece of paper notwithstanding his struggles and protests, then I would agree that there is good ground for saying that the offence committed, whatever it may be, was not the offence of extortion because the complainant would not have been induced by the fear of injury but would have simply been the subject of actual physical compulsion, and I venture to agree with the reasoning of my learned brother Dhavle in Criminal Revision No. 420 of 1930 *Kapildeo Singh* v. *Emperor*."

The Assistant Govt. Advocate has drawn attention to *Batisa Singh* v. *Emperor* (1) where the petitioners were convicted under s. 347. It is said in one part of the report that the victim was laid down on the floor and gagged and only allowed to go after his thumb impressions were taken on several pieces of paper. Macpherson, J. upheld the conviction, after pointing out however that it had been found as a fact that the petitioners intentionally put the victim in fear of injury to himself and thereby dishonestly induced him to place his thumb impression upon certain pieces of paper. There is no such finding in the present case. The lower Courts only speak of the forcible taking of the victim's thumb impressions; and as this does not necessarily involve inducing the victim to deliver papers with his thumb impressions (papars which could no doubt be converted into valuable securities). I must hold that the offence of extortion is not established. The learned Advocate suggested that in that event this may be a case of robbery, but it has not been asserted or found that the papers were taken from the victim's possession. It seems to me that on the findings the offence is no more than the use of criminal force or an assault punishable under s. 352, I. P. C.

Jadunandan Singh was also convicted under s. 323, but no separate sentence was passed upon him under that section. I do not propose to interfere with that part of the order of the lower Court, and as regards his conviction under s. 384, I. P. C., which must be replaced by a conviction under s. 352, I. P. C., I sentence him to rigorous imprisonment for three months and a fine of Rs. 100 with two months rigorous imprisonment in default. As regards the petitioner Alakh it has been urged that he is a student. From the record it appears that his age is 22, and though the record does not show that he is a student, an attempt has been made before me quite recently by means of an affidavit and a certificate to show that he is a student. I am not sure that this is any mitigation of the offence of causing hurt with a *bhala*, but having regard to the nature of the injury that he caused, it seems to me that the ends of justice will be served if the sentence passed upon him under s. 324, I. P. C, is reduced to rigorous imprisonment for three months. Ordered accordingly.

S. *Order accordingly.*

(1) 13 P L T 588; A I R 1932 Pat. 335; 140 Ind. Cas. 752; 34 Cr. L J 81; Ind. Rul. (1933) Pat. 19; (1932) Cr. Cas. 852.

BOMBAY HIGH COURT

Civil Reference No. 8 of 1939

August 7, 1940

BROOMFIELD AND DIVATIA, JJ.

BABUBHAI VAMALCHAND KACHRA—PLAINTIFF

versus

HIRALAL VAMALCHAND KACHRA AND OTHERS—DEFENDANTS

Civil Procedure Code (Act V of 1908), O. XLVI, r. 1, O. VII, r. 10, s. 24—Suit valued at Rs. 205 filed in First Class Sub-Judge's Court allocated to joint First Class Sub-Judge—Case sent to Second Class Sub-Judge by District Judge's order—Latter allowing amendment—Suit becoming beyond his pecuniary jurisdiction and sent by him to First Class Court—Action reported to District Judge—District Judge informing grant of sanction—Reference by First Class Sub-Judge under O. XLVI, r. 1—Neither O. XLVI, r. 1, nor O. VII, r. 10 held applied—High Court held could transfer case under s. 24.

A suit for a declaration and injunction valued at Rs. 205 was instituted in the First Class Subordinate Judge's Court. According to the practice the case was allocated to the joint First Class Subordinate Judge for disposal. Subsequently, by order of the District Judge the case was sent to the Court of the extra joint Second Class Subordinate Judge, who was one of the subordinate Judges attached to the First Class Court. While the case was pending in the Court of the joint First Class Subordinate Judge, an application was made to amend the plaint by including additional properties in the list of suit properties and asking for partition. This application for amendment was granted by the Second Class Subordinate Judge after the case had been taken up by him. The result was that the suit became one beyond his pecuniary jurisdiction and so he sent the case to the First Class Court and reported the action taken by him to the District Judge. In a letter sent by the clerk of the Court of the District Judge by order of the District Judge, the First Class Subordinate Judge was informed that the sanction applied for, had been granted. When the case was taken up by the First Class Subordinate Judge, the defendants objected that he had no jurisdiction and that the

only legal way of dealing with the case was that the Second Class Subordinate Judge should have returned the plaint for presentation to the First Class Subordinate Judge under O. VII, r. 10. The First Class Subordinate Judge doubted whether the District Judge had power to transfer the case under s. 24, Civil P. C., and also whether any order of transfer under that section had in fact been made. He submitted several questions for the opinion of the High Court under O. XLVI, r. 1 :

Held, that O. XLVI, r. 1 had no application, nor did O. VII, r. 10 apply as the suit was properly instituted in the first instance. 64 Ind. Cas. 919 (5), relied on.

Held, further that the High Court could properly take action under s. 24, of its own motion and in order to save difficulty and delay, transfer the suit to the First Class Court for disposal, since, the suit was properly filed in the First Class Court and the Second Class Subordinate Judge to whom it was transferred for disposal by administrative order had jurisdiction to entertain it and to deal with it up to the date of amendment. Hence there was no legal objection to the High Court passing an order under s. 24 transferring the case to the Court of the First Class Subordinate Judge. 158 Ind. Cas. 382 (1), *Ledgard* v. *Bull* (2), *Peary Lall Mozoomdar* v. *Komal Kishore Dassia* (3) and *Jagjivan Javerdas* v. *Magdum Ali* (4), distinguished.

[The High Court in this case passed an order under s. 24, Civil P. C, *ex majore cautela*, withdrawing the suit from the Court of the extra joint Second Class Subordinate Judge and transferring it for trial to the First Class Subordinate Judge.]

C. Ref made by the Fisrt Class Sub-Judge, Surat.

Messrs. *M. R. Vidyarthi* and *S. M. Vidyarthi*, for the Plaintiff.

Messrs. *G. N. Thakor* and *B. G. Thakor*, for the Defendants.

Broomfield, J.—This is a reference by the First Class Subordinate Judge of Surat purporting to be under O. XLVI, r. 1. The facts are as follows : A suit for a declaration and injunction valued at Rs. 205 was instituted in the First Class Subordinate Judge's Court. According to the practice by which the work of that Court is distributed the case was allocated to the joint First Class Subordinate Judge for disposal. Subsequently, by order of the District Judge (it is not quite clear whether this was an administrative order or an order under s. 24, Civil P. C.) the case was sent to the Court of the extra joint Second Class Subordinate Judge, who is one of the four Subordinate Judges attached to the first class Court. While the case was pending in the Court of the joint First Class Subordinate Judge, an application was made to amend the plaint by including additional properties in the list of suit properties and asking for partition. This application for amendment was granted by the Second Class Subordinate Judge after the case had been taken up by him. The result was that the suit became one beyond his pecuniary jurisdiction and he made the following order :

"The suit is now valued at more than Rs. 5,000. So this Court can have no jurisdiction to hear the suit. I therefore pass the order below : The suit be sent to the first class Court as this Court has no jurisdiction."

Apparently he reported the action taken by him to the District Judge and in a letter sent by the clerk of the Court of the District Judge by order of the District Judge the First Class Subordinate Judge was informed that the sanction applied for had been granted. It is not clear, however, that any judicial order of transfer under s. 24, Civil P. C., had been made. When the case was taken up by the First Class Subordinate Judge, the defendants objected that he had no jurisdiction and that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have returned the plaint for presentation to the First Class Subordinate Judge under O. VII, r. 10. The learned First Class Subordinate Judge was of opinion that this was the correct view. He doubted whether the District Judge had power to transfer the case under s. 24, Civil P. C., and also whether any order of transfer under that section had in fact been made. He thought that there was a difficulty in the way of his entertaining the suit by reason of a decision of the learned Chief Justice in *Shankerji Samalji* v. *Vrajlal Bapalal* (1), and he submitted several questions for the opinion of this Court under O. XLVI, r. 1.

The first point that has to be decided is whether a reference under O. XLVI, r. 1 lies in the circumstances of the present case. It is clear from the wording of the rule that it cannot apply except in cases where there is a pending suit or appeal in which the decree is not subject to appeal. In the present case it appears to us that the First Class Subordinate Judge in whose Court the suit was instituted and who is the only Judge who can possibly have jurisdiction to try it must either try it or dismiss it. He cannot refuse to try it. Whether he dismisses it without hearing it or decides it after hearing, in either case there will be an appealable decree. That being so we do not consider that O. XLVI, r. 1 has any application.

(1) 59 B 466; 158 Ind. Cgs. 382; A I R 1935 Bom. 286; 37 Bom. L R 255; 8 R B 123.

At the same time we think it is a case in which this Court may properly take action of its own motion under s. 24, Civil P. C., and in order to save difficulty and delay transfer the suit to the First Class Subordinate Judge for disposal. The learned First Class Subordinate Judge doubted whether an order under s. 24 could be made, and learned Counsel who appears here for the defendants has also argued that at any rate according to some authorities an order under this section cannot be made in such a case. The points relied upon seem to be two. It is urged that there must, first of all, be a pending suit, and, secondly, there must be a suit pending in a Court which has jurisdiction to try it. As regards the first point the suit must be regarded as pending before the Second Class Subordinate Judge, if, as is contended, the First Class Subordinate Judge has as yet no jurisdiction to hear it. As regards the second point, reliance is placed on a Privy Council ruling, *Ledgard* v. *Bull* (2), where it was held, following *Peary Lall Mozoomdar* v. *Komal Kishore Dassia* (3), that under s. 25 of the old Civil P. C., which corresponds to the present s. 24, a superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it. It was also held in *Jagjivan Javerdas* v. *Magdum Ali* (4), that the District Court could not transfer a suit under s. 24 which had not been properly instituted. We think, however, that these authorities only mean that the Court from which the suit is to be transferred must have had jurisdiction at the time the suit was instituted. The present case was properly instituted in the Court of the First Class Subordinate Judge and the Second Class Subordinate Judge to whom it was transferred for disposal by administrative order had jurisdiction to entertain it and deal with it up to the time when the plaint was amended.

We are of opinion that there is no legal objection to our passing an order under s. 24 transferring the case to the Court of the First Class Subordinate Judge. We think the present case is distinguishable from any case which has been cited before us by the facts that the two Courts with which we are concerned are in a sense parts of one Court, and that the suit was properly instituted and registered in the first instance and would have been properly instituted even if the amendment had been part of the original plaint, since all suits whether of special or ordinary jurisdiction are according to the recognized practice instituted in the Court of the First Class Subordinate Judge. As at present advised we are not in agreement with the view taken by the learned First Class Subordinate Judge that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have made an order under O. VII r. 10. Speaking for myself, I must say that if the learned First Class Subordinate Judge was of opinion that a re-presentation of the plaint to him was necessary before he could proceed with the case, there was nothing to prevent him returning the plaint to the plaintiff in order that it should be re-presented. But in the view we take, O. VII, r. 10 has no application in a case like the resent when the suit was properly instituted in the first instance. In *Mahomedbhai Husenbhai* v. *Adamji Halimbhai* (5) Macleod, C. J. at p. 236 said :

"Under O. VII, r. 10 it is no doubt obligatory that the plaint, if instituted in the wrong Court, shall at any stage of the suit be returned to be presented to a Court in which the suit should have been instituted. But it is only in a case where the suit is instituted in a wrong Court that the plaint must be returned."

If it transpires during the hearing of a suit that the plaint has been instituted in a wrong Court, everything that has been done by that Court is without jurisdiction and therefore the suit has to be instituted afresh in the proper Court. But, in the present case, everything that was done by the Second Class Subordinate Judge up to the time when the amendment of the plaint was allowed was within his jurisdiction. We are not aware of any authority for the view that in such a case it is necessary that the suit should be instituted again and re-registered as a fresh suit under O. IV. The amendment of the plaint did not make it a new suit and no re-institution of the suit was necessary. Although, we propose to make an order under s. 24, we should not be taken to have decided that an order of transfer is really necessary. *Shankerji Samalji* v. *Vrajlal Bapalal* (1) to which the learned First Class Subordinate Judge has referred, did not deal with similar facts. There a suit had been sent for disposal to a Subordinate Judge Subordinate to the First Class Subordinate Judge by administrative order. It was afterwads removed from his file and transferred to another Subordinate

(2) 13 I A 134; 9 A 191; 4 Sar. 741 (P C).
(3) 6 C 30.
(4) 7 B 487.
(5) 46 B 229 (236); 64 Ind. Cas. 919; A I R 1922 Bom 152; 23 Bom. L R 1086.

Judge also by administrative order. The learned Chief Justice said (p. 468*):

".....there is a clear distinction between orders of transfer and administrative orders allocating business to Courts of particular Judges. When once a Judge has taken congnizance of a suit, it seems to me, that any order removing the suit from his file is an order of transfer."

Holding that the order made by the First Class Subordinate Judge there was an order of transfer, he ruled that it was invalid because the First Class Subordinate Judge has no power of transfer under s. 24, Civil P. C., but only the District Judge or the High Court. It is to be noted that in that case the Subordinate Judge from whose Court the case was transferred was competent to try it. He had not only taken cognizance of it, but, apart from the order removing the suit from his Court, he would have been competent to proceed with it and dispose of it. In our opinion, the position is not the same when, as in the present case, the Judge to whom a suit has been sent by an administrative order has become *functus officio* because by reason of an amendment of the plaint the valuation of the suit exceeds his pecuniary jurisdiction. Where under those circumstances an administrative order for the allocation of business has become inoperative we can see no reason why the difficulty should not be removed by the First Class Subordinate Judge resuming control administratively of the suit which was properly instituted in his Court. He might in our opinion himself send for the papers in exercise of his powers under s. 23, Bom. Civil Courts Act, but whether he sends for the papers or whether they are sent to him makes no material difference. However, for the reasons already given, we have decided to make an order under s. 24 *ex majore cautela*, and we order accordingly that Regular Civil Suit No. 298 of 1938 be withdrawn from the Court of the extra joint Second Class Subordinate Judge and transferred for trial to the First Class Subordinate Judge, Surat. Costs to be costs in the case.

S. *Order accordingly.*

*Page of 59 Bom.—[*Ed.*]

PATNA HIGH COURT

Appeal No. 329 of 1939

April 2, 1940

AGARWALA AND ROWLAND, JJ.

DEBENDRA NATH HALDAR AND OTHERS —APPELLANTS

versus

G. A. ARATOON—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 50, 99—Order of substitution by executing Court under s. 50 not affecting merits of case—No interference with, by Appellate Court by reason of s. 99.

When the Court to which the decree has been transferred for execution makes an order for substitution under s. 50, Civil P. C it is a matter of procedure and not of jurisdiction. 109 Ind Cas. 417 (1), 139 Ind. Cas 397 (2) and 141 Ind. Cas. 61 (3), relied on.

An Appellate Court cannot therefore interfere with that order by reason of s. 99, where the merits of the case are not affected by the irregularity. 109 Ind. Cas. 417 (1) and 168 Ind. Cas. 346 (6), distinguished, *Amar Chandra Banerjee* v. *Guru Prosunno Mukerjee* (5), explained, *Sham Lal Pal* v. *Modhu Sudan Sircar* (4) and 133 Ind. Cas. 609 (7), relied on.

A. from the appellate order of the Judicial Commissioner, Chota Nagpur, dated August 9, 1939.

Mr. *K. Sahay*, for the Appellants.

Mr. *R. P. Jaruhar*, for the Respondent.

Agarwala, J.—The facts material to this appeal are as follows: G. A. Aratoon & Co., obtained in the Calcutta High Court a decree for Rs. 2,000 against Upendra and Debendra, a firm carrying on business at Bundu near Ranchi in this province. On the application of the decree-holder the decree was transferred for execution to Ranchi. In the Ranchi Court a compromise was entered into under which the judgment-debtors agreed to pay Rs. 100 a month to the decree-holder until the decretal debt should be satisfied. The compromise also provided that in default of any payment the decree-holder should be entitled to realize the entire balance then due. Only one instalment was paid. The Ranchi Court which executed the decree then struck off the execution and returned the decree to the Calcutta High Court with a report that the decree had been satisfied only in part. Thereafter the decree was again transferred for execution to Ranchi on an application made by the decree-holder for its execution there. On receipt of the report of the process-server by the Court at Ranchi it was learnt that Upendra had died. On the application of the decree-holder the widow and the son of Upendra were substituted in his place in the execution proceedings by the Court at Ranchi

to which the decree had been transferred. These persons appeared and objected that the Court at Ranchi had no jurisdiction to execute the decree as against them. They relied upon s. 50, Civil P. C., which provides that :

"Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

The contention of the objectors therefore was that it was only the Calcutta High Court which could direct the decree to be executed against them. That objection has been considered by the Court below and overruled. They have preferred the present appeal and in support of their appeal a number of decisions relating to the construction of s. 50 have been referred to. The first of these is the decision of the Privy Council in *Jang Bahadur* v. *Bank of Upper India Ltd.* (1). There it was held that it is the Court which passes the decree which has power under s. 50 to substitute the heirs of a deceased judgment-debtor ; it was, however, observed by their Lordships that the matter was not one of jurisdiction but of procedure, and that in the case that was before them objections to the defect in the procedure of the executing Court had been waived by acquiescene.

The same view has been taken in two cases of this Court, namely, *Chandra Chur Deo* v. *Shyam Kumari* (2) and *Kalu Ram* v. *Sheonand Rai Jokhi Ram* (3), in both of which cases the defect in procedure had been waived by the persons who subsequently challenged the order of the Court on the ground that the procedure was defective. It cannot now be disputed that when the Court to which the decree has been transferred for execution makes an order for substitution under s. 50, it is a matter of procedure and not of jurisdiction. The question therefore arises whether an Appellate Court should interfere with an order under s. 50 made by a Court to which a decree has been transferred for execution where the merits of the case are not affected by the irregularity. Section 99 of the Code provides in unequivocal language that no decree should be reversed or substantially varied, nor any case should be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Unless therefore, the defect in the procedure of the Court below is a material irregularity which has occasioned injustice to the aggrieved party, this Court, in exercise of its appellate powers, cannot interfere with the order of the Court below. In *Sham Lal Pal* v. *Modhu Sudan Sircar* (4) it was held that, even assuming that an application under s. 234 of the Code of 1882 (which has been replaced by s. 50 of the Code of 1908) to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 by the Code executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and, under s. 578 (which has been replaced by s. 99 of the present Code) the order of the Court of first instance could not be reversed on account of such irregularity. This case was referred to in a later decision of the Division Bench of the Calcutta High Court in *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee* (5). In that case it was held that an application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree and the Court to which the decree has been transferred has no jurisdiction to entertain it. With reference to *Sham Lal Pal* v. *Modhu Sudan Sircar* (4) Banerji, J. said :

"As to the case in *Sham Lal Pal* v. *Modhu Sudan Sircar* (4) that case is distinguishable from the present. The question there was as to the meaning and effect of s. 234, Civil P. C., which provides that an application for executing the decree against the legal representative of a deceased judgment-debtor is to be made to the Court which passed it but does not, like s. 232, leave any discretion in that Court to allow execution or not."

Order XXI, r. 22 has replaced s. 232 of the old Code. Stevens, J. agreed with the judgment of Banerji, J., but said that he desired to express no opinion with regard to the construction of s. 234. In the Privy Council case to which I have already referred both these decisions were referred to, and Banerji, J.'s explanation of the decision in *Sham Lal Pal* v. *Modhu Sudan Sircar* (4) was accepted. The case before their Lordships of the Privy Council was a case in which the judgment-debtors had acquiesced in the defect of procedure and their Lordships therefore held that they must be taken to have waived the defect. They were

(1) 32 C W N 790; 109 Ind. Cas. 417; A I R 1928 P C 162; 3 Luck. 314; 5 O W N 502; 26 A L J 681; 48 C L J 23; 28 L W 25; 30 Bom. L R 1373; 55 M L J 545; (1928) M W N 863; 55 I A 227 (P C).

(2) 11 Pat. 445; 139 Ind. Cas. 397; A I R 1932 Pat. 261; 13 P L T 719; Ind. Rul. (1933) Pat. 229.

(3) 11 Pat. 580; 141 Ind. Cas. 61; A I R 1932 Pat. 393; 13 P L T 751; Ind. Rul. (1933) Pat. 41.

(4) 22 C 558.

(5) 27 C 488.

not dealing with a case in which it was necessary to decide whether an Appellate Court should interfere where a defect of procedure has occurred but where it is not shown that the defect has affected the merits of the case. The case which at first sight supports the contention of the learned Advocate for the appellants is a Division Bench decision of this Court in *Official Trustee of Bengal* v. *Basdeo Bhagat* (6). That was a case in which there had been no waiver of the irregularity in the procedure of the Court executing the decree in making an order under s. 50, Civil P. C., but the learned Judges who dealt with that case, after referring to the Privy Council decision, decided that the execution should not be allowed to proceed. The facts were that the executing Court had refused to order the substitution of the representatives of the deceased judgment-debtor, and it was against that order of refusal that the appeal had been preferred. Mohammad Noor, J. delivering the judgment of the Court said :

"We are at a stage where no execution has been issued. When it is brought to the notice of the Court that a certain procedure is irregular, and when the proceedings can be regularised by applications to the proper Court, there is no reason why the Court should allow the irregular proceeding to continue."

It will be observed therefore that Mohammad Noor, J. was not dealing with a case like the present where the Court has passed an order in favour of continuing the execution proceeding and the Appellate Court has to consider whether the order should be interfered with. The last case to which I propose to refer is the decision of a Division Bench of the Allahabad High Court in *Marahmat Husain* v. *Oudh Commercial Bank, Ltd.* (7). There it was held that s. 50 (1) does not confer exclusive jurisdiction on the Court which passed a decree for the purpose of substituting the names of the legal representatives of a deceased judgment-debtor, but that an application for substitution is also entertainable by a Court to which a decree has been transferred for execution. In delivering the judgment of the Court, Bennet, J. observed :

"For the judgment-debtor-appellant it was argued that although s. 42 gave jurisdiction to the Court to which a decree was transferred for purposes of execution that jurisdiction does not include the particular jurisdiction given by s 50 (1), exclusively to the Court which passed the decree. Now if that were so a very remarkable result would follow, because s. 47 (3) states that a Court executing a decree shall determine all questions which arise as to whether any person is or is not representative of a party."

In my view the defect in procedure which has occurred has not affected the merits of the decision and should not be interfered with. The appellants admittedly reside in Ranchi and, *prima facie* therefore it was more convenient for them to have the matter decided at Ranchi than at Calcutta. It has not been made a matter of grievance that they have been inconvenienced in placing their case before the Ranchi Court or that they were not representatives of the deceased judgment-debtor. I would therefore dismiss this appeal with costs.

Rowland, J.—I agree.

S. *Appeal dismissed.*

(6) A I R 1937 Pat. 239; 168 Ind. Cas. 346; 3 B R 421; 9 R P 481.

(7) A I R 1931 All. 320; 133 Ind. Cas. 609; (1931) A L J 166; Ind. Rul. (1931) All. 721.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 2 of 1938
January 15, 1940
DAVIS, J. C. AND WESTON, J.

KHIALMAL CHOITHRAM PUNJABI —PLAINTIFF—APPELLANT
versus
POHUMAL CHOITHRAM PUNJABI AND ANOTHER —DEFENDANTS— RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 89—Mortgagee purchasing property at auction sale in execution of mortgage decree—Application under O. XXI, r. 89 by prior purchaser of half of mortgaged property—Applicant, if becomes party to mortgage suit—Rejection of application—Subsequent suit for redemption by applicant, if barred—Application under O. XXI, r. 89, if falls under s. 47.

Where the mortgaged property is sold in execution of the mortgage decree and an application under O. XXI, r. 89, Civil P. C, to have the sale set aside is made by the prior purchaser of half of the mortgaged property, the applicant does not become a party, to the mortgage suit in which the decree was passed. The dispute between him and the mortgagee who himself is the auction purchaser cannot be deemed to be a dispute between the parties to the suit within the meaning of s. 47 and hence a suit by the applicant for redemption of half of the mortgaged property cannot be said to be barred by s. 47.

The rejection of the application under O. XXI, r. 89 does not bar the subsequent suit to redeem, for, the applicant did not by his application under r. 89 make himself a party to the suit in which he could have been impleaded. 65 Ind. Cas. 151 (9), explained and relied on, 155 Ind. Cas. 635 (10) and 101 Ind. Cas. 15 (11), relied on, 56 Ind. Cas. 274 (4) distinguished.

An application by a person interested under O. XXI, r. 89, does not fall under s. 47, for there is now special provision for an appeal against such an order under O. XLIII, (1) (*f*), and the controversy on the question as to whether an appeal did or did not lay in the case of a dispute between the judgment-debtor and the auction-purchaser, is now set at rest. *Krishna Satapasti* v. *Saraswatula Sambasiva Row* (5), *Maganlal Mulji* v. *Doshi Mulji Bhaichand* (6), *Bashir-ud-din* v. *Johri Singh* (7) and *Anandi Kunwari* v. *Ajudhia Nath* (8), referred to. [p. 249, cols. 1 & 2.]

S. A. against the judgment and decree of the First Class Sub-Judge, Shikarpur, dated November 24, 1937.

Mr. *Srikishendas H. Lulla*, for the Appellant

Mr. *Kodumal Issardas*, for the Respondents.

Davis, J. C.—This is an appeal against a judgment of the First Class Subordinate Judge at Shikarpur, with appellate powers, reversing a judgment of the Subordinate Judge at Shikarpur who passed a preliminary decree for the redemption of half of Survey No. 426 in *deh* Khanpur in a redemption suit brought by the plaintiff for the redemption of the whole survey number. The plaintiff grounded his suit for the redemption of the whole survey number upon a purchase by him from defendant No. 2 of half the survey number being a sale deed, dated February 6, 1934, in satisfaction of two mortgage bonds, dated January 24, 1922, and July 14, 1922, (Exs. 40 and 41) and a money decree, the mortgages having merged in the sale. Defendant No. 1 however, resisted plaintiff's suit on the ground that he was a prior mortgagee under a mortgage, dated February 9, 1920, and that on the foot of this mortgage he had obtained an award decree on an award out of Court, and that in execution of that decree he had purchased the whole survey number in the Court auction on December 19, 1934.

In the trial Court the suit was decided on the question of whether the plaintiff had a right to redeem. The learned trial Judge stated that it was not seriously disputed that the plaintiff as purchaser of part of the mortgaged property had a right to redeem under s. 91, T. P. Act, and the question which was urged before him was whether the plaintiff was entitled and bound to redeem the entire mortgage, but he came to the conclusion that, as the integrity of the mortgage was broken by the purchase by the mortgagee of part of the mortgaged property and following a long line of cases decided by the Allahabad High Court from *Kuray Mal* v. *Puran Mal* (1) and *Ahamed Husain* v. *Muhammad Qasim Khan* (2) the plaintiff suing for redemption could sue only for that part of the property which he had purchased. He referred particularly to the case in *Amba Prasad* v. *Vahid Ullah* (3), as a case with facts similar to this. Therefore, he allowed the plaintiff to redeem only the half of the survey number which he had purchased on payment of Rs. 625 which was the amount claimed by the defendant, the prior mortgagee and auction purchaser.

In the first Appellate Court, however, the suit seems to have proceeded on altogether different lines and while the trial Judge decreed the plaintiff's suit in part, the learned Appellate Judge dismissed the plaintiff's suit on the ground that he had by an application under O. XXI, r. 89, Civil P. C., before the sale in execution of the award decree was confirmed, to set aside the sale, become a party to the suit and that any question between him and the auction-purchaser should have been decided in execution proceedings under s. 47, Civil P. C. The learned Judge also held that the plaintiff's suit was barred under O. XXI, r. 92 (3), Civil P. C., because the suit is a suit to set aside an order confirming a sale by the party against whom the order is made. So far as the suit is barred under s. 47, Civil P. C., the learned Judge relied on the fact that the word "suit" includes execution proceedings, and that as the plaintiff in suit No. 542 of 1932 applied under O. XXI, r. 89, Civil P. C. to have the sale set aside, and to redeem the land, as he has sued in this suit to redeem the land so he was a party to Suit No. 542 of 1932, and as this application was disallowed and he did not appeal, he cannot reagitate the matter in this suit. The learned Judge, however, points out that as Suit No. 542 of 1932, was based upon an award out of Court, the appellant could not have been joined as a party to the suit at any rate before the decree and he relies upon a judgment of the Privy Council in support of his conclusion that the appellant did become a party to Suit No. 542 of 1932 within the meaning of s. 47, Civil P. C., when he made an application under O. XXI, r. 89, Civil P. C. to set aside the sale. In the Privy Council case in

(1) 2 All. 565; 4 Ind. Jur. 653.
(2) 48 A 171; 90 Ind. Cas. 80; A I R 1926 All. 46; 24 A L J 88; L R 6 A 598 Civ.
(3) 44 A 708; 68 Ind. Cas. 261; A I R 1922 All. 405; 20 A L J 583; 4 U P L R (A) 178.

Ganpat Lal v. *Bindbasini Prashad Narayan Singh* (4), their Lordships said (p. 929):

"Turning to the legal questions that thereupon arise in this case, the appellant did not dispute the proposition that if a person interested in mortgaged property, who should have been joined as a party to a mortgage suit, but has not been so joined comes in before foreclosure or sale, he has all the rights of redemption that his interest in the property gives him and may exercise them notwithstanding the decree."

The learned Appellate Judge in another part of his judgment points out that the appellant could not have been joined under O. XXXIV, r. 1, Civil P. C. in Suit No. 542 of 1932, because that order applies to regular suits and not to applications made under para. 20, Sch. II, to file private awards as was the case here. Therefore, the learned Judge takes the application under O. XXI, r. 89, Civil P. C., as an application in the suit within the meaning of s. 47, Civil P. C., holding then as a consequence that the appellants' rights as a mortgagee in the land must have been extinguished because in that same judgment their Lordships hold that where mortgaged land has been sold in execution of the decree, parties to the suit cannot thereafter sue to redeem so long as the sale is not set aside because the sale extinguished the right to redeem and the owner holds as purchaser, and is entitled to raise all defences that belong to him as such. But their Lordships were dealing with a case, as they pointed out, where the sons were suing to redeem land which their father had mortgaged and which he had a right to mortgage binding their interest; the sons did not challenge the mortgage or the debts, and when the land was sold and their father's right in it extinguished, their rights were extinguished also. They had also refused to amend the plaint and to add a prayer to set aside the sale, so their Lordships held that the sale must stand and their right to redeem must remain extinguished.

But the facts in this case are different, and we find it difficult to hold that an application under O. XXI, r. 89, Civil P. C., makes the person who makes it a party to the suit within the meaning of s. 47, Civil P. C. It is not all applications made in execution of a decree which fall under s. 47, Civil P. C An application by a person interested under O. XXI, r. 89, Civil P. C., does not fall under s. 47, Civil P. C., for there is now special provision for an appeal against such an order under O. XLIII (1) (*f*), and the controversy between the High Courts as to whether an appeal did or did not lay in the case of a dispute between the judgment-debtor and the auction-purchaser. *Krishna Satapasti* v. *Saraswatula Sambasiva Row* (5), *Maganlal Mulji* v. *Doshi Mulji Baichand* (6), *Bashir-ud-din* v. *Jhori Singh* (7) and *Anandi Kunwari* v. *Ajudhia Nath* (8) is now set aside at rest. But a dispute between a stranger to the suit and an auction purchaser, as was the case when the appellant in this suit made his application under O. XXI, r. 89, Civil P. C., could not be deemed a dispute between parties to the suit within the meaning of s. 47, Civil P. C., and, with all respect to the learned Judge, we do not think it can be said that the appellant's suit in this case was barred by s. 47, Civil P. C.

The question then however remains as to whether this suit is barred by reason of the provisions of sub-r. (3) of r. 92, and if this suit is a suit to set aside a sale or if the suit for redemption will not lie until the sale is set aside, the learned Appellate Judge would be right and the plaintiff's suit is barred. Clearly the plaintiff's application to set aside the sale was disallowed; he did not appeal, and the order was an order made against him, and he cannot under sub-r. (3) of r. 92 sue to set the sale aside. The decision on this point appears to us to turn upon the question whether by the refusal of the Court to set aside the sale, the appellant's right to redeem was extinguished. It is to be remembered that he applied under O. XXI, r. 89 as purchaser of half the survey number and his right to redeem in this suit was based upon his title as purchaser. The three cases to which the learned Judge refers, do not appear to assist his conclusions. In *Sukhi* v. *Ghulam Safdar Khan* (9) the Judicial Committee held that the puisne mortgagee not impleaded in a suit against the prior mortgagee could sue the prior mortgagee, but that if the prior mortgagee was owner by virtue of the purchase of the mortgagor's rights, he could raise the prior mortgage as a shield

(4) 47 C 924 (929); 56 Ind. Cas. 274; A I R 1920 P C 1; 47 I A 91; 18 A L J 555; (1920) M W N 382; 12 L W 59; 39 M L J 108; 2 U P L R (P C) 103; 24 C W N 954; 28 M L T 330 (P C.)

(5) 31 M 177; 3 M L T 306.
(6) 25 B 631; 3 Bom. L R 255.
(7) 19 A 140; A W N 1897, 7.
(8) 30 A 379; 5 A L J 557; 1908 A W N 157.
(9) 43 A 469; 65 Ind. Cas. 151; A I R 1922 P C 11; 48 I A 465; (1921) M W N 445; 14 L W 162; 26 C W N 279; 42 M L J 15; 30 M L T 175; 24 Bom. L R 590 (P C.)

against the claims of the puisne mortgagee; but this does not show that the appellant as purchaser and a party interested within the meaning of O. XXI, r. 89, Civil P. C., and not impleaded in that prior suit, cannot sue for redemption in a subsequent suit. In *Bhekdhari Mahton* v. *Radhika Koer* (10) it was decided that if the integrity of the mortgage is broken up by the purchase by the mortgagee of the mortgagor's property, and the mortgagee omits to implead persons interested in a portion of the property, he cannot resist redemption of the portion concerned on payment of a proportionate amount, and it was also decided, following line of cases, that if a mortgagee is not impleaded in a suit when he should be so impleaded, he is not bound by the decree.

In *Dharindhar Boral* v. *Panchanan Saha* (11) it was held that where the purchaser of the equity of redemption was not joined as a party to a suit in which the mortgagee obtained a decree, the purchaser is entitled in a subsequent suit to occupy the position in which he would have been had he been a party. He can sue for redemption and it is not essential for him to proceed to get the mortgage sale set aside before he can bring a suit for redemption. It was pointed out that when the Code was amended the words in s. 89, T. P. Act, "and therefore the defendant's right to redeem and the security shall both be extinguished was not carried into O. XXXIV, Civil P. C. and that in *Sukhi* v *Ghulam Safdar Khan* (9) the Judicial Committee had pointed out that where a mortgagee had not been made a party to a suit in which the prior mortgagee has obtained a decree, the puisne mortgagee is entitled in a subsequent suit to occupy the position which he would have had, had he been a party.

The learned Judges of the Calcutta High Court were of the opinion that there was no difference between the purchaser as plaintiff, as in the case before us, or the puisne mortgagee as plaintiff. It is true that in the Calcutta case the plaintiff had not complicated the position by making an application under O. XXI, r. 89, Civil P. C., but we do not think the failure of that application to set aside the sale bars the present suit to redeem if the plaintiff can redeem without setting aside the sale. We think the plaintiff can so sue, because he did not by his application under O. XXI, r. 89, Civil P. C., make himself a party to the suit in which he could not have been impleaded. We think, therefore that the judgment of the trial Court was right and must be restored, and that the judgment of the lower Appellate Court must be reversed and the appeal allowed with costs throughout.

D *Appeal allowed.*

(10) 13 P 364; 155 Ind. Cas. 635; A I R 1934 Pat. 648; 16 P L T 78; 7 R P 603.
(11) A I R 1927 Cal. 559; 101 Ind. Cas. 15.

PATNA HIGH COURT

Appeal from Appellate Decree No. 229 of 1940
January 20, 1941
AGARWALA, J.

BASANTI LAL MARWARY—APPELLANT
versus
Thakur JAMUNA PRASAD SINGH—RESPONDENT

Landlord and tenant—Rent—Suspension, doctrine of—Essentials for applicability of—Landlord realising rent of part of demised land from sub-tenant by mistake and not with intention of evicting tenant—Tenant not entitled to suspension of rent.

Mere dispossession of the tenant from part of the demised premises is not sufficient to justify a total suspension of rent, but in order to apply the doctrine of suspension it must be proved that the landlord deliberately and intentionally evicted the tenant from a part of the demised premises. 156 Ind. Cas 1066 (7) and *Henderson* v. *Mears* (8), relied on.

Where a landlord has realised the rent of a part of the demised land from the sub-tenant by mistake and his purpose was not to evict the tenant from that portion of the land, his action does not entitle the tenant to a suspension of the rent of the tenure.

A. from a decision of the Subordinate Judge of Bhagalpur, dated January 24, 1940.

Messrs. *S. N. Bose* and *K. N. Lal*, for the Appellant.

Messrs. *Kanhaiyaji* and *Mahabir Prasad*, for the Respondent.

Judgment.—This second appeal by the defendant arises out of a suit for recovery of rent of a sub-tenure for the last quarter of 1344 and the year 1345 *Fasli*. The rent of the sub-tenure is Rs. 302 a year. The defendant pleaded that he had been dispossessed of a portion of the tenure by the plaintiff. It appears that the plaintiff realised rent for the period in suit in respect of plot No. 688 of *Khata* No. 35 from the tenant in possession. At the time when the sub-tenure was created no rent had been assessed in respect of this plot. Since then, however, the defendant has settled it with a tenant at the rate of Rs. 3-12-0 per annum. The first Court was not satisfied that the defendant was entitled to realise rent in

respect of this plot under the terms of his lease, or that if he was so entitled, he had not in fact realised it. The Appellate Court held that the plaintiff had in fact realised Rs. 5 in respect of plot No. 688 for the period in suit and that it was the defendant who was entitled to this rent. The Appellate Court, however, held that the plaintiff had realised this rent inadvertently, that is to say, that he realised it under a mistake, and that the plaintiff did not intend to dispossess the defendant from any part of the sub-tenure. Accordingly the plaintiff's suit has been decreed subject to the plaintiff refunding to the defendant Rs. 5 which he has realised.

In appeal it is contended that as the rent for the sub-tenure was a lump sum the defendant is entitled to suspension of the rent in its entirety. Reference was made to the decision of the Privy Council in *Katyayani Debi* v. *Udoy Kumar Das* (1), and to the decisions of this Court reported in *Deoki Kuer* v. *Shiva Prasad Singh* (2), *Dalip Narayan Singh* v. *Suraj Narayan Missir* (3), *Bhuneshwar Nath Pandey* v. *Gudur Nath Pandey* (4), *Rameshwar Lal* v. *Butto Krishto Rai* (5), and to the decision in *Sajjad Ahmad Chowdhury* v. *Trailakhya Nath Chowdhury* (6). On the other hand, in *Hira Lal Singh* v. *Rinkauri Singh* (7), a Division Bench of this Court held that mere dispossession of the tenant from part of the demised premises is not sufficient to justify a total suspension of rent, but that in order to apply the doctrine of suspension it must be proved that the landlord deliberately and intentionally evicted the tenant from a part of the demised premises. This is in accordance with the decision in *Henderson* v. *Mears* (8). The facts of that case were that the defendant being a tenant of certain apartments belonging to the plaintiff, left them and put *K* into possession, for the purpose of taking care of and letting them. The plaintiff turned *K* out by force and afterwards brought an action for rent. The defendant contested the action on the ground that there had been an eviction. The plaintiff, however, alleged that he turned *K* out because he was not a proper person to be in the rooms and because he had misconducted himself. The Judge directed the jury that the question was whether the trespass upon *K* was committed merely for the purpose of expelling him from the house or whether it was for the purpose of depriving the defendant of his possession and held that it was a right question. In appeal it was held that there was no misdirection. On the finding of fact in the present case that the plaintiff realised the rent of plot No. 688 by mistake it must be that his purpose was not to evict the defendant and that his action, therefore, does not entitle the defendant to a suspension of the rent of the sub-tenure.

The appeal is accordingly dismissed. In the circumstances, however, as this litigation has been occasioned by the plaintiff's mistake it is only right that the parties should bear their own costs throughout.

S. *Appeal dismissed.*

(1) 52 C 417; 88 Ind. Cas. 110; 52 I A 160; A I R 1925 P C 97; 23 A L J 751; L R 6 A (P C) 140; 30 C W N 1 (P C).
(2) 20 P L T 378; 180 Ind. Cas. 98; 5 B R 341; 11 R P 452; A I R 1939 Pat. 356.
(3) 14 Pat. 323; 153 Ind. Cas. 298; 7 R P 328; A I R 1935 Pat. 38.
(4) 17 P L T 356.
(5) 13 Pat. 396; 152 Ind. Cas. 992; A I R 1934 Pat. 653; 7 R P 281.
(6) 55 C 464 (472); 116 Ind. Cas. 375; A I R 1928 Cal. 479; 32 C W N 472; Ind. Rul. (1925) Cal. 471.
(7) 15 P L T 21; 156 Ind. Cas. 1066; A I R 1934 Pat. 75; 7 R P 521.
(8) (1859) 28 L J Q B 305.

MADRAS HIGH COURT

City Civil Court Appeal No. 51 of 1939
December 11, 1939
HORWILL, J.
M. VENKATA RAO —APPELLANT
versus
B. SUBBA RAO AND ANOTHER— RESPONDENTS

Landlord and tenant—Estoppel—Termination of tenancy—Estoppel, when continues—S. 43, Presidency Small Cause Courts Act (IX of 1887), if modifies rule—S. 46 of the Act if applies.

The ordinary rule is that a tenant must deliver possession before he can dispute his landlord's title and that, that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. Section 43, Presidency Small Cause Courts Act does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. Section 46 of that Act has no application. 79 Ind. Cas. 881 (1), approved.

A. against the decree of the City Civil Court, Madras (Additional), dated August 18, 1939.

Messrs. *T. V. Muthukrishna Aiyer* and *T. V. Bhagawat*, for the Appellant.

Mr. *M. S. Venkatarama Aiyer*, for the Respondents.

Judgment. — The Sri Parthasarathi Temple, Triplicane, leased the suit land to defendant No. 1, defendant No. 1 sub-leased it to defendant No. 2, and defendant No. 2

to the plaintiff. At the termination of the period of tenancy, defendant No. 2 brought proceedings under Chap. VII, Presidency Small Cause Courts Act, to recover possession from the plaintiff. An order was passed under s. 43 in defendant No. 2's favour, and the plaintiff thereupon filed this suit under s. 47. He raised very many pleas and they are set out in the five issues. *Inter alia*, the plaintiff alleged that defendant No. 2 agreed to allow the plaintiff to remain in possession for three years which, he said, was the period of the lease of defendant No. 1 from the temple and defendant No. 2, from defendant No. 1. After the plaint was filed the temple obtained an order under s. 43, Presidency Small Cause Courts Act, against defendant No. 1. The plaintiff thereupon obtained permission to amend his plaint and add another ground that the period of tenancy having determined, defendant No. 2 had no right to possession. The plaintiff's suit was dismissed and hence this appeal.

The only point argued in appeal was whether defendant No. 2 could retain possession in view of the fact that the period of her own tenancy had terminated. As already pointed out, one of the plaintiff's contentions was that the period of tenancy was for three years and that he too was entitled to remain in possession for three years. His present contention is therefore inconsistent with one of his main contentions in the amended plaint. It is however said that the matter has now been determined by an order under s. 43 in proceedings between the temple and defendant No. 1 and that finding is final and binding until defendant No. 1 has had it set aside in the City Civil Court under s. 47. Such a suit was filed by defendant No. 1 and that suit is still pending. The ordinary rule is admitted to be that a tenant must deliver possession before he can dispute his landlord's title and that that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. A number of cases are quoted by Mulla in his "T. P. Act," as holding that the estoppel continues after termination of the tenancy unless possession is given up. Halsbury, in Vol. 13 at p. 506, says:

"But, if the tenant came into possession under a lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title; it has however been held that it is not necessary that he should actually go out of possession... .. ...and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him."

The only case quoted by the learned Advocate for the plaintiff in appeal is *Ramaswami Thevan* v. *Alaga Pillai*, 79 Ind. Cas. 881 (1) which was a case in which the Govt. had granted tree *patta* to a certain person who had sub-leased his rights to a tenant. The Govt. issued a notice to the *pattadar* which amounted to an eviction and Wallace, J. held in the words of another case he quoted, *Ram Chandra* v. *Pramatha Natha*, 63 Ind. Cas. 754 (2) 'that there was the equivalent of eviction'. If the tenant has been evicted and he is put into possession by the person who evicts him, then his possession is not referred back to his original lessor and so the estoppel would not operate as it would if he had not been evicted. So it is seen that even in *Ramaswami Thevan* v *Alaga Pillai*, 79 Ind. Cas. 881 (1) it was considered that eviction or something equivalent to it must have taken place before the lessee can deny the title of the lessor.

The learned Advocate for the plaintiff has relied on the wording of ss. 43 and 46, Presidency Small Cause Courts Act. Section 43 merely lays down the procedure to be adopted by the Court in applications for recovery of possession of property. If the occupant has proved that the tenancy has been determined and that his lessor had no right to possession, then it is sufficient cause, for the purpose of that section, why the Court should not pass an order for possession. The section does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. Section 46 of that Act has no application as far as I can see; for the very question under consideration is whether defendant No. 2 is entitled to possession. It is further argued that a decision under s. 43 is, in the absence of a decree of a Civil Court varying it, final and that therefore the tenancy must be deemed to have been determined. I have already held that even if that were the case, defendant No. 2 would still be entitled to retain possession until he is ousted by regular proceedings; but in view of the fact that a suit is still pending in the City Civil Court in which the right of defendant No. 1 and therefore of defendant No. 2 to remain in possession is being agitated and in view of the plaintiff's own case that his tenancy and defendant No. 2's tenancy are

(1) 79 Ind. Cas. 881; A I R 1925 Mad. 143.

(2) 63 Ind. Cas. 754; A I R 1922 Cal. 237; 35 C L J 146.

for three years, I do not consider that it can be assumed that the tenancy has terminated. In any event therefore whether on the facts or in law, the appeal fails and is dismissed with costs.

N. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 85 of 1940
January 29, 1941
AGARWALA, J.

SAMBHU GOSAIN AND ANOTHER—APPELLANTS
versus
PIYARI MIAN—RESPONDENT

Muhammadan Law—Minor—Sale of minor's immovable property by mere de facto *guardian—Validity—Co-owners—Suit by one co-owner alone without joining others, to eject trespasser—Maintainability.*

Under Muhammadan Law, the mother of a minor child who is merely his *de facto* guardian, has no power to sell any immovable property belonging to the minor and consequently, the sale of his interest by the mother is absolutely void. 47 Ind. Cas. 513 (1), relied on.

One of several co-owners is entitled to maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. Where the plaintiff is the owner of a share of one of the mortgagors in principle there is no bar to his obtaining possession of the mortgaged property. 101 Ind. Cas. 35 (2) and 29 Ind. Cas. 60 (3), relied on, 4 Ind. Cas. 740 (4), distinguished.

A. from a decision of the Subordinate Judge of Dhanbad, dated September 18, 1939.

Mr. *S. C. Mozumdar*, for the Appellants.

Mr. *R. S. Chatterjee*, for the Respondent.

Judgment.—This is an appeal by the defendants and arises out of a suit to recover plot No. 462 which belonged to one Alhad Mia. The latter died leaving two sons, Ramjan and Basarat. These two sons executed a usufructuary mortgage of the property in favour of the appellants for a period of seven years, expiring in 1340 *Fasli*. Basarat died leaving a minor son Abdin. In 1934, Ramjan and the mother of Abdin, as the latter's guardian, executed a sale deed in favour of the plaintiff. The present suit was to recover possession on the basis of this sale deed. The Court below has decreed the plaintiff's suit.

In appeal it is now contended that the mother of Abdin, being merely his *de facto* guardian, had no power to sell any immovable property belonging to him and that, consequently, the sale of his interest to the plaintiff was absolutely void. There can be no doubt of the correctness of the proposition in view of the decision of the Privy Council in the case of *Imambandi* v. *Mutsaddi* (1), but by the purchase the plaintiff indubitably acquired the 8 annas interest of Ramjan and thus became a co-owner of the property. The question, therefore, resolves itself into this: Is the plaintiff who has acquired the interest of Ramjan as a co-owner entitled as a co-owner to eject the defendants who are trespassers since the expiry of the mortgage under which they were in possession. In *Maganlal Dulabhadas* v. *Budhar Purshottam* (2) it was held that where a tenancy is entered into for a fixed term with co-owners of property, and the tenant continues on sufference after the expiration of the period of the tenancy, a suit brought to eject the tenant by one only of the co-owners is maintainable. Similarly, in *Syed Ahmed Sahib Shutari* v. *The Magnesite Syndicate, Ltd.* (3) it was held that one of several co-owners is entitled to maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. On behalf of the appellants reference was made to the decision in *Hossein Mahomed* v. *Fakir Mahomed* (4). The facts of that case were that several joint landlords had assented to a transfer of a non-transferable holding. The remaining co-sharer landlords sued to eject the trespasser from their shares only and to recover possession of the whole holding on the basis of the defenant being a trespasser. It was held that the defendant could not be ejected from the holding as his transfer had been recognised by some of the co-sharer landlords and that the plaintiff ought not to be given a decree for joint possession with the purchaser as he had sued for possession of the entire holding. The facts of that case are distinguishable from the facts of the Bombay and Madras cases. Here, there is no question of the defendants not being trespassers. Their mortgage has expired and if there had been no transfer to the plaintiff the mortgagors would have been entitled to recover possession. The plaintiff is the owner of a share of one of the mortgagors and in principle there is no bar to his obtaining possession of the mortgaged property.

(1) 45 C 878; 47 Ind. Cas. 513; 35 M L J 422; 16 A L J 800; 24 M L T 330; 28 C L J 409; 23 C W N 50; 5 P L W 276; 20 Bom. L R 1022; (1919) M W N 91; 9 L W 518; 45 I A 73; A I R 1918 P C 11 (PC).

(2) 51 B 149; 101 Ind. Cas. 35; 29 Bom. L R 222; A I R 1927 Bom. 192.

(3) 39 M 501; 29 Ind. Cas. 60; 2 L W 460; 17 M L T 387; 28 M L J 598.

(4) 10 C L J 618; 4 Ind. Cas. 740.

The decision of the Court below must, therefore, be affirmed but this decision is without prejudice to the rights of the heirs of Alhad Mian and Basarat in this property. The respondent is entitled to his costs in this appeal.

S. *Order accordingly.*

CALCUTTA HIGH COURT

Criminal Revision No. 271 of 1940
April 23, 1940
EIGLBY, J.

FAZLUR RAHMAN SARKAR
AND ANOTHER—ACCUSED—PETITIONERS
versus
ATAL BEHARY GHOSE—COMPLAINANT—OPPOSITE PARTY

Bengal Agricultural Debtors Act (VII of 1936), ss. 25 (1) (e), 27 (1) — Under s. 25 (1) (e), subject to s. 27 (1), Board can order usufructuary mortgagee to restore possession to mortgagor.

Under s. 25 (1) (e), Ben. Agri. Debtors Act, the Board has jurisdiction to give directions subject to the provision of s. 27 (1) as to the manner in which the sum for which the debt had been settled should be paid. The intention of the Legislature in enacting s. 27 (1) was merely to specify the extent to which a mortgage will continue to subsist after an award has been made. Subject to the provisions of this section, the Board have full authority to modify the terms of the original mortgage upon which the loan had been advanced.

Board has, therefore, jurisdiction to order the usufructuary mortgagee to restore possession of the mortgaged property to the mortgagor and thus convert the usufructuary mortgage into a simple mortgage. The amount at which the mortgage debt is settled would however continue to be a charge under s. 27 on the mortgaged property until the terms of the settlement have been fulfilled.

Mr. *Dinesh Chandra Roy*, for the Petitioners.

Mr. *Jnanendra Kumar Roy*, for the Opposite Party.

Order.—This rule is directed against the order of Moulavi Abul Hossain, Honorary Magistrate of Serajganj, dated December 22, 1939 under which he convicted the petitioners under s. 379, I. P. C. and sentenced them to pay fines of Rs. 52 each or in default to undergo rigorous imprisonment for two months each. The case for the prosecution appears to have been that the complainant was the mortgagor in respect of certain property which had been mortgaged to Fazlur Rahman Sarkar, petitioner No. 1 and also to the father of Abdul Gani, petitioner No. 2 under a usufructuary mortgage which was executed on February 17, 1932. In due course the complainant applied to the Mesra Debt Settlement Board for the settlement of his debts including the debt covered by the above-mentioned mortgage. The amount of these debts was duly determined under s. 18, Ben. Agri. Debtors Act, and on October 8, 1938 the Debt Settlement Board settled the complainant's debts under an award, one of the terms of which was that, as far as the debts due to the petitioners were concerned, these should be liquidated by means of annual payments of Rs. 7-5-0 a year for 20 years and that, in the meantime, the mortgaged property would be made over to the possession of the mortgagor with effect from the beginning of *Magh* 1345 *B. S.* It was the complainant's case that in accordance with the terms of this award the mortgaged property came to his possession and he cultivated it through his *bargardars*, but that on July 17, 1939 the petitioners together with a number of other people entered the land and cut away and took jute therefrom valued at about Rs. 80. The main defence of the petitioners before the trial Court was to the effect that they were not guilty and did not take part in the alleged occurrence. The learned Magistrate after a careful discussion of the evidence came to the conclusion that the complainant's debt to the petitioners had been settled under the award of the Debt Settlement Board on October 8, 1938, as alleged by him, and that as a result of the award he had obtained possession of the mortgaged property and had grown jute thereon through his *bargardars*, which had been cut and taken away by the petitioners. The learned Magistrate further found that the prosecution case had been satisfactorily proved and the petitioners were guilty under s. 379, I. P. C.

The main point urged on behalf of the petitioners in connection with this rule is that they should not have been convicted under s. 379, I. P. C. because in view of the provisions of s. 27, Ben. Agri. Debtors Act, the Debt Settlement Board had no jurisdiction to direct that the mortgaged property should be made over to the complainant and in this view of the case, this term in the award dated October 8, 1938, must be regarded as being without jurisdiction. It is, therefore, contended that the usufructuary mortgage dated February 17, 1932, should have been regarded as still subsisting on July 17 1939, the date of the occurrence; and this being the case, the petitioners could not be convicted of theft. From a reference to the proceedings of the Debt Settlement Board there is no doubt that the debt due to the

petitioners was duly determined under s. 18, Ben. Agri. Debtors Act, and that this debt was settled by means of an award under s. 19 of the Act. Under s. 25 (1) (*e*) of the Act it is laid down that amongst other particulars which should be included in the award are directions as to the manner and the order in which and the times at which the amounts referred to in cl. (*d*) shall be paid. Clause (*d*) of this section refers to the amount to be paid to each creditor for each debt owing to him under the terms of an amicable settlement or of an order of the Board under s. 19 or s. 22. It is, therefore, clear that the Board had jurisdiction to give directions as to the manner in which the sum for which the debt had been settled should be paid; their directions on this point were to the effect that the debt should be settled for Rs. 151-4-0 which sum should be payable by annual instalments of Rs. 7-5-0 as already stated. Under the terms of the usufructuary mortgage, which was executed on Februaay 17, 1932, it was stipulated that the amount of the debt together with the interest thereon would be liquidated, by making over possession of the mortgaged property to the mortgagee for a period of 15 years. It would therefore appear to have been the intention of the parties according to the terms of the mortgage that the debt should be liquidated in the above mentioned manner.

Obviously, having regard to the provisions of s. 25 (1) (*e*), Ben. Agri. Debtors Act, the Debt Settlement Board had authority to prescribe some other manner for liquidating the debt and in my view, it cannot be said that the directions which they gave in respect of this matter were beyond their powers. In this connection, it is argued by the learned Advocate for the petitioners that, in view of the provisions of s. 27 of the Act, the Debt Settlement Board had no authority to alter the usufructuary character of the mortgage. Section 27 (1) of the Act is in the following terms:

"When an award is made as regards any debt which is secured by a mortgage, lien or charge on any immovable property of a debtor, such mortgage, lien or charge shall subsist to the extent of the amount payable in respect of such debt under the award until such amount has been paid or the property has been sold for the satisfaction of such debt or the debtor has been granted a certificate of discharge under sub-s. (5) of s. 22."

In my view the intention of the Legislature in enacting this section was merely to specify the extent to which a mortgage will continue to subsist after an award has been made. The sum specified in the award must obviously be regarded as a charge on the mortgaged property until the conditions of the settlement have been fulfilled, but subject to the provisions of this section, it would appear that the Board have full authority to modify the terms of the original mortgage upon which the loan had been advanced. In the case with which we are now dealing the effect of the award dated October 8, 1938 was merely to convert the usufructuary mortgage dated February 17, 1932 into a simple mortgage, and I am not prepared to accept the argument to the effect that in doing so the Debt Settlement Board acted without jurisdiction. There can be no doubt from the findings of the learned Magistrate that, at the time of the occurrence, the mortgaged land was actually in the possession of the complainant, and that all the elements of an offence under s. 379, I. P. C. are present. This being the case, I am of opinion that the convictions of the petitioner are correct. This rule must therefore be discharged and the order of the learned Magistrate dated December 22, 1939 is affirmed.

D. *Rule discharged.*

PATNA HIGH COURT

Criminal Revision Application No. 524 of 1940

September 6, 1940

DHAVLE, J.

SAIDU KHAN AND OTHERS—PETITIONERS

versus

GAYA PRASAD—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 200—Anticipatory protest petition and petition filed after Police report—Distinction between—Anticipatory protest petitions, if amount to complaints.

The only distinction between anticipatory protest petition, that is to say, petition made to the Magistrate before the receipt of the Police report and that filed after Police report, is, that an anticipatory protest petition may possibly call for no action at all if the Police report that is received afterwards actually places the accused persons on their trial. This position can of course never arise in connection with petitions of protest filed after the receipt of the Police report. But apart from this, the two stand on much the same footing. Petitions amount to petitions of complaint on which the petitioners must be examined under s. 200, Criminal P. C.

Cr. R. App. from an order of the Sessions Judge, Patna, dated July 15, 1940.

Messrs. *S. Jafar Imam, K. P. Varma* and *S. C. Chakravarti*, for the Petitioners.

Messrs. *S. K. Banerji* and *B. K. Banerji*, for the Opposite Party.

Order.—This is an application in revision against an order of the Sessions Judge of Patna directing a further enquiry under s. 436, Criminal P. C. It appears that on the evening of March 31, 1940, the opposite party lodged an information with the Police about offences under ss. 147, 379 and 436, I. P. C. against the first seven petitioners before me. The Police investigation took a long time, and on May 10, 1940, the opposite party put in a petition to the Sub-Divisional Magistrate praying that a charge sheet may be called for from the Police, and the accused persons, namely the first seven petitioners, who were accused in the first information, as well as the six other persons who are among the petitioners before me, be placed on their trial. Three days afterwards the Magistrate disposed of the Police report which was what they called a final report as distinguished from a charge sheet, and ordered that the case be entered as true under ss. 147 and 379, I. P. C. but as a case of insufficient evidence. On the application made by the opposite party on May 10, the Magistrate on this date merely passed the order "file." The learned Sessions Judge was moved in revision and treated this order "file" passed on the opposite party's application of May 10, as an order summarily dismissing a complaint.

Mr. Jafar Imam who appears for the petitioners suggested that though similar applications filed by parties who were dissatisfied with a Police report have been treated in many reported decisions as petitions of complaint on which the petitioners must be examined, there is a distinction attaching to anticipatory protest petitions, that is to say, petitions made to the Magistrate before the receipt of the Police report. The only distinction that I can see seems to be that an anticipatory protest petition may possibly call for no action at all if the Police report that is received afterwards actually places the accused persons on their trial. This position can of course never arise in connexion with petitions of protest filed after the receipt of the Police report. But apart from this, it seems to me that the two stand on much the same footing. It is also common ground before me that it has actually been held on more than one occasion in this Court that such petitions amount to petitions of complaint on which the petitioners must be examined under s. 200. It is, therefore, impossible to interfere with the order of the learned Sessions Judge on the footing that he erred in treating the application made by the opposite party on May 10, as a complaint.

It was also suggested on behalf of the petitioners that this was not a case in which a further enquiry should have been ordered, but that the form of the order of the Sessions Judge should have been somewhat different. The answer to this is that s. 436 specifically authorizes the Sessions Judge in a case of this kind to direct the Subordinate Magistrate concerned 'to make further enquiry.' My attention was drawn to the fact that petitioners Nos. 8 to 13 were not named in the first information at all. That may be, but the point does not really arise at the present stage. It will be for the Magistrate who makes the further enquiry and who deals with the case to decide how far any distinction can be made between the first seven petitioners and the next six I cannot go into the merits of the case at this stage any more than could the learned Sessions Judge; and indeed, learned Counsel for the petitioners has carefully, and very properly refrained from taking me into the merits of the case. The application in revision fails and is dismissed.

S. *Application dismissed.*

SIND CHIEF COURT

Reference No. 81 of 1938
July 26, 1940
DAVIS, C. J. AND LOBO, J.

COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN—APPLICANT

versus

IBRAMHIMJI HAKIMJI FIRM AND OTHERS —ASSESSEES—OPPONENTS

Income Tax Act (XI of 1922), ss. 3, 4 (3) (i), 6 9, 33, 34, 35—Trustees of private trust, if association of individuals within s. 3—Private waqf *for maintenance of settlor's family—Income, if taxable —Trustees of such* waqf *are not owners of income—Income to be taxed in hands of beneficiaries—Powers of Income-tax Officer in matter of revision.*

The Trustees under the trust constitute an association of individuals within the meaning of s 3 of the Act, but that does not make them owners within the meaning of s. 9.

A difference must be drawn between property dedicated in name and in fact to God, in short a difference must be drawn between a private *waqf* created, if not primarily, at least in part, for the maintenance of the settlor's family, and a *waqf* created for charitable or religious purposes falling within the exception in s. 4 (3) (i) of the Income Tax Act. So far as the *waqf* operates as a *waqf* for charitable and religious purposes, immunity from taxation can be claimed, but so far as the *waqf* operates for the maintenance of the settlor's family or other *quasi*

secular purposes, so far it appears to us the income is liable to taxation. 182 Ind. Cas. 712 (1), relied on. [p. 259, col. 2.]

For the purpose of ss. 6 and 9, Income Tax Act, the trustees of a private *waqf* created for maintaining the settlor's family are not the owners of the income. The income should, therefore, be taxed in the hands of the beneficiaries and not in the hands of the trustees. [p. 260, col. 1.]

It is not open to an Income-tax Officer, when he has proceeded to a final assessment to reopen that assessment whenever and, however, he pleases. The powers of Income-tax Officers in the matter of revision are limited by ss. 33, 34 and 35 of the Income Tax Act. [p. 258, col. 2.]

Reference made by the Commissioner of Income-tax, Bombay &c., dated November 14, 1938.

Mr. *Partabrai D. Punwani*, Advocate General, for the Applicant.

Mr. *Suganlal Hassanand*, for Opponents (Assessees).

Davis, C. J.—This is a reference by the Commissioner of Income-tax, Bombay Presidency and Sind under s. 66 (2), Income Tax Act, relating to the assessment for the year 1937-38 of an association of individuals Messrs. Ibrahimji Hakimji, Ghulam Hussain Ibrahimji and others, Trustees of the *waqf* properties of Seth Ibrahimji Hakimji. This is a case of private *waqf*, now valid under the Mussalman Waqf Validating Act of 1913, and the real question at issue is whether the tax is to be assessed upon the income in the hands of the trustees as an association or upon the income in the hands of the beneficiaries.

The Advocate for the assessees relies principally upon a Bombay case in *Commissioner of Income Tax, Bombay* v. *Abubakar Abaul Rehmam* (1). Some confusion appears to have arisen in the first instance as to the proper designation or identity of the assessees. The assessment was first made by the Income-tax Officer upon the Ibrahimji Hakimji trust on an income of Rs. 2,937 left after payments to charities and various beneficiaries had been deducted. An appeal was made against this assessment principally upon the ground that the *waqf* as a charity was exempt, but also upon the question of the identity of the assessees. Before this appeal was decided, however, the Income-tax Officer came to the conclusion that this assessment was incorrect and he issued a second notice in the matter of this same income but addressed it, as he thought, to other assessees, namely, Seth Ibrahimji Hakimji, Ghulam Hussain Ibrahimji and others, trustees of the *waqf* properties of Seth Ibrahimji Hakimji, as "per Seth Ghulam Hussain Ibrahimji, Garden Road, Karachi". Though we accept for the purpose of this reference the finding of fact by the Commissioner that these two assessees, the Ibrahimji Hakimji trust in the first case, and the trustees by name in the second case, were different entities, and he answers the questions referred to us on this basis, were we deciding this question of fact, we think we should have come to the conclusion that the trust on whom the first notice was issued and the individual trustees who composed the trust were essentially the same. Indeed, the fact that the Income-tax Officer issued these two notices has been made the basis of much argument before us, for relying upon the case in *Commissioner of Income Tax, Bombay, Presidenby & Aden* v. *Firm Khemehand Ramdas* (2), it has been argued before us that the Income-tax Officer had no power to cancel his first assessment, he having proceeded finally under the Act to make a formal asssesment on the assessees, the trust. He could not, therefore, make a second assessment upon the same income on the second assessees, the trustees, as an association of individuals. Therefore, it was argued the second assessment was bad; and there is no first assessment in existence because that has been quashed on appeal by the Assistant Commissioner, when by consent the appeals against both assessments were heard together and the second assessment upon the trustees as an association was confirmed.

There is, however, no need for us to decide in this referenee the general question of how far an Income-tax Officer, having proceeded to a formal assessment upon the income in the hands of *A*, can treat that assessment as of no effect and proceed to a formal assessment upon the same income in the hands of *B*. The third question referred to us, which involves this question of what might be called a double assessment of the same income, is in the following form;

"(iii). Whether the assessment in dispute is invalid because the appeal londged against the assessment in the name of "Ibrahimji Hakimji Trust" was not decided by the Assistant Commissioner but was kept back for hearing along with the

(1) 41 Bom. L R 232; 182 Ind. Cas. 712; I L R (1939) Bom. 284; A I R 1939 Bom. 195; 12 R B 33.

(2) 32 S L R 549; 175 Ind. Cas. 1; A I R 1938 P C 175; I L R (1938) Bom. 487; 65 I A 236; 1938 O L R 291; 1938 A L R 436; 10 R P C 303; 4 B R 645; 42 C W N 873; 48 L W 47; 1938 O W N 621; 67 C L J 442; (1938) A L J 754; (1938) 2 M L J 115; (1938) M W N 888; 40 Bom. L R 854 (P C).

appeal against the assessment in dispute as agreed to by the assessees,"
and must be decided on its own particular facts.

It could have been argued that if the Income-tax Commissioner had not found as a matter of fact that the "trust" and the "trustees" were different persons, and second notice issued nominally under s. 22 could have been regarded as essentially a notice by the Income-tax Officer under s. 34, on the principle that what has to be looked at is what in fact and in substance has been done, and that mere labels, mere references to sections, do not count. So it might be held that the second notice on the assessees under s. 22 in the circumstance of the case substantially complied with and was in effect a notice under s. 34. We must, however, treat this case on the basis that the two notices were on two different persons. Thus, it might well be argued that the first assessment under the order dated July 21, 1937, was valid until it was set aside in appeal, and that the second assessment made under the order dated January 14 1938, and while the appeal against the first assessment was pending, was contrary to law because it was made after the first assessment, which had not been set aside and was still in force and the same income cannot be assessed twice in the hands of different persons.

It appears, however, that it was agreed between the assessees and the Assistant Income-tax Commissioner that the appeal against the first assessment, when it came up for hearing before the Assistant Commissioner on October 5, 1937, should be adjourned pending an appeal to be made against the second assessment when it was made and that both appeals should be heard together. Otherwise the Assistant Commissioner would have heard the appeal against the first assessment on October 5, 1937, before the second assessment was made, when, if the appeal had been dismissed, presumably the second assessment would not have been made, while if the appeal had succeeded, the way for the second assessment would have been left open.

It would thus appear that the assessees themselves agreed to the course that was taken, and that in equity they had no cause for complaint. We do not think that we have here a question of jurisdiction which consent cannot give but a matter of errors in procedure which could be, and were in this case, in fact, condoned. It cannot be said that the Income-tax Officer had no inherent jurisdiction over the subject-matter in dispute so as to attract the principal laid down in *Ledgard* v. *Bull* (3), referred to in *Allah bux* v. *Nusserwanji & Co.* (4). We would invite the attention of the Income-tax Officers concerned to the case in *Commissioner of Income Tax, Bombay Presidency and Aden* v. *Firm Khemchand Ramdas* (2), to which we have referred and the necessity of following the priniciples laid down therein. It is not open to an Income-tax Officer, when he has proceeded to a final assessment to reopn that assessment whenever and however he pleases. The powers of Income-tax Officers in the matter of revision are limited by ss. 33, 34 and 35 of the Act. Now the questions referred to us are four in number and are as follows:

"(*i*) Whether in the circumstances of the case, the assessees formed an association of individuals within the meaning of s. 3 of the Act; (*ii*) whether the said association can be said to be the owner of the *waqf* properties within the meaning of s. 9 of the Act and is rightly assessed as such; (*iii*) whether the assessment in dispute is invalid because the appeal lodged against the assessment in the name of "Ibrahimji Hakimji Trust" was not decided by the Assistant Commissioner but was kept back for hearing along with the appeal against the assessment in dispute as agreed to by the assessees; and (*iv*) whether the procedure adopted by the Income-tax Officer in serving notices on Seth Ghulam Hussain Ibrahimji contravened the provisions of ss. 2 (12) and 63."

With the third question we have already dealt as it was argued first before us. But the second question really covers the decision in this case whether it is the trustees or the beneficiaries under the trust who are to be assessed to income-tax, and it does appear that in answering this question as he had done, the learned Income-tax Commissioner has fallen into the same error as is referred to in the Bombay case in *Commissioner of Income Tax, Bombay* v. *Abubakar Abdul Rehman* (1), for in this case, as in that, the learned Commissioner quotes a passage from the judgment of the Bombay High Court in the case of *Kantisen Mohanji Ganjawalla and Brothers* (Civil Reference No. 10 of 1937) as follows:

"In the case of the other property involved, the assessees did not purchase this but it was conveyed to them by the trustees of a settlement under which they were the beneficiaries. It seems to me to be irrelevant to consider how the property vested in the association of individuals became vested in them. The question is how they have it and are using it. If they are using it for the purpose of producing income, I think the property is vested

(3) 13 I A 134; 9 A 191; 4 Sar. 741 (P C).
(4) 29 S L R 455; 164 Ind. Cas. 43; A I R 1936 Sind 99; 9 R S 30.

in them as an association of individuals, and they are properly assessable under s. 9."

And with reference to this passage also cited by the learned Commissioner in the reference to the High Court at Bombay in *Commissioner of Income Tax, Bombay* v. *Abubakar Abdul Rehaman* (1) the learned Chief Justice remarked:

"The main question which arises is whether under this *wakf* the trustees or the beneficiaries ought to be assessed. Up to a recent date, the Commissioner of Income-tax had assessed the beneficiaries on the income which they received under the *waqf* deed, as appears from his order of June 20, 1935, which is an accompaniment to Ex "E". But recently he has altered that practice in accordance with what he considers to be the law as laid down by this Court in *Commissioner of Income-tax, Bombay* v. *Laxmidas* (5) and *Commissioner of Income-tax, Bombay* v. *Dwarkadas Pitale* (6), and in two unreported cases to which the learned Commissioner refers. Those cases, in my opinion, do not govern the present questions, because in none of those cases was the Court dealing with trustees. In all those cases immovable property had become vested in two or more persons who were using it for the purpose of producing income for their own benefit, and the Court held that they were properly assessable as an association of individuals under s. 3 in respect of the property and were not assessable separately in respect of their respective interests in the property. But in none of those cases, as I have said, was there any question as between a trustee and beneficiary. The trustees in this case are no doubt an association of individuals, but that consideration does not determine the question whether they or their beneficiaries should be assessed to income-tax."

Now under the *waqf* deed made by Ibrahim Hakimji, dated February 17, 1932, which made certain immovable properties the subject of the *waqf*, after the payment of rates and taxes, and 10 per cent. of the net income into a depreciation fund for repairs, Rs. 35 per month was to be spent on the Dawoodi Borah Madressah in Karachi, and of the balance of the net income, Rs. 200 per month was to be paid to the wife of the settlor Amtullabai, Rs. 50 per month to each of the four daughters of the settlor, while the residue was to be divided in equal shares among the four sons. The settlor appointed himself and his four sons as trustees, but we do not think that this makes any difference to the decision of the case. After the extinction of all male descendants in the direct line the *waqf* property was to go to its ostensible purpose, charities, such as *musjids, madressahs, musaffirkhanas* of the Dawoodi Borah community and other uses such as the maintenance of the poor and needy of the Dawoodi Borah community.

(5) A I R 1938 Bom. 41; 173 Ind. Cas. 482; I L R (1937) Bom. 830; 39 Bom. L R 910; 10 R B 335.

(6) A I R 1938 Bom. 353; 177 Ind. Cas. 447; 40 Bom. L R 455; 11 R B 81 (1).

It was argued before us on behalf of the assessees that a *waqf* being a dedication to God could not be the subject of taxation but we think a difference must be drawn between property dedicated in name and in fact to God, in short a difference must be drawn between a private *wqaf* created, if not primarily, at least in part, for the maintenance of the settlor's family, and a *waqf* created for charitable or religious purposes falling within the exception in s. 4 (3) (*i*) of the Act. So far as the *waqf* operates as a *waqf* for charitable and religious purposes, so far, it appears to us, immunity from taxation can be claimed, but so far as the *waqf* operates for the maintenance of the settlor's family or other *quasi* secular purposes, so far it appears to us the income is liable to taxation. This is the opinion of the Bombay High Court in *Commissioner of Income-Tax, Bombay* v. *Abubakar Abdul Rehman* (1) already referred to. This is also the opinion of a Bench of the Allahabad High Court in *Muhammad Qamar Shah* v. *Muhammad Salamat Ali Khan* (7), at p. 517. At p. 517 the learned Judges say:

"It is true that according to the view taken in *Muhammad Rustam Ali Khan* v. *Mushtaq Hussain* (8) the estate in the *waqf* property vests in God after the creation of a public *waqf*. But we doubt if it can be argued that in private *waqfs* the estate vests in God. The correct view would be to hold that the estate vests in the beneficiaries."

It was argued by the learned Advocate-General that not only was the income of the *waqf* other than that part spent on charitable purposes liable to taxation, but it was liable to taxation in the hands of the trustees, and he referred to the case in *Umar Bakhsh* v. *Commissioner of Income-tax, Punjab* (9), but the question there at issue was not as to whether the income was liable to taxation in the hands of the trustees or the beneficiaries, but whether it was liable at all. It of course makes a difference to the revenue whether the income is liable to taxation in the hands of the trustees before it is divided up among the beneficiaries or after it is divided up.

In this case the total income assessed in the hands of the trustees for the second

(7) 55 A 512 (517); 147 Ind. Cas. 926; A I R 1933 All. 407; (1933) A L J 685; L R 14 A 450 Rev.; 17 R D 593; 6 R A 583.

(8) 42 A 609; 57 Ind. Cas. 349; A I R 1921 P C 105; 47 I A 224; 39 M L J 263; (1920) M W N 565; 12 L W 539; 18 A L J 1089; 28 M L T 220; 32 C L J 471; 25 C W N 122; 1 P W R 1921 (P C).

(9) 12 L 725; 132 Ind. Cas. 689; A I R 1931 Lah. 578; 33 P L R 349; Ind. Rul. (1931) Lah. 637.

assessment confirmed in appeal was Rs. 8,967 liable to a tax of Rs. 455-5-0, but the position will be very different if the wife, each of the four daughters and each of the four sons is to be taxed on their individual shares. But this we think was the intention of the Legislature and the scheme of the Act, and must be done. We have heard arguments on behalf of the assessees that the trustees, so misnamed under the deed of trust, are not owners, for the owner is God, but are merely managers or superintendents. We doubt if God can be rightly described as the owner of *waqf* properties subject to the *quasi* religious or charitable burden of the maintenance of the settlor or his family, at least not within the meaning of the Income Tax Act. But we do not think for the purpose of ss. 6 and 9, Income Tax Act, that the trustees are the owners of the income, for after all it is income which is taxed under the Income Tax Act. It is true the language of s. 9 does give rise to some difficulty. Section 9(1) is as follows :

"The tax shall be payable by an assessee under the head 'property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances.'

Now, we think this must mean that the "annual value" is the "assessable income" of the immovable property. The person liable to taxation is the owner of the income of the annual value, and we think this is the beneficiary who receives and keeps the income and not the trustees who, in this case are the mere channel through which the income passes to its named recipients. It is, we think, no answer to say that the trustees first receive the income, and a person is not immune from income-tax on his own income because he chooses to give that income away. But the trustees do not here receive an income which they can give away or retain as they wish. It is not their income; they cannot keep it; they must deal with it as the trust declares.

We think the decision in *Currimbhoy Ebrahim* v. *Commissioner of Income-tax, Bombay* (10) must be read in the light of its own facts. Under the Act endowing the Baronetcy the trustees paid only the balance to the Baronet. In their hands was the disposal of the income, it is true, in accordance with the terms of the trust, but the beneficiary had no claim on any particular sum. We think, therefore, this is a case where the income is found with the beneficiaries and should be taxed in their hands. There remain then only questions (*i*) and (*iv*). So far as question (*i*) is concerned, we have no doubt that the trustees under the trust constitute an association of individuals within the meaning of s. 3 of the Act, but that does not make them owners within the meaning of s. 9. The answer to the first question is in the affirmative. The answer to the fourth question is, we think, also in the affirmative. In this case it has been found as a matter of fact that Seth Ghulam Hussain Ibrahimji was the managing trustee. He was therefore properly served with notice under s. 2 (12) (*a*) read with s. 63, Income Tax Act, but in view of our answer to the second question, the answers to the three other questions are irrelevant.

We think, the assesses are entitled to their costs, and the refund of the Rs. 100 fee. The questions are answered accordingly. We have also a reference relating to the assessment on the same assessees for the year 1936-37. There is no material difference in the two cases; the questions referred to us are the same, and the answers will be the same as the answers given on the case stated for the year 1937-38 for the reasons given in the order. It is true that in the course of the proceedings for the assessment of 1936-37, the Income-tax Officer issued a notice to the assessees under s. 34 of the Act, but this makes no material difference to the answers to be given on the questions referred to us. The order as to costs in this case will be the same as the order as to costs in the connected case.

S. *Answer accordingly.*

(10) 61 I A 209; 148 Ind. Cas. 855; A I R 1934 P C 116; 58 B 317; 6 R P C 145; (1934) A L J 429; 1934 A L R 559; 38 C W N 618; 66 M L J 643; 39 L W 771; (1934) M W N 582; 1934 O L R 440; 35 Bom. L R 557; 59 C L J 403 (P C).

ALLAHABAD HIGH COURT

Criminal Miscellaneous No. 7 of 1940

October 2, 1940

COLLISTER AND BAJPAI, JJ.

RADHEY LAL—APPLICANT

versus

NIRANJAN NATH—OPPOSITE PARTY

Contempt—Contempt of Court—Essence of offence —Insolvency application by L *against* N *containing statements defamatory of* N*—Complaint by* N *against* L *under s.* 500, *Penal Code* (*Act XLV of* 1860), *to*

vindicate his character and integrity—N held not guilty of contempt of Court.

It is of great importance to the administration of justice that it should be allowed to take an unfettered course and not be sullied and besmirched in any manner. The essence of an offence of contempt of Court lies in the fact that the person complained of has done something which might have the effect of prejudicing the fair trial of a pending case. [p. 263, col. 2.]

L applied to the Insolvency Court praying that *N* should be adjudged insolvent and in this application made certain statements defamatory of *N*. *N* instituted a complaint against *L* under s. 500, I. P. C, in order to vindicate his character and integrity:

Held, that *N* was not guilty of contempt of Court, as nothing was done by *N* from which it could be gathered that if *L* withdrew the allegations which he had made against *N's* character in the insolvency proceedings *N* would drop the complaint which he had preferred under s. 500, I. P. C.

[Case-law referred to.)

Held, also that threat by *N* before the institution of the insolvency proceedings that if *L* filed insolvency proceedings against *N*, he would file a complaint for defamation against *L* amounted only to a warning so that an unguarded action may not be taken and did not amount to contempt of Court.

Sir *Tej Bahadur Sapru*, Messrs. *Shiva Prasad Sinha* and *C. B. Agarwala*, for the Applicant.

Messrs. *S. K. Dar* and *Din Dayal*, for the Opposite Party.

The Govt. Advocate, for the Crown.

Bajpai, J.—Lala Radhey Lal, a money-lender of Agra, is the applicant before us. He prays (1) that Niranjan Nath, the opposite party, may be dealt with and punished according to law for contempt of Court of the Insolvency Court of Agra which is seized of the insolvency case filed by the petitioner against Ram Chand Niranjan Nath and, (2) that the proceedings in the criminal case under s. 500, I. P. C. (*Seth Niranjan Nath*, Complainant *versus* Lala *Radhey Lal*, accused) pending in the Court of the City Magistrate of Agra be stayed till the decision of this application. The facts seem to be that Niranjan Nath carries on business at Agra as a bookseller and is also a military contractor. He had occasion to borrow money on negotiable *hundis* in the market of Agra. The *hundis* were drawn in favour of creditors and such *hundis* sometimes used to be endorsed in favour of other persons. In the month of April 1940, some of the *hundis* drawn by Niranjan Nath fell due and although some of them were paid by the endorsers they were not paid by the drawer Niranjan Nath, whereas some others were not honoured at all. On May 25, 1940 Lala Radhey Lal filed an application in the Court of the Insolvency Judge of Agra against Ram Chand Niranjan Nath through Niranjan Nath praying that the opposite party be declared insolvent and a Receiver be appointed of his property and his estate be administered according to law. In this application Lala Radhey Lal makes mention of five *hundis* which came to be held in due course by Lala Radhey Lal the amounts of which *hundis* were not paid by Niranjan Nath. It was stated in para. 5

"That the business of the opposite party failed and he suspended payment on or about *Chait Sudi* 5, *Sambat* 1997, corresponding to April 11, 1940, and has as a matter of fact given notice to his creditors that he cannot pay his debts for the last time again on or about the second week of May 1940."

In para. 6 it was said:

"That with the object of bringing pressure on the creditors the opposite party also gives out that he has transferred his property to his relations. The applicant does not admit this but in any view if there is any such transfer it is entirely bogus *farzi* and fraudulent."

Notice of this application was issued to Niranjan Nath and was served some time in the first week of June. It is however admitted that Niranjan Nath came to know of this application on May 26, 1940 through one of his servants and he then obtained a copy of the application in order to file his objections in the Civil Court, but such copy was delivered to him on June 2, 1940 and the Civil Courts had by that time closed for the long summer vacation. On June 10, 1940, Niranjan Nath filed a complaint in the Court of the City Magistrate of Agra under s. 500, I. P. C., against Lala Radhey Lal. He alleged in this complaint that he was a *rais* and an approved Govt. military contractor and a reputed businessman of Agra coming from a respectable and rich family and that he was a fellow of the Royal Society of London and paid substantial amount of income-tax and last year was assessed to income-tax of Rs. 857-3 0 on an income of Rs. 11,500. The complainant said that the accused was a near relation of the complainant's rivals in his trade of books and with a view to affect his credit in the market adversely made the following false statements in the course of an insolvency petition filed by him without justification and with absolutely false allegations on May 25, 1940 and thereby caused the complaintant's credit to fall in the estimation of his fellow businessmen and in the money market generally:

"That the business of the opposite party failed and he suspended payment on or about *Chait Sudi* 5, *Sambat* 1997, corresponding to April 11 1940, and has as a matter of fact given notice to his creditors that he cannot pay his debts."

The allegations aforesaid regarding failure of business, suspension of payment and giving notice to creditors intimating inability to pay were absolutely false and malicious and had been made solely with the object of lowering his credit and as the insolvency petition containing the aforesaid defamatory allegations was presented by the accused in open Court on May 25, 1940 and as it was pressed in open Court by his Counsel on the aforesaid date within the hearing of persons present in Court and as it was given publicity by the accused and his agents, the accused was guilty of an offence punishable under s. 500, I. P. C., and therefore a warrant of arrest should issue against the accused and he be tried according to law. The City Magistrate issued a bailable warrant fixing June 26, 1940. The complainant was examined on June 10, 1940 on the back of the complaint and he corroborated the statements made in the complaint and said that his business had not failed at all and that he had given no notice of suspension of payment to his creditors, but that, as a matter of fact, the complainant had sent money to the accused after April 11, 1940 and had got receipts by him. The complainant further stated that he had been defamed in general because the accused person made the statement in the presence of people as well as spread it among people in various other ways and he therefore desired that the accused might be arrested by means of a warrant and punished. It is stated by the learned Counsel for the applicant that on June 18, 1940 the complainant Niranjan Nath applied for a search warrant for the seizure of the account books of Radhey Lal for the year 1996-97 and the books were actually seized on June 20, 1940, and later, on June 22, 1940, Niranjan Nath submitted for the information of the Criminal Court an application that the accused had defamed him not only in the complaint, but also on previous occasions the accused had defamed the complainant with similar applications and the allegations in the insolvency case were simply repetitions and that the accused persisted in defaming the complainant.

On June 27, 1940 a regular application was filed by the complainant in Court to the same effect and it was prayed that either the Court can be pleased to consider the said petition as a part of the complaint already filed or it may be pleased to treat this as a separate complaint and amalgamate this with the previous one so as to avoid multiplicity of complaints. Niranjan Nath was also examined by the Criminal Court on June 27, 1940 when he made a fuller statement as to the defamatory statements made by Radhey Lal in Court in the insolvency petition of May 25, 1940 and before that on earlier occasions in the presence of persons and it was stated therein that when the accused Radhey Lal made defamatory statements prior to May 25, 1940 and had expressed his intention of getting Niranjan Nath declared an insolvent, Niranjan Nath had sent word to Radhey Lal that if he would do so Niranjan Nath would bring a case for defamation. This message was sent through one Jwala Prasad. The accused had then said that if Niranjan Nath liked he was at liberty to do so. Niranjan Nath further stated that on April 12, 1940 he had paid the money of a *hundi* to the accused and he had paid the money of another *hundi* to the accused in the month of *Baisakh*.

The present application for contempt of Court was filed in this Court on July 3, 1940, and one of us issued notice to Niranjan Nath to reply to the application and the proceedings in the Criminal Court were stayed. Niranjan Nath has appeared in response to the notice, and learned Counsel for the parties have argued the case at length. Our attention has been drawn to three cases of this Court and to a case in Oudh. One of the cases cited at the bar was decided by ourselves and we shall refer to the various authorities at this stage and in the light of those authorities proceed to determine "whether the acts of the opposite party which are complained of by the applicant were calculated to prejudice a fair trial" in the insolvency proceedings pending before the Insolvency Judge of Agra or were intended to "exert pressure upon the applicant in respect to those proceedings and if so, whether they amounted to a contempt of Court." The contention of the opposite party is that they could not in any way prejudice a fair trial of the insolvency proceedings and that they were filed with the sole object of clearing his character and with that object alone the protection of the Criminal Court was sought.

It cannot be doubted for a single moment

that it is of great importance to the administration of justice that it should be allowed to take an unfettered course and not be sullied and besmirched in any manner. The essence of an offence of contempt of Court lies in the fact that the person complained of has done something which might have the effect of prejudicing the fair trial of a pending case. In *Rajender Singh* v. *Uma Prasad* (1), a plaintiff after the settlement of issues gave notice to the defendant's guardian drawing attention to a certain plea taken in the written statement and alleged that the said plea was defamatory *per se* of the plaintiff's deceased father and lowered his reputation in the estimation of his fellowmen and caused him harm in various ways and then added that unless within a week of the receipt of the notice an unqualified apology was sent and the aforesaid statement was withdrawn by putting an application to that effect in the said Court and also by publishing the said withdrawal and apology in such newspapers as were required by the sender of the notice in order to clear the character and the conduct of his late father and unless further within the same one week the sum of Rs. 10,000 was paid as damages, action would be taken by him in Civil and Criminal Courts as advised; and it was held by a Bench of this Court the sending of the notice amounted to a direct interference with the administration of justice in preventing the defendant from pressing his defence and putting forward the plea which might, if established, prove fatal to the suit; and in that way an indirect attempt was made to exclude the plea taken on behalf of the minor defendant from the consideration of the Court and, as such, the plaintiff and his Counsel were guilty of contempt of Court. It is of importance to note that the notice complained of and the threat held out was after the filing of the civil suit and "was intended to put extraneous pressure on the defendant in order to compel him to withdraw the plea contained in his written statement."

In *Baldeo Sahai* v. *Shiva Datt* (2), the facts were that a suit had been instituted for possession of land for removal of certain constructions. In the written statement the defendant alleged that the suit had been brought at the instance of the brother of the plaintiff who was *awara*. The plaintiff then filed an application for striking out the word *awara* and asked for an apology stating that on failure of the apology proceedings would be taken. The Munsif passed an order stating that the defendant's Vakil had stated that the word *awara* be substituted by the word *awaragard* which simply meant an aimless wanderer while *awara* might also mean a vagabond and therefore an amendment should be made. The plaintiff then sent a notice to the effect that the use of the word *awara* in the written statement was without justification and defamatory and therefore a sum of Rs. 1,000 should be paid as damages, otherwise action would be taken in law. The defendant then applied to this Court that the application to strike out the word *awara* and the notice demanding damages amounted to a contempt of the Civil Court where the oringinal suit was pending. It was held that the plaintiff of the suit was not guilty of contempt of Court and it was observed by Bennet, J., that a distinction was to be drawn between *Rajender Singh* v. *Uma Prasad* (1), and the case before them because the notice in the former case required that the plea in the written statement was to be withdrawn, whereas in the case before them there was nothing in the notice asking that any action should be taken in the conduct of the civil suit and the notice was merely the usual notice which was given as a preliminary to filing a suit for damages for libel. In *Mohammad Yusuf* v. *Imtiyaz Ahmed* (3), the facts were that one Imtiyaz Ahmad Khan filed a complaint under s. 500, I. P. C., against Nur Muhammad who was a prosecution witness in a case proceeding against Imtiyaz Ahmad Khan under ss. 420 and 406, I. P. C., and had made certain statements which might be said to be defamatory of Imtiyaz Ahmad Khan, and the question for consideration before the learned Judges was whether Imtiyaz Ahmad Khan was guilty of contempt of Court where the proceedings under ss. 420 and 406, I. P. C., were pending. The complainant of that case filed an application before the Oudh Chief Court praying that Imtiyaz Ahmad Khan should be punished for contempt. The argument was that Imtiyaz Ahmad Khan should have waited until the case under ss. 420 and 406, I. P. C., had terminated. The learned Judges ob-

(1) (1935) A L J 29; 159 Ind. Cas. 193; A I R 1935 All. 117; 57 A 573; 1935 A L R 1083; 8 R A 404.
(2) (1939) A L J 1157; 187 Ind. Cas 65; A I R 1940 All. 114; 41 Cr. L J 390; 12 R A 486.
(3) A I R 1939 Oudh 225; 181 Ind. Cas. 575; 40 Cr. L J 569; 1939 O W N 467, 1939 O L R 336; 11 R O 308.

served :

"In the first place, we do not think that he was bound to do so, and in the second place that case has been kept dragging on already from 1936 to 1939, and the implication of the argument is that Imtiyaz Ahmad Khan is to put up with defamatory statements being made without protest until such time as those proceedings terminate which might not be for several years to come. It is the existence of uncontradicted defamatory statements which damages a man's reputation beyond repair, and we are not prepared to hold that the circumstances being as they were, Imtiyaz Khan was precluded from taking action."

In *Hrishi Kesh Sanyal* v. *A. P. Bagchi* (4) we had to deal with a contempt matter and we in the end discharged the rule that was issued and held that the opposite party to the rule was not guilty of contempt of Court. The facts were that one Mr. Bagchi, an Advocate of this Court, had applied to the District Judge of Allahabad for his appointment as guardian of certain minors and notice of the application was issued to certain relations including one Hrishi Kesh Sanyal. Sanyal then filed an objection accompanied by an affidavit in which he made various imputations against the character and conduct of Mr. Bagchi. Mr. Bagchi then moved the District Judge of Allahabad for proceedings under s. 476, Criminal P. C., against Sanyal praying that an inquiry be made into certain of the allegations in the affidavit of Sanyal which were alleged to be absolutely false and Bagchi further preferred a complaint against Sanyal before the City Magistrate under s. 500, I. P. C. Sanyal then moved this Court for taking proceedings for contempt of Court against Bagchi, and we held that under the circumstances the application under s. 476, Criminal P. C., and the complaint under s. 500, I. P. C., did not amount to a contempt of Court. We discussed the previous Allahabad cases to which reference has already been made in this judgment, and we held, that

"there were no sufficient materials before us upon which we could find as a fact that the motive which actuated the opposite party in filing this complaint when he did instead of waiting until the conclusion of the guardianship proceedings was to harass and handicap the applicant in those proceedings and so interfere with the administration of justice"

and

"whatever the opposite party's real motive might have been, there was nothing in his action to suggest to the applicant that, if he withdrew any of his pleas regarding the opposite party's character, the latter would drop the complaint which he had preferred under s. 500, I. P. C."

We have considered with anxious care the circumstances under which Niranjan Nath filed his complaint under s. 500, I. P. C., against Radhey Lal and we have also taken account of the various steps which Niranjan Nath took in connection with his complaint and we find that it would be fruitless to speculate into the motives of Nirjanjan Nath. Learned Counsel on his behalf has argued that Niranjan Nath was a military contractor and a man dealing in the business of books, and it was not expected that he should wait for the termination of the insolvency proceedings before he should seek the protection of the Criminal Courts for the clearing of his character and that if he did so wait and the insolvency proceedings had taken their dreary course for a year or so, his reputation would be damaged irretrievably and his contract in the army department might have been cancelled. The argument is that it was, therefore, necessary for him to vindicate his reputation at the earliest possible opportunity and there was nothing in what he had done which would justify the inference that the object of the criminal complaint was to handicap Radhey Lal in the insolvency proceedings and thus prevent Radhey Lal from conducting with safety his insolvency proceedings. We have come to the conclusion that nothing was done by Niranjan Nath from which it could be gathered that if Radhey Lal withdrew the allegations which he had made against Niranjan Nath's character in the insolvency proceedings Niranjan Nath would drop the complaint which he had preferred under s. 500, I. P. C. In *Hrishi Kesh Sanyal* v. *A. P. Bagchi* (4) at p. 584* of the reports we said :

"Had the opposite party first tried to intimidate the applicant by holding out a threat of prosecution, thereby bringing pressure to bear upon him, the matter would have had a very different aspect."

Learned Counsel for the applicant before us contends that in the present case it is clear from the statement of Niranjan Nath made on June 27, 1940 in support of his complaint that before the institution of the insolvency proceedings Niranjan Nath had come to know that Radhey Lal intended to file insolvency proceedings and Niranjan Nath had then and there said that if insolvency proceedings were taken a case for defamation would be brought. The following passage occurs in the statement of Niranjan Nath:

"From April 1940, the accused person began to tell me and the bazar people that I would not pay the money due to a large number of people and

(4) (1940) A L J 579; 191 Ind. Cas. 641; A I R 1940 All. 497; 42 Cr. L J 811; 13 R A 283.

*Page of (1940) A. L. J.—[*Ed.*]

that I had given notice to my creditors to the effect that I would not pay anyone's money. My business had failed and that he would have me declared insolvent. Thereupon, I sent word to the accused that if he would do so I would bring a case for defamation. I sent this word through Jwala Prasad. Thereupon the accused said that if I liked to do so, I was at liberty to do so."

The contention, therefore, is that the opposite party in the present case had tried to intimidate the applicant by holding out a threat of prosecution and thereby brought pressure to bear upon him and therefore the case before us assumes a different aspect and the opposite party is guilty of contempt of Court. We did not intend to say that in every case where proceedings are intended to be taken against a person and if that person on coming to know of the intention holds out a threat that if such proceedings are taken he himself would take counter-proceedings to protect himself, the latter person is guilty of contempt of Court if both persons institute proceedings and counter-proceedings. If when the earlier proceedings have been taken a threat is held out then to the person who institutes the proceedings by the opposite party to the effect that unless the proceedings are withdrawn drastic action would be taken, the holder of the threat would be guilty of contempt of Court; but where the threat is held out before the institution of the proceedings it amounts only to a warning so that an unguarded action may not be taken. We may well conceive of a contemplated action in the nature of a blackmail and it would be dangerous to hold that if the person attempted to be blackmailed were to hold out a counter-threat, he would be guilty of contempt of Court. There is a difference between a threat before proceedings are instituted and a threat after proceedings have been instituted, and in the present case we find that all that Niranjan Nath did was to warn the applicant that if insolvency proceedings were taken by Radhey Lal, Niranjan Nath would take proper action. This does not, to our minds, amount to a contempt of Court, nor does the filing of the criminal complaint amount to a contempt of Court, and we therefore discharge the notice. It was then said that we should order the stay of the criminal complaint and our attention has been drawn to the order that we made in *Hrishi Kesh Sanyal* v. *A. P. Bagchi* (4). We find that in matters like these

"no hard and fast rule can be laid down to indicate the considerations by which a Court ought to be guided in considering the question of the stay of a criminal proceeding, pending the disposal of a civil suit, and each case must be determined upon its own facts,"

vide the case in *Gopalchandra Chakravarti* v. *Emperor* (5). In *Hrishi Kesh Sanyal* v. *A. P. Bagchi* (4) we held the view that the interests of the minors which were of paramount importance and which ought to be zealously guarded by Courts ran the risk of being jeopardized owing to the squabbles of their relations and we, therefore, thought that the guardianship proceedings should be conducted in an atmosphere of perfect serenity and for ought we knew the guardianship proceedings would come to a termination, at least so far as the original Court was concerned, soon and we, therefore, stayed the criminal complaint. Here we find that the insolvency proceedings were started on May 25, 1940 and in connection with a preliminary matter, namely the appointment of an *interim* Receiver, the record has come to this High Court and at this rate it is not likely that the insolvency proceedings would be over at an early date. The findings in the Criminal Court will not be of any importance in the insolvency proceedings and *vice versa*, and in the circumstances of he case we think that it is not desirable that the criminal complaint should be stayed. We dismiss this application, but in the circumstances make no order as to costs.

S. *Application dismissed.*

(5) 57 C 558; 121 Ind. Cas. 308; A I R 1929 Cal. 563; 31 Cr. L J 211; 33 C W N 969; Ind. Rul. (1930) Cal. 100.

NAGPUR HIGH COURT

Criminal Appeal No. 42 of 1940
July 27, 1940
GRILLE, J.

In re ABDUL GAFOOR AND OTHERS—
APPELLANTS

Confession—Co-accused—Confession by co-accused if can be made basis of conviction—Retracted confession—Value and use of—Self inculpatory confession—How far can be acted upon.

The very existence of s. 30, Evi. Act postulates that the confession of the co-accused may be used in cases where the evidence afforded—and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. [p. 269, col. 2.]

The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—where such a confession is self-inculpatory in respect of the person who made it and the person implicated therein. Merely because these confessions have been retracted in the Court of Session, it cannot

be said that they were involuntarily made. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence, and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuation by their fellows who have not confessed. 154 Ind. Cas. 273 (3), not approved. [p. 269, col. 2; p. 270, col. 1.]

No doubt when a confession is retracted and the truth of it denied, the person retracting has lied on one occasion or the other, and although in the case where the retractions are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance, it must be presumed that if these accused had been asked by the Magistrate, as they should have been, whether the confessions were false in substance or no, they would have replied in the affirmative. This does not, absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence. [p. 270, cols. 1 & 2.]

Retracted confessions must be used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or no. [p. 270, col. 2.]

[Case-law relied on.]

Cr. A. from an order of the Court of the Magistrate, First Class, Buldana, dated January 2, 1940,

Mr. *M. Y. Shareef*, for the Appellants.

Mr. *Y. S. Tambe*, for the Crown.

Judgment. — This appeal is by seven persons and Criminal Appeal No. 43 of 1940 by one Ganpatsingh. All these eight persons have been convicted of dacoity and all have been sentenced in the aggregate to ten years' rigorous imprisonment each. Three dacoities are said to have been committed in the course of one night at the same village and all the appellants, have been sentenced to six years' rigorous imprisonment for the first dacoity, to two years for the second and to two years for the third. The fact that there are two appeals arises as Ganpatsingh claimed that he accompanied the other persons on instructions of the Police and was in fact a Police informant, and that consequently he should not have been convicted at all. His appeal has been separately argued, but this judgment will cover both appeals.

The dacoity took place on the night of August 16, at the village of Pangri which is about four miles from Fattekherda, the nearest Police Station. Of the accused Abdul Gafoor, Syed Usman, Sheikh Hussein, Syed Miroo and Ramsingh are inhabitants of Fattekherda. Umar Khan is a resident of Pangri, and Sherali was temporarily staying at Pangri. Ganpatsingh is an inhabitant of Fattekherda. The raid on the village which occurred during a drizzling August night began at about 10 in the evening and lasted for about two hours The village is a small one of about 30 houses. The first house to be visited was that of Sawalaram (P. W. No. 30). The raid was conducted with very considerable noise so as to terrify the rest of the villagers, and corrugated iron roofs were beaten with sticks and stones thrown. Sawalaram was caught by two of the assailants and beaten with sticks and was told to hand over Rs. 1,100 which he was said to have with him. He denied that he had any money. He was dragged out of his house and the assailants searched the house. His mother *Mst.* Ahelabai, who had been sleeping near him, called out to a servant, Hariba, to open the main door of the house; this was by way of precaution. This man did so and was beaten. The main part of the house was then ransacked, boxes were burst open, but nothing was found, and the dacoits eventually left the house taking with them no more than Rs. 25. The next house visited was that of Balwanta (P. W. No. 11) which was near by. Balwanta and the other inmates of his house had already fled, having heard the uproar at Sawalaram's. No details of the actual ransacking of this house are available, but when Balwanta returned after the dacoits had left the village, boxes were found broken open, clothes and papers littered on the floor, and silver ornaments were missing. After this the dacoits came back to the house of Bhiwaji (P. W. No. 6), which is next door to Sawlaram's. Bhiwaji fled to the Mahar quarter of the village, and when he came back he found a similar state of things to that which had prevailed in Balwanta's house. Silver ornaments were missing and money had been stolen. After that the house of Kachra is said to have been attacked, but this is not included in the charges in this case.

In the course of the events of this night the victims profess to have recognised five of the assailants. Sawalaram and his mother both recognised Abdul Gafoor as did Bhiwaji and Balwanta, although the latter says that he recognised him by his voice alone when a question was put by him to Umarkhan whom also he recognised by his voice. Umarkhan was also recognised by

Sawalaram and his mother, and both profess to have seen him. They also speak to recognising Sherali who was on a visit to their village, and in addition Sawalaram recognises Ramsingh whom he identifies as wearing a gunny bag by way of a hood to keep off the rain, and *Mst.* Ahelabai identifies Sheikh Hussein, who is identified by no one else, as a man who was making a noise by beating the corrugated iron roof with his *lathi*. Syed Usman, Syed Miroo and Ganpatsingh were at no time identified in the village. The general concensus of the witnesses is that the raiding party numbered about nine. The village patel after the dacoits had departed made a hurried enquiry. Sawalaram who had been severely beaten was unable to give any details at the time, and Gyanu Mahar, the village Kamdar, left at 3 o'clock in the morning to report at the Fattekherda Police Station. He reached there at 4 in the morning and made his report. He found a crowd outside the Police Station and sat at Fattekherda till 1 o'clock as the Police told him that he was wanted to help to carry the Sub-Inspector's luggage to Pangri when the latter proceeded to go for investigation. The crowd was as a matter of fact occasioned by the fact that the Police had already arrested four men before Gyanu arrived to make his report of the dacoity, and although it has been strongly contended by the learned Counsel for the seven appellants that Gyanu must have been fully aware of the identity of these people and that it was because he was so aware that the written report that he made at the dictation of the victims when he returned to Fattekherda was influenced by this knowledge, it is strange that not a single question was asked him in cross examination to elicit from him that he knew who the people who had been arrested were or even that he knew that anyone had been arrested in respect of the dacoity.

The Police at Fatekherda were not unaware that a dacoity was about to be committed although they were unaware of the locality where it was to take place. The Station-House Officer at the time was Sub-Inspector Pitale (P. W. No. 1), and he had received information on August 13, and on August 15, that some Rohillas and Bundelas of Fattekerda were planning a dacoity. Both these rumours had turned out to be false, and when he was warned again on August 16, at 9 P. M., he decided to verify the statement of his informant Lalsingh (P. W. No. 5) who is a brother of Ganpatsingh and who had brought Ganpatsingh, who, he says, was his own informant, to the Police Station that night to impress on the authorities the genuineness of his information. The Sub-Inspector accordingly visited the houses of certain people as they were suspicious characters, and he found that four of them were absent, namely, Ramsingh (also Chainsingh who lives next door but who does not appear in the proceedings), Syed Miroo, Abdul Gafoor and Syed Usman. He sent for additional Police constables and called out *choukidars* and other people and set posts round these houses. Towards 3 o'clock in the morning all these four persons were captured on the way back to their houses. Abdul Gafoor was accosted outside his own house, but ran away and was apprehended in his *bagicha* about a furlong away and captured after some resistance. Syed Usman was met near the *baithak* of Rohillas and claimed that although he was a married man with a family, he had been sleeping in the *baithak* and had gone out to ease himself and was returning. Ramsingh was met near his own house and said that he had come back from his field. He gives the time as before midnight. The circumstances of the apprehension of Syed Miroo are somewhat different. When the other people were caught, there was a considerable noise, and the party watching Syed Miroo's house ran back to the Police station thinking that their man had been caught. The others had, but not Syed Miroo, and consequently a constable was ordered to go back to Syed Miroo's house. A call was then made at the house and a reply was given that Syed Miroo was not there. The party waited and after some time they heard a thud on the earth as of someone jumping over a compound wall. They then heard a cough, they repeated the challenge and Syed Miroo came out of the house. I give these details in view of the apparent discrepancy which arises from the evidence of the Police Constable concerned, Mahomed Subhan when he states that after arresting Ramsingh he was ordered to go to Miroo's house, when according to the Sub-Inspector a guard had already been posted there. It is thus clear that four of the people brought before the Court were actually arrested before any news of the dacoity had reached the Police Officers. The remaining three appellants and also Ganpatsingh were arrested on later days.

Some of the stolen property has been recovered from some of the accused. The fact that the dacoity did occur has not been disputed, neither has the identification of the articles recovered as being the property of those who suffered in the dacoities ; all that is disputed is the identity of the raiders and their identification by the victims. Property was recovered from Sheikh Hussein, Sherali and Umarkhan in circumstances which make their participation in the dacoity—and it may be noted that they were all identified—positive. An ornament was also recovered from Ganpatsingh, and this I will deal with, later. In addition Sheikh Hussein, Umarkhan and Sherali all made detailed confessions which implicated all of the accused. These confessions were in no way self-exculpatory and tallied in a remarkable degree in wealth of detail. All these three confessions were retracted in the Court of Session. There was also a confession recorded as such, although Ganpatsingh countered the statement, by Ganpatsingh. This may be left out of account as in the circumstances of Ganpatsingh's connection with the affair the learned Counsel appearing for the Crown has very rightly conceded the position contended for by the learned Counsel for the appellants that Ganpatsingh's statement cannot be taken into evidence as against them. An attempt was made to argue that no evidence concerning the recovery of the property based on s. 27 of the Evi. Act was admissible in view of the Privy Council ruling in *Pakala Narayana Swami* v. *Emperor* (1). It was pointed out to the learned Counsel that no fewer than four Judges of this Court including myself have recently held contrary to the interpretation that the learned Counsel wished to put on this ruling, and consequently the argument was not pressed. On the question of the identification, principal stress is laid on the fact that the victims mentioned no names until the following afternoon when the Sub-Inspector arrived in the village and written complaints were taken from them which were written out by Gyanu. It is contended that by that time Gyanu must have known the names of the persons who had been arrested and had detailed these to the victims. This argument, however, is based only on supposition, and admittedly there is no evidence whatever to support it, and if it were true and all these identifications were false and prompted by the Police and the Kamdar, one would have expected the identifications to have included Syed Usman and Syed Miroo who had been arrested as well as those of Abdul Gafoor and Ramsingh. There is, however, no mention of these two persons. Included by name in the written report is also Umarkhan of whom the Police knew nothing up to that time, and one of the names mentioned is of a man who was not arrested. This militates against Police tutoring. One of the minor details which form the grounds of attack is that Bhiwaji stated that he was so afraid that he went to the Mahar part of the village and hid in Gyanu's house and that therefore he could not have been able to identify Gafoor, whom he says he did, and one Sabjalkhan whom he mentioned in his report (Ex. P-27). It is clear, however, from his evidence that he is referring to different times. When Sawalaram's house was attacked, he hid near by and identified Gafoor. When the assailants entered his own house, which was the third, Sawalaram's house being the first, it was then that he ran to the Maharpura. There is thus no inconsistency. The only other point is that Hariba, Sawalaram's servant who was told to open the door and who was himself beaten, stated in cross-examination that when everything was over, he met his master again who told him that he was struck by thieves but could not recognise them, and that his wife and mother had said the same. It is not very difficult to elicit answers of this kind in cross-examination in the case of villagers like Hariba, and on the evidence of the patel it is apparent that Sawalaram was in no fit condition to give details before Gyanu was sent in to make the preliminary report. I consider that the evidence of identification is acceptable and true, and had there been any tutoring or embellishment on the part of the Police, a much more perfect case would have been made out, particularly in respect of two of the accused who had already been arrested and against whom the evidence is less than against the others, namely Syed Usman and Syed Miroo. The evidence against the five people, Abdul Gafoor, Sheikh Hussein, Ram Singh, Umarkhan and Sherali is convincing. All have been identified as participating in the dacoity,

(1) A I R 1939 P C 47; 180 Ind. Cas. 1; 1939 O L R 134; (1939) M W N 185; 40 Cr. L J 364; 11 R P C 166; 1939 O W N 282; 20 P L T 265; 49 L W 349; 43 C W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; 5 B R 449; (1939) 1 M L J 756; 18 Pat. 234; 66 I A 66; (1939) Kar. (P C) 123 Sup. (P C).

property was recovered from three of them, and of those from whom property was not recovered Ramsingh was actually wearing a gunny bag over his head when arrested at 3 o'clock in the morning, and he was dressed like this when identified by Sawalaram, and Abdul Gafoor has been identified by all three victims. In respect of the remaining accused their conviction is dependent on whether the only substantive evidence against them, namely, the circumstances of their arrest before the fact that any dacoity had actually been committed was known, can be supported by the confessions of their three co-accused, Sheikh Hussein, Umarkhan and Sherali.

A reference has naturally been made to the Full Bench decision in the Judicial Commissioner's Court, Nagpur, in *Gobaraya* v. *Emperor* (2), and raliance is placed on the judgment epitomized in the headnote, which runs:

"The self-inculpatory confesson of an accused implicating his co-accused is not a fact upon which alone the conviction of his co-accused can legally be based. It cannot be said that such a confession, corroborated by other evidence, from a legal basis for his conviction: for it is not permissible to start with the confession and proceed to enquire how for it receives corroboration from other evidence on record. Where there is other relevant matter implicating the co-accused, the course which the Judge is permitted by s. 30 of the Evi. Act to take, is to consider the confession along with the said matter and decide after such consideration whether or not conviction is justified."

The problem of course resolves itself into the question of fact whether the evidence against Syed Miroo and Syed Usman is sufficient to form a basis for conviction which would warrant the Court in taking the material appearing in the self-inculpatory confessions of Sheikh Hussein, Umarkhan and Sherali into account against the non-confessing accused therein implicated. Here, we have the fact that information was given to the Police that certain persons including the two accused Syed Miroo and Syed Usman were to participate in a dacoity that night, and when late at night they were found to be away from their houses and a guard was kept on their houses, they were found attempting to return to them at 3 o'clock in the morning and gave explanations of their absence which were unacceptable. It is urged that this is not enough to form a basis for a conviction and that it is possible that they may have been absent for purposes which they have not chosen to disclose and that these circumstances do not necessarily implicate them in the dacoity which took place. My considered opinion is that the circumstances do form a sufficient basis. Were a stranger basis required connecting them with the dacoity, a basis on which a conviction itself would be permissible, then there would be no need of corroboration, or, to use the words of s. 30 of the Evi. Act, "of taking such confession into consideration", and the provisions of s. 30 of the Evi. Act would be rendered otiose. The very existence of this provision postulates that it may be used in cases where the evidence afforded and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. The facts which have been proved, excluding what appears in the confessions, raises a very strong suspicion against these two persons, and that suspicion has been confirmed and made certain by the confessions of their accomplices, confessions in which the accomplices do not exclude their own share in the dacoity. Next it is urged that these confessions lose their entire force as against these two accused, Syed Miroo and Syed Usman, because they have been retracted, and the authority given for this proposition is a decision of the Calcutta High Court in *Kashimuddin* v. *Emperor* (3). In that case the conviction in a jury trial was set aside because *inter alia* the trying Judge did not in his charge to the jury inform them that when a confession is retracted, it has no value at all as against the co-accused. With the greatest respect, I am unable to agree with this exposition of the law. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—such a confession being self-inculpartory—in respect of the person who made it and the person implicated therein. The extent to which such a confession operates against another person therein implicated has been discussed in the preceding paragraph.

I can see no reason at all to hold that merely because these confessions have been retracted in the Court of Session, they were

(2) 26 N L R 229; 125 Ind. Cas 673; 31 Cr. L J 881; Ind. Rul. (1930) Nag. 321; A I R 1930 Nag. 212 (F B).

(3) 62 C 312; 154 Ind. Cas. 273; A I R 1934 Cal. 853; 39 C W N 27; (1934) Cr Cas. 1338; 7 R C 440 (2); 36 Cr. L J 485.

involuntarily made. The motive for making a self-inculpatory confession (and there is no question that all these three confessions are entirely self-inculpatory) is the very simple one of an expectation of leniency in the matter of sentence, and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuation by their fellows who have not confessed. There is of course ample opportunity for this while parties are under-trial prisoners, and there is nothing to support the statements made by two of these three confessing accused that the confessions were the result of Police torture, that indeed is the common reason given and, barring the reason that they had changed their minds and thought better of it and were no longer trying to save their own skins, is the only reason for retracting which the confessing accused could possibly give. I am satisfied that these confessions were voluntary and that a mere allegation to the contrary raises no inherent probability that the confessions were not voluntarily made.

It must then be seen whether the confessions are true. In *Kashimuddin* v. *Emperor* (3), the learned Judge referred in support of the proposition there enunciated to the decision in *Emperor* v. *Lalit Mohan Chuckerbutty* (4). In that case Jenkins, C. J. stated that to place any reliance on retracted confessions against a co-accused would be most unsafe, and referred to *Yasin* v. *Emperor* (5). But a perusal of the following paragraphs will indicate that the learned Chief Justice disregarded the confessions implicating the co-accused because on examination they were found to be false, and in *Yasin* v. *Emperor* (5), it was not laid down as was laid down in *Kashimuddin* v. *Emperor* (3), that such a confession has no value at all against the co-accused, but only that it should carry practically no weight, which dictum was somewhat modified by the subsequent remark that a very full corroboration would be necessary in such a case.

Now, no doubt when a confession is retracted and the truth of it denied, the person retracting has lied on one occasion or the other, and although in the case before me the retractions are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance, it must be presumed that if these accused had been asked by the Magistrate as they should have been, whether the confessions were false in substance or no, they would have replied in the affirmative. This does not, in my opinion, absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence. In the case before me the confessions are given with a wealth of detail in each case, and mutual corroboration which can leave no doubt at all as to their truth. It is to be noted that neither in *Yasin* v. *Emperor* (3), nor in *Emperor* v. *Lalit Mohan Chuckerbutty* (4), is it laid down that no weight at all is to be given to such retracted confessions. I am in respectful agreement with the proposition that such retracted confessions must by used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, I consider that they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or no. In the present case all the three confessions agree as to the distribution of the booty which in the case of property other than cash was so inconsiderable that single ornaments had to be shared by the participants in the dacoity in pairs, and the distribution agrees in each case. There are differences in the confessions in respect of statements as to which persons entered which house in the four visits and the irruptions made into the houses that night, that is, discrepancies which are really no more than omissions except in the case of statements of the people who caught hold of Sawalaram, which bear the mark of truth and honesty and individual and uncollaboratory narrative, and Police tutoring would not attempt to produce such detailed narrative on unessential points. On the one point on which they ought to be clear and in agreement and on which agreement is to be expected, namely, the division of the spoils, they are in agreement. Where the confessions inspired by the Police, the Police would have taken care to see that there was equal and meticulous agreement on the question of who were the persons who actually caught hold of Sawalaram when his house was invaded. The result is that I am satisfied that the confessions are

(4) 38 C 559; 10 Ind. Cas. 582; 15 C W N 593; 12 Cr. L J 286.
(5) 28 C 689.

true, that they were voluntarily made and that they can be taken into consideration against the accused Syed Miroo and Syed Usman.

Ganpatsingh's case is a peculiar one. There is no doubt that he was the informant who warned the Police as the result of which the houses of all the accused who have been arrested, residing in the village, except Sheikh Hussein were watched and their arrests effected. It is also clear that he was told to accompany the dacoits and when he protested against this was told sharply to obey orders and to report at the station house the next morning. The learned Magistrate has found that he betrayed his trust to the extent of retaining some of the stolen property in consequence of which he was arrested, and he has been given the sentence of 10 years rigorous imprisonment as if he had whole heartedly participated in the dacoity with the others. I am of opinion that Ganpatsingh has been the victim of circumstances in that the Sub-Inspector Pitale who was in charge of the station house and to whom information was given and at whose orders he accompanied the dacoits was transferred during the early stages of the investigation. He admits that he was given an ornament which was subsequently recovered from him, and his story is that after the return of the expedition and the booty had been divided he went to the station house but did not find the Sub-Inspector there, so went to his own house and when sent for the next morning said that he would come later as he was dressing a wound which he had received from a stone during the dacoity. He was then brought to the station house and had left behind the money and the ornament in his own house as he was on his way back from easing himself when the Constable met him, and he then related the whole story to the Sub-Inspector. This would be on the morning of the 17th. He was then ill for a day or two, and when he went to the station house again, the Sub-Inspector was not there, a change in officers having taken place. He said he would relate everything to the previous Sub-Inspector, Mr. Pitale. He handed over the money which he had received to the new Sub-Inspector Desasingh, but not the *kadola* as in his peculiar position of an informer he did not trust a new man. After he was arrested he had the *kadola* handed over by his daughter. Now, a good deal of this is confirmed by the prosecution witnesses. Sub-Inspector Pitale, did not investigate the case beyond August 20 and admits directing Ganpatsingh to accompany the dacoits. He admits seeing Ganpatsingh on the following day, namely, August 17, and Ganpatsingh stated to him that he would produce his portion of the stolen property, that is to say, that the Police were aware on the next day that their informer had stolen property with him which would appear to make any deliberate concealment on his part useless. The Sub-Inspector says that he instructed the Station-House Moharir, Ramsingh, to seize the property from Ganpatsingh and also says in cross-examination that he saw Ganpatsingh on the after-noon of the 17th as he was going off to investigate and directed him to hand over the property, if any, to the Thana Moharir. This phrase, "if any", dose not seem to agree with what he stated of in cross-examination where he implies that Ganpatsingh had admitted that he had property, and Ramsingh the Moharir, also gives a slightly different version where he states that the Station House Officer's orders to him were that any property which might be produced by Ganpatsingh should be seized and that as Gangpatsingh did not produce any property he did not do anything more about it. This last portion of the evidence appears to me an excuse for not having recovered the property earlier when they were aware of its existence. Desasingh, the relieving Sub-Inspector, is P.W. No.4, and he received orders to take over the investigation on August 19 and he began investigation the following day. He at once began with questioning Ganpatsingh, and after the latter had handed over the money he searched Gangpatsingh's house and arrested him the same day. This was before he had any communication with Sub-Inspector Pitale, from whom he took over, at the scene of the dacoity. On the 25th at at Mehkar Ganpatsingh agreed to produce the property, and they went to his house where the property was produced. The Sub-Inspector Desasingh says he was aware from the *thana* record that Ganpatsingh was the informer in the case and he arrested him because he had agreed to produce the money and had an injury to his forehead. He admits that Ganpatsingh immediately claimed to be an informer and that he had done what he had under the instructions of Sub-Inspector Pitale; yet he does not remember asking Pitale about this when he met him the next day at Pangri. Neither does he remember if Ganpatsingh's

brother Lalsingh (P. W. No. 5) requested that Sub-Inspector Pitale should be sent for before Ganpatsingh was arrested. He arrested him on his own initiative without consulting his predecessor.

Now, what has weighed heavily with the learned Magistrate in convicting Ganpatsingh is the fact that the *kadola* was not recovered from him until a week later. It is of course quite possible that owing to the change of Sub-Inspectors Ganpatsingh might have been under the impression that the new Sub-Inspector would not be aware that he had already told Pitale that he had an ornament in his possession and that he might be left in undisturbed possession of it. On the other hand, it is equally probable that Ganpatsingh, a Police informer, who as such leads a precarious existence at the best of times, might well have distrusted a newcomer and considered that he would be endangering himself if he owned that he possessed part of the proceeds of the dacoity without being satisfied that the new Sub-Inspector knew that his predecessor had ordered him to accompany the dacoits, and I think the statement of his brother Lalsingh (P. W. No. 5) in cross-examination to the effect that in the Mekhar lock-up he met Ganpatsingh and said "You are not a thief. You were sent by Pitale. If there is any property with you, give it up," and that Ganpatsingh said "I was sent by Pitale. I cannot trust the other Police Officers" is true and reasonable. I think it probable that if there had not been this change of controlling officers at the beginning of the investigation, Ganpatsingh would not have been arrested at all. It is admitted by the learned Counsel who appears for the the Crown that at the most he can only press in respect of Ganpatsingh for a conviction under s. 411 of the I. P. C., Admittedly Ganpatsingh went with the dacoits in the capacity of a spy, and apparently an unwilling one, as he considered he had done his duty sufficiently to the Police in giving the names of the people who were going to commit the dacoity. Having gone with them, he could not without awakening suspicion have declined to receive any share in the booty. It is also apparent that he admitted possession of his share on the following morning. I consider he should be given the benefit of the doubt, and acquitted. He is accordinly acquitted and I direct that he be set at liberty forthwith.

There now remains the question of sentence on the other accused. The learned Magistrate appears to have adopted a somewhat unusual principle. He has sentenced the accused to six years' rigorous imprisonment on account of the entry into the house of Sawalaram and two years' rigorous imprisonment each for the entry into the other houses and directed that the sentences shall run consecutively, making the aggregate to ten years which is the maximum penalty for the offence. The offence so far as Sawalaram's house is concerned does not appear to be any more heinous than that of the entry into the other houses, and it is difficult to see any other reason for this allotment than that the Magistrate desired to pass the maximum sentence and was unable to divide it by three. Further, I do not consider that this is a case in which the passing of the maximum sentence permitted by s. 395 of the I. P. C., was necessary. The dacoity was not accompanied by any particular violence or brutality. The sentences are reduced to five years' rigorous imprisonment in each case.

D. *Order accordingly.*

PATNA HIGH COURT

Appeal from Original Decree No. 41 of 1938

November 20, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

HARNATH SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAIYA AMBIKA DEVI AND ANOTHER—PLAINTIFF AND ABDUL SHAKOOR AND OTHERS—DEFENDANTS—RESPONDENTS

Mortgage—Construction—Usufructuary—Mortgagor binding himself to deliver possession and authorising mortgagee to retain possession till payment of money advanced—Indication in document that property is to be taken as security—Mortgage held usufructuary within meaning of s. 58 (d), *Transfer of Property Act* (*XX of* 1929)—*Mortgagee not put in possession—He is entitled to decree under s.* 68, *Transfer of Property Act* (*IV of* 1882).

Where the mortgagor binds himself to deliver possession of the property in *Jeth* 1341 *F.* and authorizes the mortgagee to retain possession until *Jeth* 1350 *F.* when the executant binds himself to pay the money and the mortgagee is entitled to retain possession until payment of the money advanced, the transaction is an usufructuary mortgage. The mere absence of hypothecation clause is immaterial when in the deed the word '*rehan*' is expressly mentioned in the heading and in

the body of the document in more places than one there are indications that the parties intended that the properties described in the document should be taken as security for the loan advanced.

In such a case where the mortgagee is not put in possession against the stipulation contained in the document under s. 68, T. P. Act, he is entitled to either a decree for the amount which he lent or for possession.

A. from a decision of the Subordinate Judge Gaya, dated September 29, 1937.

Mr. *Sarjoo Prasad*, for the Appellants.

Messrs. *C. P. Sinha*, *Saiyid Ali Khan* and *H. R. Kazimi*, for the Respondents.

Manohar Lall, J.—This is an appeal by the fifth defendant against a decision of the learned Subordinate Judge, dated September 29, 1937, by which he decreed the suit instituted by the plaintiffs in part.

The suit was instituted for recovery of possession of property covered by Ex. 3 styled as a *rehan* deed by the mortgagor (defendant No. 1) in favour of the plaintiffs and another on June 6, 1933. The document was executed on taking an advance of Rs. 13,000. It was stipulated that the defendant No. 1 was to remain in possession for a certain period and to pay certain amount of interest on the sum advanced. It was also stipulated in the document that, if the entire amount was not paid in *Jeth* 1341 *F.* this document will be operative till 1350 *F.* at the expiry of which period, namely 1350 *F.* the defendant No. 1 will be entitled to repay the entire amount to the plaintiffs who will then have to deliver up possession to the executant. In case the amount was not paid, the plaintiffs would remain in possession until satisfaction of the sum advanced. On April 10, 1935, the interest of defendant No. 1 was sold in execution of some decree and purchased by the appellant. The plaintiffs have never obtained possession of the lands since the execution of the deed of June 6, 1933. In these circumstances, the present suit was instituted on June 6, 1936, for recovery of possession of the properties described in the bond of 1933. Plaintiffs claimed to be the usufructuary mortgagees who were entitled to possession under the terms of this document. They also claimed mesne profits for 1342 and 1343 *Fasli*, that is to say, for the period anterior to the institution of the suit and also mesne profits *pendente lite* and in future up to the date of recovery of possession.

The learned Subordinate Judge has held that the plaintiffs are entitled to a decree for possession; but no mortgage decree can be passed in this suit; hence the appeal by defendant No. 5.

It was contended by the learned Advocate for the appellants that there is no hypothecation clause in the deed (Ex. 3) and, therefore, the plaintiffs are not usufructuary mortgagees with the result that the decree for possession passed in favour of the plaintiffs should be set aside. Now, the definition of usufructuary mortgage is given in s. 58, T. P. Act which was amended in 1929. The definition, as it stands, is wide enough to cover the transaction in the present case. By sub-cl. (*d*) it is provided that

"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

This is exactly what the present document provides. It states that the mortgagor binds himself to deliver possession of the property in *Jeth* 1341 *F.* and authorizes the plaintiffs to retain possession until *Jeth* 1350 *F.* when the executant binds himself to pay the money. It further provides that the plaintiff will be entitled to retain possession until payment of the money advanced. It was argued that there is no hypothecation clause in the document such as is commonly found in similar deeds. But the word *rehan* which is expressly mentioned in the heading of the document and in the body of the document in more places than one indicates that the parties intended that the properties described in the document should be taken as security for the loan advanced. The amount of Rs. 13,000 is spoken of as the *rehan* money at p. 5, line 7. I am, therefore, of opinion that, upon a proper consideration of this document, it must be held that the plaintiffs were usufructuary mortgagees and, in the circumstances, as has been found by the learned Subordinate Judge, they were not put in possession against the stipulation contained in the document. It follows that under s. 68, T. P. Act, plaintiffs are entitled to either a decree for the amount which they lent or for possession. In the present case the learned Subordinate Judge has granted them a decree for possession to which the plaintiffs were entitled. I do not

see any error in the judgment delivered by the learned Subordinate Judge.

The appeal fails and must be dismissed with costs.

It was argued on behalf of defendant No. 7 who is not an appellant before us, that he is aggrieved by certain findings which have been arrived at in the case; but notwithstanding the findings the decision is in his favour. I do not see, therefore how he is aggrieved when the decree is in his favour.

Harries, C. J.—I agree.

D. *Appeal dismissed.*

NAGPUR HIGH COURT

Miscellaneous Appeal No. 146 of 1938
October 24, 1939
NIYOGI, J.

ZIBAL AND OTHERS—DECREE-HOLDERS AND PURCHASERS—APPELLANTS
versus
MUKA *alias* JAIRAM AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 68, 47—Decree transferred to Collector for execution—Jurisdiction of Court passing decree, if ousted—Application by judgment-debtor to Civil Court for payment of decree by instalments—Stay of proceedings before Collector ordered—Order not communicated and sale held—Sale and subsequent confirmation held invalid—Decree-holder purchasing property—Sale confirmed—Judgment-debtor applying to have sale declared void—Civil Court alone can decide issue under s. 47—Issue cannot be decided by superior revenue Court.

The transfer of a decree to the Collector does not oust the jurisdiction of the Civil Court in all matters. [Case-law relied on]

After such a transfer the judgment-debtor applied to the Court which passed the decree for payment of the decree by instalments under s. 11, C. P. Money-lenders Act. The Court entertained the application and ordered the stay of the proceedings before the Collector. But the stay order was not communicated to the Collector with the result that the Collector held the sale and confirmed it;

Held, that the order of the Civil Court must be construed as an order recalling the decree and the Collector ceased to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalled it. Consequently, the power of the Collector to proceed with the case was suspended by virtue of the order made by the Court passing the decree.

Held, also that when the Civil Court exercised its authority and recalled the decree, its order recalling the decree by its own force deprived the power of the Collector to execute the decree and the Civil Court's order came into effect as soon as it was passed so as to suspend the Collector's power to proceed with the sale. 147 Ind. Cas. 700 (13) and *Sant Lal* v. *Umrao-un-nissa* (14), relied on, 102 Ind. Cas. 665 (11) and 43 Ind. Cas. 214 (12) referred.

The judgment-debtors moved the Court which passed the decree to have the sale declared void and not for setting aside the confirmation of the sale under O. XXI, Civil P. C., on the ground that it was a nullity.

Held, that the proceeding was one under s. 47, Civil P. C., as it related to execution of the decree and was one between the parties to the suit, the decree-holders being the purchasers. The Civil Court was the only authority to determine whether or not the execution sale held by the Collector was valid. That issue could not be decided by the superior revenue Courts.

Misc. A. from an order of the Court of the Additional District Judge, Bhandara, dated June 21, 1938.

Mr. *D. T. Mangalmoorti*, for the Appellants.

Mr. *Y. V. Jakatdar*, for the Respondents.

Order.—This is an appeal under s. 47, Civil P. C. from an order passed by the Additional District Judge in Civil Appeal No. 12-B of 1938 arising out of execution proceedings.

A decree obtained by the appellants against the respondents had been transferred for execution under s. 68 of the Civil P. C. The Collector ordered the sale of the respondents' *malik makbuza* fields to be held on November 1, 1937. On October 9, 1937, the judgment-debtors applied to the civil Court for reduction of interest and making the decree payable by instalments under s. 11 of the C. P. Money-lenders Act. On that very date the civil Court (Sub-Judge, II Class, Bhandara) made an order in these terms:

"Applicants by Mr. Lakhnikar. Mr. Lakhnikar has filed an application for instalments under Money-lenders Act. Application be registered as a Miscellaneous Judicial Case under s. 11 of the C. P. Money-lenders Act. Issue notices to the non-applicants decree-holders to show cause. Collector be informed to stay the proceedings until further orders. Case for November 27, 1937."

This order was not communicated by the Execution Mohurrir as he was in usual course of routine bound to do. The Collector held the sale on November 1, 1937, as advertised and the decree-holders became the purchasers. On November 27, 1937, the decree-holders appeared in the civil Court and reported that the sale had been held in their favour. It was discovered that the order ordering stay of proceedings before the Collector had not been communicated. The Court warned the Execution Mohurrir for his lapse and directed instructions to be sent to the Collector that the sale should not be confirmed. For some mysterious reason

even this was not brought to the notice of the Collector with the result that the sale was confirmed. Thereon the judgment-debtors made an application to the civil Court for an order setting aside the sale as void in consequence of its order directing the proceedings before the Collector to be stayed. That Court held that, since rightly or wrongly the sale was held and confirmed, it was conclusive and that it had no jurisdiction to interfere with it. That order was reversed by the lower Appellate Court on the ground that the effect of the civil Court's order dated October 9, 1937, staying the sale porceedings was to suspend the power of the Collector to execute the decree transferred to him irrespective of the fact that it was not communicated to him.

The case has been argued at great length and the points which arise for determination are:—

(*i*) Whether the civil Court has power in the circumstances to suspend the proceedings before the Collector after the decree is transferred to him for execution.

(*ii*) Whether, if the civil Court has such a power, its order would take effect only when it is communicated to the Collector.

(*iii*) Whether the proper remedy of the judgment debtor was to take recourse to the superior Revenue Courts and whether the civil Court, in the circumstances, is competent to set aside the sale.

On the first question, it may generally be conceded that the civil Court has no jurisdiction to interfere with the proceedings before the Collector after it has transferred the decree to the Collector for execution under s. 68, Civil P. C. That is a proposition which requires no authority to confirm its validity in view of the plain terms of s. 70 (2), Civil P. C. It was by virtue of this enactment that in *Daulat Singh* v. *Jugal Kishore* (1), *Mathura Das* v. *Lachman Ram* (2), *Gulzari Lal* v. *Madho Ram* (3), *Shahzad Singh* v. *Hanuman Rai* (4), *Krishna Das* v. *Ram Gopal Singh* (5), *Shriniwas Appacharya* v. *Jagadevappa* (6) and *Rudrappa Virappa* v. *Bashettappa Chenbasappa* (7), it was held that the transfer of the decree to the Collector under s. 68, Civil P. C. ousted the jurisdiction of the civil Court in matters in respect of which power had been conferred on the Collector. The problem arising for decision in the present case is different, if one looks to the substance and not merely the form. Can it be said here that the civil Court was seeking to exercise the powers which the law has conferred on the Collector to the exclusion of the civil Court? The answer must be in the negative since the civil Court manifestly never intended to usurp the powers of the Collector in respect of the execution proceedings. The judgment-debtors' application under s. 11, C. P. Money-lenders Act could lie only in the civil Court which alone had the power to order the decree to be paid by instalments. This power was not and could not be withdrawn from the civil Court and vested in the Collector by any rules made by the Local Govt. under s. 68 of the Civil P. C. The decree could be amended by the civil Court alone as desired by the judgment-debtors and if so amended the Collector's power would automatically come to an end since the decree which was transferred to the Collector would itself cease to exist.

The transfer of decree to the Collector does not oust the jurisdiction of the civil Court in all matters. *Zipru Krishna* v. *Pannalal Bahirudas* (8) and *Shankar Atmaram* v. *Keshav Govind* (9), may be cited as illustrations. In these cases it was held that the power to give permission to the decree-holder to bid and the power to certify adjustment of a decree remain with the civil Court notwithstanding the transfer of the decree to the Collector. The case in *Kadhey Mal* v. *Murtaza Ali* (10), bears a close analogy to the present case. In the cited case an application was made to the civil Court under s. 5 of the U. P. Agri. Relief Act with the prayer that execution proceedings might be re-called from the Collector. The civil Court entertained the application and sent an order to the Collector staying further proceedings for confirmation of sale. The Collector, however, confirmed the sale and granted a sale certificate to the execution purchaser. It was held that the civil Court in re-calling the decree did not pass any order which was within the exclusive

(1) 22 A 108; A W N 1899, 205.
(2) 24 A 239; A W N 1902, 49.
(3) 26 A 447; A W N 1904, 61; 1 A L J 65.
(4) 46 A 562; 83 Ind. Cas. 766; A I R 1924 All. 704; 22 A L J 452.
(5) 50 A 827; 115 Ind. Cas. 125; A I R 1928 All. 558; 26 A L J 769; Ind. Rul. (1929) All. 349.
(6) 42 B 621; 46 Ind. Cas. 653; A I R 1918 Bom. 216; 20 Bom L R 708.
(7) 52 B 290; 110 Ind. Cas. 710; A I R 1928 Bom 189; 30 Bom. L R 465.
(8) 60 B 688; 162 Ind. Cas. 806; A I R 1936 Bom 189; 38 Bom. L R 276; 8 R B 428.
(9) 60 B 729; 164 Ind. Cas. 9; A I R 1936 Bom 277; 38 Bom. L R 505; 9 R B 70;
(10) I L R (1937) All 766; 171 Ind. Cas. 359; A R 1937 All. 550; (1937) A L J 723; 1937 R D 365; 1937 A L R 825; 10 R A 256.

jurisdiction of the Collector but exercised a power which was expressly reserved to it. Although the order of the civil Court was one staying further proceedings it was construed as an order re-calling the decree. That is the construction which the order in the present case can reasonably bear. As pointed out in the cited case, the Collector ceases to have jurisdiction to sell or to confirm the sale after the Court passing the decree re-calls it. Whether the Collector fails to comply with the civil Court's order in disregard or in ignorance of it, that order must prevail against anything done by the Collector subsequent to that order. It must, therefore, be held that the Collector's power to proceed with the case was suspended by virtue of the order made by the Court passing the decree.

The next question is whether the civil Court's order could take effect only after it was communicated to the Collector. In *Parsotam Saran* v. *Barma Nand* (11) and *Venkatachalapati Rao* v. *Kameswaramma* (12), it was held that communication was essential. In the former case the Subordinate Court held the sale in ignorance of the High Court's order staying the execution of the decree. It is pertinent to observe that purchaser was an innocent third party largely influenced the decision of the Court. Moreover, O. XLI, r. 5, Civil P. C. expressly lays down that mere filing of an appeal shall not operate to stay proceedings under the decree. It is, therefore, clear that until the officer executing the decree comes to know about the order staying execution, his power must be presumed to continue. The other cited case was also decided on this principle. The Appellate Court's order staying execution was interpreted as having the effect of a prohibitory order which could not come into effect until it was communicated to the officer who was prohibited. In *Ma Ti* v. *Ma Thit* (13), this principle was held not to apply to a sale held by ministerial officer of the Court passing the decree with the result that the sale was set aside even though the Court's order staying execution proceedings was not brought to the notice of that officer. The reason, as pointed out in *Sant Lal* v. *Umrao-un-Nissa* (14), is that the ministerial officer is deprived of his power as soon as the order staying execution is made by the Court. The Collector is not a Court and has no power to execute decrees except when they are transferred to it by the civil Court for execution. The power to execute decrees comes into operation only by virtue of the transfer of the decree. The civil Court which has the authority to transfer the decree, has also the authority to re-call the decree for any lawful cause such as adjustment by the parties or modification of the decree by the Appellate Court. Consequently, when the civil Court exercises its authority and recalls the decree, its order re-calling the decree by its own force deprives the power of the Collector to execute the decree. I hold that the civil Court's order came into effect as soon as it was passed so as to suspend the Collector's power to proceed with the sale.

Finally, there survives the question whether the proper remedy of the judgment-debtors was to move the higher revenue authorities. In this case the judgment-debtors moved the Court which passed the decree to have the sale declared void and not for setting aside the confirmation of the sale under O. XXI, Civil P. C. on the ground that it was a nullity. The proceeding was one under s. 47, Civil P. C. as it related to execution of the decree and was one between the parties to the suit—the decree-holders being the purchasers. The civil Court is the only authority to determine whether or not the execution sale held in the circumstances stated above was valid. That issue could not be decided by the superior Revenue Courts.

The result is that the lower Appellate Court's order is affirmed and the appeal is dismissed with costs. The costs in the Courts below will be borne as ordered by the lower Appellate Court. Counsel's fee Rs. 30.

D. *Appeal dismissed.*

(11) 50 A 41; 102 Ind. Cas. 665; A I R 1927 All. 401; 25 A L J 530 (F B).

(12) 41 M 151; 43 Ind. Cas. 214; A I R 1918 Mad. 391; 33 M L J 515; 22 M L T 330; 6 L W 617; (1917) M W N 785 (F B).

(13) 11 R 410; 147 Ind. Cas. 700; A I R 1933 Rang 416; 6 R Rang. 173.

(14) 12 A 96; A W N 1889, 201.

PATNA HIGH COURT

Civil Revisions Nos. 137 and 175 of 1940

November 22, 1940

FAZL ALI AND ROWLAND, JJ.

NAND KUMAR SINHA—PETITIONER

versus

Rai Bahadur PASHUPATI GHOSH AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 2 (3), 115, O. I, r. 10—Order of trial Court striking off some of defendants on ground that suit was not maintainable against them in absence of consent of

Governor of Province under s. 270, *Government of India Act—Whether decree—Revision, if lies—Government of India Act*, 1935 (25 & 26 *Geo. V. Ch.* 42), *s.* 270 (1)—*Applicability—Act done by public officer apparently official Act—Character, if changed by allegations in plaint of conspiracy or malice—Receipt of affidavit and making of complaint for offence under s.* 193 *Penal Code (Act XLV of* 1860) *by Sub-Divisional Officer are official Acts—Suit for damages based on such acts—Consent of Governor, if necessary—Giving of evidence by Police Officers—When official act.*

Order of the trial Court striking off some of the defendants holding that the suit was not maintainable against them in the absence of consent of the Governor of the Province under s. 270 (1) of the Govt. of India Act, 1935, those defendants being the servants of the Crown, amounts to a decree within the meaning of s. 2 (2), Civil P. C., even if the Court erroneously refers to O. I, r. 10, as, between the parties the trial Court had finally decided that the plaintiff could get no relief in the suit against those defendants. Such an order is therefore appealable and no revision is maintainable under s. 115 as it is the practice of the High Court to abstain from interference in revision in favour of a party who has another remedy by way of appeal and has not availed himself of it. 49 Ind Cas. 835 (3), 131 Ind. Cas. 548 (4) and 85 Ind. Cas. 90 (5), relied on, 143 Ind. Cas. 476 (9), referred to. [p. 278, col. 2; p. 279, col. 1.]

If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purported to have. Applicability of the statute depends on what the act purports to be and is not affected by allegations that the apparent state of things is not the real one. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character: and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less where the same malice is attributed to him jointly with others. The word conspiracy only means that a malicious purpose is entertained by two or more persons jointly. [p. 279, col. 2.]

The receipt of an affidavit of a person by a Sub-Divisional Officer and making of the complaint against such person to the District Magistrate of an offence under s. 193 read with s 116, Penal Code are official acts done by the Sub-Divisional Officer in his capacity as such, whether rightly or wrongly done and no suit for damages for wrongful prosecution will lie in respect of these acts without the consent of the Governor of the Province under s. 270 (1), Govt. of India Act, 1935, when such acts are done before the relevant date *i. e.*, April 1, 1937.

The giving of evidence by the Police Officers is not an act necessarily referable to their duty as Police Officers. The giving of evidence by a public officer may be an act regarding which it is to be determined on the facts of the particular case whether it was or was not done in an official capacity. There may be cases in which a public officer giving evidence does so in the execution of his duty as such officer. [p. 280, col. 2.]

Where however, the trial Court has found that the giving of evidence by the public officers in the case was done in the execution of their duty the High Court will not, in revision, go behind such finding. *Jogendra Nath Roy Bahadur* v. *Price* (8), referred to.

C. R. from a decision of the Munsif of Monghyr, dated March 4, 1940.

Messrs. *Nirsu Narayan Sinha, Sarjoo Prosad* and *K. Dayal*, for the Petitioner.

Messrs. *Baldeva Sahay* Advocate General and *Nitai Chandra Ghosh*, for the Opposite Party.

Rowland, J.—These two applications in civil revision have been heard together as they raise questions substantially identical namely, whether institution of the two suit, as against some of the defendants is barred by s. 270 (1) of the Govt. of India Act, in the absence of consent of the Governor of the Province. The section by its terms applies to a suit against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown. The words used are similar to those in s. 80 of the Civil P. C. The most authoritative decision of s. 270 (1) of the Govt. of India Act is that in *Hori Ram Singh* v. *Emperor* (1), and on s. 80 of the Civil P. C. in *Bhagchand Dagadus* v. *Secretary of State* (2). The words of the statute it has been authoritatively said are to receive their natural meaning. We have then to see whether the facts of each of the cases before us fall within the terms of the statute.

Civil Revision No. 137 arises out of suit No. 215 of 1938 in the Court of the Munsif of Begusarai. The facts are that during the pendency of a dacoity case one of the prosecution witnesses by name Sitaram Sahu on November 27, 1935, presented an affidavit in the Court of *Rai Bahadur* Pashupati, S. D. O. to the effect that the plaintiff had instigated this witness not to identify correctly before the Court some accused persons whom he had identified at a test identification. After the conclusion of the Sessions trial, a complaint was presented to the District Magistrate by *Rai Bahadur* Pashupati Ghosh, S. D. O. Begusarai against the plaintiff charging him with the offence punishable under s. 193 read with s. 116, of the I. P. C. in relation to the proceedings in the dacoity case. The plaintiff was put on his trial and acquitted. In the trial

(1) 20 P L T 539; 181 Ind. Cas. 317; 40 Cr. L J 468; 11 R F C 60; (1939) M W N 497; 5 B R 685; A I R 1939 F C 43; 1939 O L R 366; 50 L W 95; (1939) 2 M L J 23 Sup.; 41 P L R 680; 43 C W N F C 50; (1939) F C R 159; (1939) Kar. (F C) 132 Sup.; 71 C L J 340; I L R (1940) Lah. 400 (F C)

(2) 51 B 725; 104 Ind. Cas. 257; 53 M L J 81; A I R 1927 P C 176; 23 A L J 641; 29 Bom. L R 1227; (1927) M W N 561; 46 C L J 76; 1 Luck. Cas. 291; 32 C W N 61; 26 L W 809; 54 I A 338 (P C.)

of the plaintiff Babu Ramprit Pandey, an Inspector of Police was a witness and so was Babu Bhubaneshwar Prasad, Sub-Inspector. The plaintiff instituted the present suit impleading *Rai Bahadur* Pashupati Ghosh as defendant No. 1, Babu Ramprit Pandey as defendant No. 2 and Babu Bhubaneshwar Prasad as defendant No. 6 along with three other defendants persons not in the service of the Crown. The plaint alleges that the complaint filed by defendant No. 1 was false and malicious and was the outcome of a conspiracy between him and the other defendants, that the affidavit of Sitaram Sahu was also false, that these were the outcome of a conspiracy among the defendants to procure the wrongful prosecution and harassment of the plaintiff. The relief claimed is that the Court may be pleased to declare that the complaint filed by defendant No. 1 was absolutely false, malicious and without any reasonable and probable cause and on adjudication of the above Rs. 499 be declared as expenses and damages. Notices under s. 80 of the Civil P. C. were served on defendants Nos. 1, 2 and 6 before the institution of the suit. These defendants raised the plea in bar that the plaintiff should also have obtained the consent of the Governor of the province as a condition precedent to the institution of suit under s. 270 (1) of the Govt. of India Act. It is conceded that the acts complained of took place before the "relavant date" referred to in that section namely April 1, 1937. The Munsif held that the suit as against defendants Nos. 1, 2 and 6 fell within the statute and that the suit was not maintainable against these defendants. He took the view that the suit was brought against defendant No. 1 in respect of acts, namely, receiving of an affidavit and the filing of a complaint, done ostensibly in the performance of his duty as a Magistrate and that it had been brought against defendants Nos. 2 and 6 in respect of acts, namely, the giving of their depositions in the trial of the plaintiff done in the performance of their duty as Police Officers. He allowed the suit to proceed against the other defendants by striking off the names of these defendants.

Civil Revision No. 175 of 1939 arises out of Suit No. 362 of 1938. The facts are that defendant No. 1 Babu Ajodhya Prasad Tewari presented a complaint before defendant No. 4, *Rai Bahadur* Pashupati Ghosh, alleging criminal trespass, with intent to annoy, insult and intimidate, to have been committed by the plaintiff. Defendant No. 4 received the complaint and took cognizance. He summoned the plaintiff and enlarged him on bail. The plaintiff was tried before another Magistrate and convicted, but on appeal he obtained an acquittal. The suit is brought to recover damages for alleged false and malicious prosecution said to have been started as a result of a conspiracy among the defendants. Notices under s. 80 of the Civil P. C. were served, but the plea was urged that the plaintiff should also have obtained the consent of the Governor under s. 270 (1) of the Govt. of India Act. The Munsif held that the section barred the suit as against defendant No. 4 *Rai Bahadur* Pashupati Ghosh, but that it could proceed against the other defendants. The application before us is against this order so far as it declines to allow the suit to proceed against defendant No. 4.

The learned Advocate General has taken a preliminary objection that neither of these application ought to succeed, because the petitioner has not availed himself of the more appropriate remedy that was open to him. He could have appealed to the District Judge from the decision of the Munsif as from a decree. We are referred to the definition of "decree" in s. 2 (2) of the Civil P. C. It means a formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and it is deemed to include the objection of a plaint. It is argued for the petitioner that the order striking off those defendants against whom the suit was held to be not maintainable was an order under O. I, r. 10 of the Civil P. C. and so not appealable. The answer is that as between the parties the Munsif had finally decided that the plaintiff could get no relief in the suits against those defendants, such an order, even if erroneously the Court refers to O. 1 r. 10, has been held to be a decree and appealable as such in *Rama Rao* v. *Raja of Pittapore* (3) and *Sherali* v. *Jagmohan Ram* (4), the substance rather than the form of the order is to be regarded. A similar view is taken in *Ramji Pandey* v. *Alaf Khan* (5), a decision of this Court.

It is then said that if the suit appeared

(3) 42 M 219; 49 Ind. Cas. 835; 36 M L J 169; 9 L W 329. 25 M L T 184.

(4) 53 A 466; 131 Ind. Cas. 548; (1931) A L J 181; Ind Rul. (1931) All. 388, A I R 1931 All. 333 (2).

(5) 3 Pat. 859; 85 Ind. Cas. 90; A I R 1925 Pat. 121; 6 P L T 581.

to the Munsif to be barred by law, his proper course was not to proceed as under O. I, r. 10 by expunging the names of some defendants but under O. VII. r. 11 (*d*) by rejecting the entire plaint. Such an order would have been on in its face appealable and the plaintiff would have been left in no doubt as to his proper remedy. Whether the Munsif ought to have rejected the entire plaint in each suit may be a question of some difficulty. The cases cited before us have been under s. 80 of the Civil P. C., no decisions under s. 270 of the Govt. of India Act being available. Some observations in *Venkata Rangiah* v. *Secretary of State* (6) have been cited in support of the argument; on the other hand in a case of this Court *Secretary of State* v. *Amar Nath* (7), the name of the Secretary of State was expunged and the action was allowed to proceed against the other defendants. But we have not to express an opinion whether the whole plaints should have been rejected, not having been moved by the other defendants in these suits to revise that part of the Munsif's order which permitted the suits to proceed against them. It is sufficient to say that the decision of the Munsif on the preliminary issue finally negatived the claim of the plaintiff to get any damages against certain of the defendants and as between him and them must be considered to be a decree within the meaning of s. 2 (2) of the Civil P. C. and, therefore, appealable. The practice in this Court is to abstain from interference in revision in favour of a party who had another remedy by way of appeal and has not availed himself of it.

The preliminary objection, therefore, seems to be well founded and the applications are liable to be dismissed on this ground. As, however, both the cases have been fully argued I shall indicate the view I take on merits.

In the Civil Revision No. 137 stress is laid on the allegation in the plaint that the defendants had conspired together to bring a false case against the plaintiff. This it is said could not be or purport to be an act done in execution of their duty and, therefore, the bar in s. 270 (1) of the Govt. of India Act has no application. It is further argued that the maintainability of the suit must be decided on the allegations in the plaint alone and without reference to any matters of fact not contained in the plaint. The latter proposition is not to be accepted unreservedly as applying without qualification to every suit of this nature. If an act done by a Public Officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have, Applicability of the statute depends on what the act purports to be and is not affected by allegations that the apparent state of things is not the real one. Were it not so, ingenious allegations could be invented and criminal motives recklessly attributed in every case so as to nullify the effect of the statute which the Court would be unable to apply until the entire suit had been heard out and those imputations proved on the facts to be untrue. The suit would in that case fail under s. 270 (2) of the Govt. of India Act and the defendant would have no additional protection by reason of the existence of sub-s. (1) of this section. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character; and what applies to the attribution of malic or corrupt motive in the mind of a single officer applies no less in my opinion where the same malice is attributed to him jointly with others. I can find no magic in the word conspiracy which only means that a malicious purpose is entertained by two or more persons jointly. The cause of action is incomplete without acts done under the influence of the corrupt motive or done in pursuance of the conspiracy. We have to see on what such acts the cause of action rests.

Defendant No. 1 received the affidavit of Sitaram Sahu and presented a complaint to the District Magistrate. Without these acts the cause of action is not complete. The malicious prosecution cannot be separated from them, nor can the alleged conspiracy to prosecute the plaintiff be separated from the institution of proceedings against him so as to form a self contained cause of action. The receipt of the affidavit and the making of the complaint before the District Magistrate were both officials acts of defendant No. 1 in his capacity of S. D. O. Whether rightly or wrongly done, no suit will lie in respect of these acts without the previous consent of the Governor of the Province. The Munsif, therefore, rightly held that no suit could be instituted against the first defendant.

(6) 54 M 416; 129 Ind. Cas 456; 59 M L J 923; 32 L W 810; Ind. Rul. (1931) Mad. 264; A I R 1931 Mad. 175.

(7) 15 Pat. 353; 161 Ind. Cas. 690; 17 P L T 152; 2 B R 352; 8 R P 467; A I R 1936 Pat. 339

As regards the second and the 6th defendants, the position is not so clear. In the criminal proceeding against the plaintiff they figured as witnesses for the prosecution, but the giving of evidence is not an act necessarily referable to their duty as Police Officers. The Munsif, however, has said that the giving of evidence by these two defendants against the plaintiff were acts done by these persons in the execution of their duty as servants of the Crown. It has been pointed out in *Jogendra Nath Roy Bahadur* v. *Price* (8) that an act may be one which on its very face could be nothing but an official act or it may be an act in respect of which the question would have to be determined on the facts whether the defendant in committing the act was or was not acting in his official capacity. The giving of evidence by a public officer may be an act regarding which it is to be determined on the facts of the particular case whether it was or was not done in an official capacity. There may be cases in which a public officer giving evidence does so in the execution of his duty as such officer. In the case of a Civil Surgeon who holds a *post mortem* examination and is examined as a witness to prove the *post mortem* report and the results of that examination, or in the case of an investigation Sub-inspector who after investigation submits a charge sheet and is examined to prove the course of his investigation and the submission of the charge-sheet, it can be very well be argued that the giving of such evidence is an act done in the discharge of their official duties. The proceedings in the trial of the plaintiff including the depositions of these witnesses are not before us, but they may have been placed before the Munsif and I do not think that in revision we should go behind his finding that the giving of evidence by these defendants was done in the execution of their duty. On that finding the Munsif was entitled to hold that the statute was applicable and the suit was not maintainable against these defendants.

In Civil Revision No. 175, as in the other application the allegation as to conspiracy is stressed and we are asked to hold that the basis of the suit is conspiracy and not the institution of a criminal proceeding against the plaintiff. As the conspiracy could be no part of the S. D. O.'s duty it is said, the suit is not in respect of anything purporting to be done in the execution of his duty and therefore the statutory bar does not apply. In my view the argument fails for reasons similar to those already given in discussing Civil Revision No. 137. The taking of cognizance of an offence on complaint whether done in good or bad faith was clearly an official act of S. D. O. purporting to be done in the execution of his duty as a Magistrate. It was an act which he could not do in any other capacity and it was an act without which there could be no institution of the criminal proceeding and so no foundation for the suit. It cannot be said that the claim against the defendant is irrespective of that act. On the contrary it is clearly in respect of it.

It follows that both these applications should be dismissed with costs.

Fazl Ali, J.—In my judgment these applications fail on the preliminary ground raised by the learned Advocate-General.

Order VII, r. 11 provides that the plaint in a suit shall be rejected when the suit appears from the statement in the plaint to be barred in law. It has been held in many cases that non-compliance with s. 80 of the Civil P. C. where the notice required under the section is necessary as a preliminary to the institution of a suit will bring the case under this provision. As the language of s. 270 of the Govt. of India Act is similar to the language used in s. 80 of the Civil P. C. there can be no doubt that there s. 270 applies and it has not been complied with, the plaint is liable to be rejected. Section 2 of the Civil P. C. states that the rejection of a plaint will amount to a decree. The order rejecting the plaint therefore is appealable and if the order passed by the Munsif in the present case is taken to amount to rejection of the plaint as against the parties represented by the Advocate-General, that order must be held to be a decree and was as such appealable. It is, however, contended that the order of the Munsif was not passed under O. VII, r. 11 because that provision contemplates the rejection of the plaint as a whole and not the rejection of the plaint in part or against some of the defendants. The learned Advocate-General does not concede that this is so. But assuming that the contention is correct, we have still to enquire whether the order passed by the Munsif was appealable or not under the Civil P. C. In my opinion, the order was appealable, because *it is* fully covered by the definition of the

(8) 24 C 584.

decree in s. 2 of the Code. The question which was raised before the Munsif was whether in law any suit could be instituted against the opposite party before us without obtaining the consent of the Governor as laid down in s. 270. The Munsif has held that such a suit cannot be instituted. This decision conclusively determines the rights of the parties so far as regards the Court which decided the matter and must therefore be held to be a decree. The Munsif has not merely dismissed some of the defendants out of the action, but he has held that the suit against them cannot proceed. As to what is meant exactly by dismissing some of the defendants out of the action, it will be sufficient to quote the following observations made by Beasely, C. J. in *Jujishiti Panda* v. *Lakshmana Dola Behara* (9).

"It is quite clear that where the parties have been wrongly joined and the suit against them is given up by the plaintiff or upon that ground he exonerates them or there is a finding come to that they have been wrongly joined, then the correct procedure is to strike out their names as having been improperly impleaded. On the exoneration or the striking out of the names of persons on the ground of misjoinder they cease to be parties to the suit. That is quite clear from the judgment of the Full Bench. In this case the learned District Munsif has adopted the correct procedure He clearly by the decree is shown to have treated these defendants as persons who had been dismissed from the suit and not as persons against whom the suit had been dismissed."

In the present case the opposite party, who are represented by the learned Advocate-General, cannot be said to have been dismissed from the suit because they were proper parties and if the procedure laid down in s. 270 had been complied with, the suit should have proceeded against them as it is proceeding against the other defendants.

The order passed by the Munsif is in effect an order dismissing the suit as against these persons on a preliminary ground. Such an order, in my opinion, is clearly appealable and that being so, the plaintiff cannot be allowed to invoke the special remedy afforded by s. 115 of the Code. This view is supported by many decisions, but I shall refer only to the decision of the Allahabad High Court in *Sherali* v. *Jagmohon Ram* (4). That decision is an authority for the following two propositions :

(1) Where the cause of action against the defendant has been specifically pleaded and a distant relief has been claimed against him, an order under O. I, r. 10 cl. (2) of the Code directing the removal of his name from the array of parties is in substance, although not in form, a decree and is open to appeal as such ; because the effect of the order is the refusal to grant the relief to the plaintiff; and

(2) the right to file a civil revision under s. 115 (Civil P. C.) is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. As the applicant did not persue the right remedy, namely, appeal to the lower Appellate Court, he could not be permitted to invoke the special and extraordinary remedy afforded by the exercise of revisional powers.

This Court has also pointed out in *Syed Razaur Rahaman* v. *Udit Singh* (10), that it is the established practice of the High Court not to exercise its revisional powers in cases where the party entitled to appeal has not appealed.

I therefore, agree with my learned brother that these applications should be dismissed with costs and in the view that I have taken I do not consider it necessary to express any opinion on the merits of the applications.

S. *Appeals dismissed.*

(9) A I R 1933 Mad. 435; 143 Ind. Cas. 476; 37 L W 582; Ind. Rul (1933) Mad. 304; (1933) M W N 527.

(10) 18 Pat. 694; 185 Ind. Cas. 135; 20 P L T 492; A I R 1939 Pat. 570; 6 B R 106; 12 R P 303.

MADRAS HIGH COURT

Civil Revision Petition No. 1657 of 1938

November 17, 1939

KUNHI RAMAN, J.

ATHIYAPPA GOUNDAN—

PETITIONER

versus

RAMANATHAN CHETTIAR—

RESPONDENT

Madras Agriculturists Relief Act (IV of 1938), s. 10 (2)—Mortgage executed for price payable to mortgagee for land purchased from him—Scaling down of such debt.

Where a mortgage is executed for the price payable by the mortgagors for lands purchased by them from the mortgagees, the debt falls under the category of s. 10 (2), cl. (2) and cannot therefore be scaled down.

C. R. P. to revise the order of the Sub-Judge, Salem, dated August 24, 1938

Mr. *K. P. Ramakrishna Ayyar*, for the Petitioner.

Mr. *K. S. Ramabhadra Ayyar*, for the Respondent.

Order.—This is an application to revise the order made by the learned Subordinate Judge of Salem in Execution Application No. 261 of 1938 in Original Suit No. 52 of 1932. The application before the lower Court was presented under s. 19, Mad. Agri. Relief Act, IV of 1938, to scale down the amount of mortgage decree. It is admitted that the original mortgage was executed for Rs. 7,000 on November 4, 1914, the whole of the mortgage-debt being the price payable by the mortgagors for lands purchased by them from the mortgagees. Subsequent to this mortgage and before the debt was discharged, there was a partition among the mortgagors and after that partition, by consent of parties, the mortgage debt was split up with the result that under a fresh mortgage deed, Ex. C, security was given only for Rs. 2,500 which was the portion of the debt that fell to the mortgagors under that documant. This was executed on January 22, 1925. Under this mortgage deed, the properties that were given as security were not the lands that were originally purchased in 1914 but some of the ancestral properties of the mortgagors under this deed. The decree debt that was sought to be scaled down under s. 19 of the Act was under the decree passed to enforce this mortgage. The application for scaling down was resisted in the Court below under s. 10, sub-s. 2, cl. 2 of the Act by the decree-holders. According to this clause nothing contained in s. 8 and 9 of the Act shall affect any liability for which a charge is provided under s. 55, cl. 4, sub-cl. (*b*), T. P. Act. The objection raised on behalf of the decree holders was upheld by the learned Subordinate Judge who found that the exemption provided for in this clause clearly indicated that the Act was not intended to benefit debtors whose debts could be under the category of debts referred to in it.

Mr. Ramakrishna Ayyar, the learned Advocate for the petitioner, argues that since under the fresh mortgage deed, Ex. C, the lands originally purchased by the mortgagors, in respect of which alone the charge provided for in s. 55, T. P. Act, can operate were not given as security and since fresh properties were given as security, the lower Court erred in holding that the clause of s. 10 relied on by the respondents was applicable to the case. In view of the scheme of the Act and in view of the wording of the clause, I am not able to accept this contention as well-founded. The clause describes a particular category of debts in respect of which the debtor should not be given relief under the Act and it cannot be denied that the debt in the present case is included in that category. It is only equitable that a person who purchases property should pay the price that he agreed to pay. In these circumstances I hold that the view taken by the Court below that the clause is a sufficient answer to the petition for scaling down the debt is correct. The civil revision petition must therfore be dismissed with costs.

N.-S. *Petition dismissed.*

CALCUTTA HIGH COURT

Criminal Appeal No. 125 of 1940

May 6, 1940

SEN AND ROXBURGH, JJ.

GERON ALI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 84, 302—Insanity—For applicability of s. 84 what is to be seen is whether accused knew that what he was doing was either wrong or contrary to law—Accused killing two persons including his own daughter considering that he was doing meritorious deed qualifying him for heaven—Accused held protected by s. 84.

For the application of s 84, I. P. C, what is to be seen is not only whether the accused knew the nature of his act, but whether he knew what he was doing was either wrong or contrary to law. The law will punish a man for doing something which he knows to be contrary to the law whatever his private opinion may be regarding its ethics. Again if an act is contrary to law ignorance of the law will not protect a man from punishment when it is shown that the man knew that what he was doing was wrong.

The accused was a disciple of the Pir and called him father and the Pirani mother. The Pir said to him, "Take the head of those who dissuade you and come to your doors." At this time the Pirani, said to him that he would go to heaven if he offered a human head in sacrifice, on that day which was an auspicious day being the first day of *Ramzan*. The accused cut off the heads of two persons including that of his own infant daughter and offered the same to the Pir and said: "Father, you asked me for one human head, I present you with two." The evidence showed that he considered that he was doing a meritorious act which qualified him for heaven:

Held, that the accused did not know that what he was doing was wrong or contrary to law and he was therefore, entitled to the protection of s. 84, I. P. C.

Judgment.—The appellant has been convicted of murder and sentenced to transportation for life by the Sessions Judge of Tippera. The case against him is as follows: One Khoaz Ali was known to be a Pir or holy man in the village

of the appellant. He had a mistress Tayeba who used to be known as Pirani. The appellant was a disciple of the Pir and called him father and the Pirani mother. The Pir had become unpopular in the village because of the irregular relationship between him and Tayeba. The appellant was however loyal to them and on October 14, 1939 complained to them about the attitude of the villagers. The Pir said to him "Take the head of those who dissuade you and come to your doors." The Pir also gave him a *dao*. In the evening the Pir gave the appellant some substance to swallow which the latter did. At this time the Pirani said to the appellant that he would go to heaven if he offered a human head in sacrifice. She also told him that the day was auspicious as it was the first day of *Ramzan*. Geron armed himself with a *dao* and severed the head of one Shaz Ali. He carried the head to his house. He saw his young daughter, aged about three years, and he cut off her head also. Taking these two heads he approached Khoaz Ali and Tayeba Bibi and said: "Father, you asked me for one human head, I present you with two." He gave Khowaz Ali the head of Shaz Ali and the head of his daughter to Tayeba Bibi. When people tried to seize him, he rushed at them shouting "Ma Kali ! !" Eventually he was secured and the Police were informed. After investigation, Khoaz Ali and Tayeba were set up on a charge of abetment of murder and the appellant on a charge of murder. The jury by a unanimous verdict found Tayeba not guilty. By a majority of six to three they found Khoaz guilty of the charge of abetment of murder and by a unanimous verdict they found the appellant guilty of murder.

The learned Judge accepting the verdict acquitted Tayeba and convicted Khoaz Ali and the appellant. Khoaz Ali was sentenced to death and the appellant to transportation for life. Khoaz Ali appealed and he has been acquitted. We are concerned with the case of the appellant only. The defence taken on behalf of the appellant in the Court below was of a two-fold character. First, it was contended that an intoxicating drug had been administered to the appellant and that he committed this crime under its influence. Next it was argued that the appellant was not responsible for his acts as he was insane at the time. In his petition of appeal a third defence is taken to the effect that he struck Shaz Ali as the latter was misconducting himself with his wife. He says that he knows nothing of how his daughter was killed. There is no substance in the first and last defences. There is no evidence to show that the substance given to the appellant was a drug which caused him to become intoxicated, nor is there any indication given in the Court below that the deceased Shaz Ali was misconducting himself with the appellant's wife.

There is however good reason to accept the defence of insanity. A mere narration of the facts relied upon by the Crown establishes that the appellant was insane at the time of the occurrence. He kills his own infant daughter for no assignable reason. His conduct after doing so also establishes that his mind was disordered. The question for consideration is whether this disordered state of mind is sufficient to bring the case within the purview of s. 84, I. P. C., which describes the type of insanity which would render a person not liable for his acts. The learned Judge has gone completely wrong in his charge to the jury on this point. He has told the jury that unless they are satisfied that the appellant was incapable of understanding the nature of his acts by reason of insanity at the time of the occurrence he would be liable for the consequences of his acts. He then points out to them that the appellant knew that he was killing somebody and that therefore he could not claim the protection of s. 84, I. P. C. This is what he told the jury in express terms. Now, this is certainly not the law. Section 84, I. P. C. is quite clear on the point. It says that if a person by reason of unsoundness of mind is incapable of understanding the nature of his acts at the time of the commission of the acts, then such acts will not amount to an offence. The section however does not stop there. It goes on to deal with another type of insanity which would also take away the criminality of an act. It says that if a person does an act and at the time of doing the act by reason of insanity does not know that the act is either wrong or contrary to law then also he would be protected even though he knew the nature of the act. This is perfectly clear from the section and it is nothing but sound common sense. A person may be under the insane delusion that he is an executioner and under that delusion he beheads his son thinking that he has been ordered to do so by the king. He knows the nature of his act but obviously he cannot be held criminally liable inasmuch as he did not know that what he was doing was either wrong on contrary to law. The

learned Judge entirely failed to appreciate this portion of s. 84, I P. C.

We are satisfied that the appellant knew the nature of his act; what we have to see is whether he knew that what he was doing was either wrong or contrary to law. If he knew that what he was doing was wrong then he will not be protected even if he did not know that it was contrary to law. If he knew that what he was doing was contrary to law then also he would not be protected even though he did not know that what he was doing is wrong. The law will punish a man for doing something which he knows to be contrary to the law whatever his private opinion may be regarding its ethics. Again if an act is contrary to law ignorance of the law will not protect a man from punishment when it is shown that the man knew that what he was doing is wrong. In our opinion, the appellant did not know that what he was doing was wrong. The evidence showed that he considered that he was doing a meritorious act which qualified him for heaven.

We also find that he did not know that what he was doing was contrary to law. His conduct establishes this. He killed these persons without any effort at concealment and he did not try to escape after doing this. We have also no doubt that this frame of mind was brought about by insanity. This is proved by his behaviour both prior to and subsequent to this act. In our opinion, the appellant is entitled to the protection of s, 84, I. P. C. We find that the appellant killed Shaz Ali and his daughter Shazda Banu, but that he was incapable of knowing that what he was doing was either wrong or contrary to law by reason of unsoundness of mind at the time of the occurrence. We accordingly set aside the order of conviction and sentence and acquit the appellant. The appeal is allowed. The appellant shall continue in safe custody in the jail in which he is now confined until further orders by the Provincial Govt. Let the Govt. be informed of this.

S. *Appeal allowed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 374 of 1940

October 16, 1980

ALMOND, J. C. AND SOOFI, J.

Mst. HASSAN PARI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), ss. 26, 114—Accused sent to doctor for medical examination, with head constable—Examination made not in immediate presence of head constable — Confession to doctor during examination — Admissibility — Birth of first child to young woman and not in presence of any one—Presumption that child was born alive, if can be drawn— Criminal trial — Confession — Murder — Question by Magistrate held defective and answer by accused held no admission—Penal Code (Act XLV of 1860), ss. 302, 318 — Prosecution seeking to prove offence under both s. 302 and s. 318—Charge should be framed under two heads— Accused found guilty under both charges — Conviction under both charges and not in alternative.

Where the accused made a confession to the doctor while being medically examined but not in the immediate presence of the head constable in whose charge she was sent to the doctor:

Held, that the accused was in the custody of Police when she made the confession to the doctor and hence it was inadmissible under s. 26, Evi. Act.

[Case-law relied on]

No presumption under s. 114, Evi. Act, that the child born was born alive can be reasonably made especially in the case of a young woman giving birth to her first child and entirely unattended during the process.

Question put to the accused by the Magistrate recording the confession was to the following effect: "Did you throw the born child into the well as the result of which he died of drowning?" To this the answer given was "Yes":

Held, that question was put in an unfortunate form as it was a question composite in nature to which it was almost impossible to give a direct answer 'yes' or 'no' and it could not therefore be inferred from it that the accused did actually admit that the child was born alive.

A conviction in the alternative should be made where on the facts proved it is not certain under which section the offence falls. Where the prosecution set out to prove both that the accused had murdered her child (s. 302, I. P. C.) and had also secretly disposed of the body by throwing it into a well (s. 318, I. P. C.) the charges should be framed under two heads and not in the alternative and where the accused is found guilty of both offences she should be convicted under both the sections and not in the alternative. 41 Ind. Cas. 310 (1), referred to.

Cr. A. against an order of the Additional Sessions Judge, Peshawar, dated September 19, 1940.

Lala *Manohar Lal*, for the Appellant.

The Advocate-General, for the Crown.

Almond, J. C.—In this case *Mst.* Hassan Pari, an unmarried girl aged 17-18, has been convicted under s. 302, I. P. C. or in the alternative under s. 318, I. P. C. for

the murder of her illegitimate child and for subsequently throwing it into a well and has been sentenced to transportation for life under s. 302, I. P. C. and in the alternative to two years' rigorous imprisonment under s. 318, I. P. C. We may state at the outset that we are of opinion that the charges should have been framed under two heads in this case and not in the alternattve, for the prosecution set out to prove both that the appellant had murdered her child and, had also secretly disposed of the body by throwing it into a well. On the facts which were found by the Sessions Judge she should have been convicted under both the sections and not in the alternative. A conviction in the alternative should be made where on the facts proved it is not certain under which section the offence falls. There is an illustration of such a case reported in *Hiranand* v. *Emperor* (1), in which it was not certain on the facts proved whether the offence fell under s. 489-A or s. 420, I. P. C. In that case a conviction was recorded in the alternative and one sentence was imposed which had to be not greater than that permitted for the minor offence.

The facts of this case are very simple and the only points raised in the appeal are legal points. At the trial the appellant admitted that she had given birth to an illegitimate child and that out of shame she had thrown it into a well. She stated that the child was born dead. Before the committing Magistrate she stated that she did not know whether the child was born dead or alive. In view of advanced decomposition, the medical witness was unable to say whether the child was born dead or alive. The prosecution relied for establishing the principal charge on three confessions made by the appellant. The first of these was made to a Police Officer and was ruled out as inadmissible by the learned Additional Sessions Judge under the provisions of s. 25, Evi. Act. Of the other two confessions one was made to a lady doctor who examined the appellant and in that confession she unequivocally admittedly that the child had been born alive. The third confession which was made to a Magistrate did not specifically state whether the child was born alive or dead. At any rate that is the interpretation of the confession which has been made by the learned Additional Sessions Judge.

(1) A I R 1917 All. 29; 41 Ind. Cas. 310; 18 Cr. L J 790; 15 A L J 587.

The learned Advocate-General has argued before us that that confession also admits that the child was born alive. He relies in this connection on the second question put to the appellant by the Magistrate recording the confession which is to the following effect: "Did you throw the born child into the well as the result of which he died of drowning?" To this the answer given was "Yes." It is clear that that question was put in an unfortunate form as it is a question composite in a nature to which it is almost impossible to give a direct answer 'yes or 'no,' and we cannot therefore infer from it that the appellant did actually admit that the child was born alive. We are therefore of opinion that if the confession made to the lady doctor is inadmissible in evidence there is no evidence on the file to show that the child was born alive. The learned Advocate-General has suggested that we might presume that all children are born alive under the provisions of s. 114, Evi. Act. Such a presumption could not, in our opinion be reasonably made especially in the case of a young woman giving birth to her first child and entirely unattended during the process. Learned Counsel for the appellant has contended that the confession made to the lady doctor was inadmissible under the provisions of s. 26, Evi. Act, as it was made while the appellant was in the custody of the Police. This point does not appear to have been argued before the learned Sessions Judge who heard the case but in our opinion it must prevail. When the body was taken from the well the appellant had been called by the Police to identify it and she made before the Police Officer the statement which has been ruled out as being inadmissible. She was then sent in charge of a lance head constable of Police to the hospital to be medically examined. While she was being medically examined but not in the immediate presence of the lance head constable she made the confession to the doctor. The question is therefore whether the appellant was at the time this confession was made, in the custody of a Police Officer.

Learned Counsel for the appellant has referred us to three cases reported in *Emperor* v. *Sheoram* (2), *Mg Lay* v. *Emperor* (3).

(2) A I R 1928 Lah. 282; 108 Ind. Cas. 389; 29 Cr. L J 386; 10 Lah. L J 174.

(3) A I R 1924 Rang. 173; 77 Ind. Cas. 429; 25 Cr. L J 381; 1 R 609.

and *Sit Ro Saw* v. *Emperor* (4). We have in addition consulted two cases referred to in Woodroffe and Amirali's Law of Evidence, namely *Empress* v. *Lester* (5) and *Emperor* v. *Nallangowda Parawatgowda* (6). In *Emperor* v. *Sheoram* (2), the facts were that a Post Office Official was accused of an offence. He was in the custody of the Police but was sent to a superior official of the Post Office Department and left with him alone for about three hours. He was alleged to have made a confession to this superior Post Office Official and the learned Judges refused to admit the confession into evidence as the procedure was taken with a view to evade the mandatory rule enacted by s. 26, Evi. Act. In *Mg. Lay* v. *Emperor* (3), it was alleged by the prosecution in order to secure the admission of a confession that the accused at the time had not been formally arrested. It was held that the question of formal arrest had not affected the merits of the case as the accused was actually detained by the Police at the time. *Sit Ro Saw* v. *Emperor* (4), does not appear to be a direct authority on the point as the section there applied was s. 24 and not s. 26, Evi. Act. The two Bombay cases however are directly in point. In the first of them an accused person was being taken in a *tonga*. In front of him was riding Policeman. The Policeman left the tonga to go to a roadside village and get another horse. In the meantime the *tonga* with the accused proceeded for some miles and during that period it was said that the accused had made a confession to a fellow passenger. It was held that the accused was still in the custody of the Police when the confession was made. The second Bombay case, namely *Emperor* v. *Nallangowda Parwatgowda* (6), is still more analogous to the facts of the present case. In that case an accused had been taken by a Policeman to a hospital. The Policeman stayed outside in the *verandah* while the accused is said to have made a confession inside the hospital but out of the hearing of the Policeman. It was held that the accused was still in the custody of the Policeman.

In our opinion, there can be no doubt that in the present case the accused was in the custody of the Police when she made the confession to the doctor and therefore its admissibility is ruled out by s. 26, Evi. Act. There remains therefore no evidence that the child was born alive and the conviction under s. 302, I. P. C. cannot be sustained. The conviction under s. 318, I. P. C. however is obviously correct for even at the trial the accused admitted having secretly thrown the child into the well with a view to hiding her shame. We set aside the conviction of the appellant under s. 302, I. P. C. and acquit her of that charge. We maintain the conviction and sentence passed upon her under s. 318, I. P. C.

D. *Order accordingly.*

(4) A I R 1936 Rang. 455; 165 Ind. Cas. 319; 37 Cr. L J 1137; 9 R Rang. 204.

(5) 20 B 165.

(6) 42 B 1; 42 Ind. Cas. 597; A I R 1917 Bom. 130; 18 Cr. L J 981; 19 Bom. L R 683.

RANGOON HIGH COURT

Letters Patent Appeal No. 5 of 1940,
July 1, 1940

ROBERTS, C. J. AND MOSELY, J.

DEOKALI PATTAH—APPELLANT

versus

RAMDEVI AND ANOTHER—RESPONDENTS

Appeal—Letters Patent—Finding of fact impugned by High Court in Letters Patent or second Appellate Court—It is not enough for High Court to say that it is not satisfied that matters of fact were proved—It must be satisfied that there was no sufficient evidence—Soundness of conclusions derived from findings of fact—High Court in Letters Patent Appeal, if can adjudicate upon — Finding of fact arrived at on evidence, interference with — Transfer of Property Act (IV of 1882), s. 53—Sole and only creditor, if can maintain representative suit—Transfer challenged as void under s. 53—Material question to be considered—Fact that all creditors have been paid off since transfer, if material — Civil Procedure Code (Act V of 1908), s. 100—Lower Appellate Court agreeing with trial Court, if bound to take every sentence of trial Court judgment and say that it agrees with it.

While considering a finding of fact arrived by the lower Appellate Court, it is necessary for the High Court in Letters Patent Appeal to distinguish between evidence which would be sufficient and evidence which the High Court itself might think satisfactory. It is not allowable for the High Court in second appeal, or in Letters Patent appeal to say merely that it is not satisfied that matters of fact were proved, within the meaning of s. 3, Evi. Act: it should have to go further, in order to impugn the finding of fact of the first Appellate Court and say that there was no sufficient evidence. The High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact. On the other hand, if there is evidence upon which a finding of fact has been arrived at which could have been arrived at with propriety, function of the High Court is at an end. *Ram Gopal* v. *Shameskhaton* (2) and 161 Ind. Cas. 887 (3), relied on. 189 Ind. Cas. 817 (1), referred to.

Even if the plaintiff is the only creditor, he can bring a representatives suit for the benefit of or on behalf of all the creditors. 152 Ind. Cas. 555 (4), referred to.

Where a transfer is challenged as void under s 53 what the Court has to consider is whether the action of the transferee on the date of the transfer was

intended to defeat or delay the creditors and not whether the creditors have been defeated since. The fact that all creditors have been paid off since the date of the transfer is immaterial.

There is no magic in any special formula of words, nor is the first Appellate Court bound to take every sentence of the trial Court's judgment and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. Where the lower Appellate Court while agreeing with the trial Court's finding of fact uses in a part of his judgment the phrase "it is not unreasonable to presume", with reference to lower Court's finding of fact, it means no more than that he was satisfied that the trial Court was right in the conclusion at which he arrived, or at least that he was unwilling to disturb it. Such a finding of fact is binding in second appeal. 128 Ind. Cas. 366 (5), distinguished.

L. P. A. against the decree of the High Court, in S. A. No. 191 of 1939.

Mr. *P. N. Bhattacharyya*, for the Appellant.

Mr. *Srinivasan*, for the Respondents.

Roberts, C. J.—This is a Letters Patent appeal in respect of which a certificate has been given that the case is a fit one for appeal, and the question before us is whether the finding of the District Judge, Meiktila, that a gift by registered deed, dated October 25, 1933, by one Ganesh Prasad to his wife Ramdevi, of two houses, was voidable as being made with intent to defeat or delay his creditors, within the meaning of s. 53, T. P. Act. If it is a finding of fact it cannot be interfered with by reason of the existence of the rule which has been recently explained in *U. Rai Gyaw Thoo & Co. Ltd.* v. *Ma Hla U, Pru* (1). The District Judge's finding purported to be one of fact, and we have to decide whether there was any material, sufficient in law, from which the District Judge could arrive by inference or deduction at the conclusion at which he arrived.

It is, of course, necessary for us to distinguish between evidence which would be sufficient and evidence which we ourselves might think satisfactory. It is not allowable for the learned Judge in second appeal, or for us, to say merely that we are not satisfied that matters of fact were proved, within the meaning of s. 3, Evi. Act : we should have to go further, in order to impugn the finding of fact of the learned District Judge, and say that there was no sufficient evidence. And the question here is whether the learned Judge was right in saying that there was no sufficient evidence in law, *i. e.*, no material at all, from which a deduction and inference could be made. If there was any evidence at all, it is plain that we cannot interfere. We can, as pointed out by Mr. Srinivasan, referring to *Ram Gopal* v. *Shameskhaton* (2) adjudicate on the soundness of conclusions which have been derived from findings of fact. On the other hand, if there is evidence upon which a finding of fact has been arrived at which could have been arrived at with propriety, our function is at an end : *see Asgar Ali* v. *C. V. R. Firm* (3) where the judgment of the Court ended with these words :

"In the present case both Courts have found that as a matter of fact the transfer of the land in question was fraudulent, and against this finding of fact no second appeal lies. The appeal is, therefore, dismissed with costs"

What, then, was the evidence upon which the learned District Judge purported to arrive at a finding of fact ? First of all, it is said by the learned Judge in second appeal that there was evidence that Ganesh Prasad was not financially embarrassed. That evidence, however, was disbelieved in the trial Court. It is clear that the gift which he purported to make to his wife on October 25, 1933, was made four days after he got a notice of demand for Rs. 2,500 from a creditor, Jagat Singh, and shortly after the gift to his wife had been made Jagat Singh was obliged to file a suit in order to get this money paid to him.

There is, moreover, evidence that the present appellant Deokali Pattah accepted the mortgage of same property of Ganesh Prasad in April 1934 to cover a debt of Rs. 2,532, due to the former. It is said that there is evidence on the record to show that the mortgaged property covered the amount of the debt, but, in our opinion, this is by no means clear. There is no doubt that the appellant took what he could get then by way of security, the mortgage being by way of renewal of an old promissory note. It is stated in the judgment appealed against, that it is inconceivable that the respondent would have accepted such a mortgage if he had not himself been satisfied at the time that his debt was sufficiently secure. But there is no contention that this was a mortgage which was taken by a person who was parting with his property in consequence of having obtained proper security ; on the contrary, he was a creditor who was trying to cover himself by every means in his power.

Not only did he take a mortgage on his

(1) 1940 Rang. 180; 189 Ind. Cas. 817; A I R 1940 Rang. 126; 13 R Rang. 54.

(2) 19 I A 228; 20 C 93; 17 Ind. Jur. 38; 6 Sar. 247 (P C).

(3) 14 R 81; 161 Ind. Cas. 887; A I R 1936 Rang. 117; 8 R Rang. 532.

property, but Ganesh Prasad also had a policy on his life which he mortgaged along with these lands, and it is in evidence and accepted that this was the subject of a prior assignment to his wife ; this was found by the learned Sub-Divisional Judge and inferentially confirmed by the District Court. There were other creditors who obtained decrees within a short time afterwards. It is, to my mind, unnecessary to go into their claims in detail ; it is enough to say that, when an examination of the position comes to be made, there were grounds for saying that Ganesh Prasad was financially embarrassed both after as well as before the time he made the purported gift of the houses to his wife.

It has been urged on behalf of the respondent that the gift of the two houses was made not by Ganesh Prasad alone but Ganesh Prasad and Muniram. Muniram is dead and it appears that his only legal representative is Lal Chand, respondent No. 2, who would be his grandson (Muniram being the father of Ganesh Prasad): however that may be, I cannot think that this point is one of importance since, the learned Judge having held that the gift was voidable and of no effect, it is clear that both the lower Courts accepted the plaintiff's views that the gift was made in collusion with Muniram, and that Muniram's name was used for the purpose of making what was represented as a gift, whereas in fact it was merely device in order to defeat or delay the creditors. Then it is said that this ought to be a representative suit and that the plaintiff-appellant represents no one except himself. It is, I think, clear that the suit has been instituted on behalf, or for the benefit, of all the creditors. The case to which reference was made in this connexion is that in *Chidambaram Chettyar* v. *R. M. A. R. S. Firm* (4). Even if the plaintiff were the only creditor, I do not see why he should not in these circumstances, bring a suit of this kind, and I agree with the observations of the learned District Judge in this connexion. It is urged that all creditors have been paid off now and that therefore it is impossible to say that the transfer is void; but what we have to consider is the action of Ganesh Prasad on Octbor 25, 1933, and not whether the creditors have been defeated since; it is quite clear that many of them may have been delayed.

The last point that was taken was that the learned District Judge did not specifically say that there was fraud and there must be concurrent finding of facts so that the Sub-Divisional Court and the District Court are agreed before the learned Judge in second appeal is bound. There is however, in my opinion, no magic in any special formula of words, nor is the District Judge bound to take every sentence of the learned Sub-Divisional Judge and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. He uses in a part of his judgment the phrase "it is not unreasonable to presume," and it is said that it is ambiguous. In my opinion, it means no more than that he was satisfied that the Sub-Divisional Judge was right in the conclusion at which he arrived, or at least that he was unwilling to disturb it. There I see a clear distinction between this case and the case in *Ma Hla Me* v. *Maung Hla Baw* (5) which is the only authority for the proposition that the High Court may intervene on a question of fact where the matter has been ambiguously dealt with and no satisfactory conclusion has been arrived at in the Court below. Bearing all these matters in mind, I am of opinion, that the whole case is really summed up in the observations of the Bench in *Asgar Ali* v. *C. V. R. M. Firm* (3) to which I have refered in the earlier part of my judgment. And, therefore, this appeal must be allowed and the judgment and decree of the learned Judge in second appeal must be set aside and the judgment of the District Court must be confirmed and the decree of the Sub-Divisional Court upheld with costs in all Courts, Advocate's fee in this Court 10 gold *mohurs*.

Mosely, J.—I agree.

D. *Appeal allowed.*

(4) 12 R 666; 152 Ind. Cas. 555; A I R 1934 Rang 302; 7 R Rang. 172.

(5) 8 R 425; 128 Ind. Cas. 366; A I R 1931 Rang 29; Ind. Rul. (1931) Rang. 14.

CALCUTTA HIGH COURT

Criminal Reference No. 109 of 1940

July 11, 1940

BARTLEY AND ROXBURGH, JJ.

JOYRAM RAKSHIT—COMPLAINANT

versus

ANNADA PROSAD KUNDU—ACCUSED

Criminal Procedure Code (Act V of 1898), s. 438—Reference under—Conviction under s. 323, if can be altered to one under s. 325, Penal Code (Act XLV of 1860)—Reference recommending enhancement of sentence—Accused is entitled to show cause against conviction—High Court can examine actual evidence to decide propriety of conviction.

High Court has no power in a reference under s. 438, Criminal P. C., to alter a conviction under s. 323 to one under s. 325 I. P. C.

Where in a reference under s. 438, Criminal P. C., the District Magistrate recommends that the sentence should be enhanced, the accused is entitled to show cause against his conviction, and the High Court can itself examine the actual evidence in the case in order to decide whether the conviction was a proper one or not.

Mr. *D. N. Bhattacharjee*, for the Crown and in support of Reference.

Messrs. *N. K. Basu* and *Ram Krishna Pal*, for the Accused and against Reference.

Bartley, J.—This is a reference under s 438, Criminal P. C., made by the District Magistrate of Bankura. The matter arose in the following way: On July 4, 1939 at 6·30 in the morning one Gobinda Lal Rakshit laid an information at the Ohhatra Police Station that Probodhbala, wife of Annada Prosad Kundu, had committed suicide by hanging herself. The Sub-Inspector went to the spot and found the body of Probodhbala lying in the upper part of the house. He held an inquest and sent the body to Bankura for *post mortem* examination. In the original *post mortem* report, it was noted that opinion regarding the cause of death was reserved pending the receipt of the results of chemical examination of the viscera of the deceased. But it was also noted in the same report that there was a tear in the pelvic cavity and that the vaginal wall was intensely congested and bruised. The body at the time of the *post mortem* examination was in a more or less decomposed condition. After receipt of the report of the Chemical Examiner which showed that there was no poison detected the Medical Officer who made the *post mortem* gave it as his opinion that the woman probably died as a result of shock and haemorrhage resulting from the injuries to the vagina, probably homicidal. On receipt of this opinion, a case was instituted at the *thana* on August 4, 1939 which ended in the submission of the final report, that is to say, that there was no evidence on which to send up anybody on a charge of causing the death of the woman.

The next step was that on October 14, 1939 the father of the deceased woman lodged a complaint to the effect that his daughter's husband in collusion with some other people, had murdered his daughter on *Ashar* 18, last and then given out that she had committed suicide. The Police, however, failed to send up anybody and the complainant therefore moved the Court by way of a petition of complaint. The matter was enquired into and finally the accused Annada Prosad, husband of the woman, was placed on his trial on a charge under s. 326, I. P. C. The trying Magistrate convicted him under s. 323 of the Code and sentenced him to pay a fine of Rs. 1,000 in default six months' rigorous imprisonment. The District Magistrate then made the present reference recommending that the charge should be altered to one under s. 325, I. P. C., and that the sentence which was grossly inadequate should be enhenced.

In the first place, it should be pointed out that this Court has no power to alter a conviction under s. 323 to one under s. 325, I. P. C., in the manner recommended by the learned District Magistrate. In the second place, as the recommendation is that the sentence should be enhanced, it follows that the accused is entitled to show cause against his conviction, and this has been done on his behalf in the present case. We have therefore been compelled to examine for ourselves the actual evidence in the case in order to decide whether the conviction was a proper one or not. On consideration of the entire evidence we are forced to come to the conclusion that it does not warrant a conviction under s. 323, I. P. C. In the case under consideration in which the Magistrate convicted, the prosecution attempted to establish that the woman had been killed by her husband at about 3 o'clock in the morning in an upper room in the accused's own house. In order to do so they examined two witnesses who claimed to have seen what actually happened and two other witnesses who deposed that they heard the woman crying out for help. Now, the evidence of the first of these two eye-witnesses is this: that on the night of occurrence at about 3 o'clock in the morning or one *prahar* before day-light he was in his room next door to the house of the accused. He heard shrieks coming from a room on the upper storey of the accused's house. There was a window in that room and there was a wooden ladder kept below the window. He climbed this ladder and saw through the window the accused beating his wife with a stick. He tried to dissuade the accused and told him not to beat his wife, but the accused went on beating her until the woman fell. The next morning he went to the house and found the woman dead. With regard to this evidence it is, in the first place, highly improbable that a

witness would go to the trouble of climbing a ladder, looking through the window, remonstrating with the accused and then merely go back home. In the second place, his evidence if accepted does not tally with the medical evidence which suggests that the death of the woman was caused not by external beating but by internal injuries. Lastly, this witness is admittedly on bad terms with the father of the accused.

The evidence of the other eye-witness who was a servant in the house of the accused but was dismissed the next day, is that on that night the accused and his wife were in the upstairs room. He heard the wife screaming and went upstairs. He saw that the accused was poking her with a stick and that the accused's father was present and was inciting the son to keep on beating her. She fell down and looked unconscious. In the morning she was dead. The father and the son asked this witness to say that she died of hanging. This, of course, is a different story to that told by the first witness. According to P. W. No. 6 the father and the son were present at the time when the woman was being beaten and until she fell senseless. According to the other witness only the son was there and he was there until she fell down senseless. The only other evidence is that of some witnesses who say that they heard screams at the time of the occurrence and recognized the voice of Prabodhbala. One of these witnesses accounts for his presence at that time on the morning by saying that he was coming at that time along the *gully* past the accused's *bari* from his field of paddy-seedlings. The other witness who heard screams from the *bari* accounts for the fact by saying that he lived about a *rashi* off and that on that night he had not a sound sleep as he had stomach trouble and that he heard the woman crying out, "Do not beat me any more. I am dying." He called for the accused's father but got no answer and went away. This witness also admits that he had a suit with the father of the accused which went to the length of this Court. This is all the evidence upon which the conviction of the accused has been based.

Now, it appears perfectly clear to us that in view of the highly discrepant stories told by the two alleged eye-witnesses about the occurrence of the improbable nature of their stories and of the fact that neither story tallies with the medical evidence in the case it would be highly unsafe to convict the accused on testimony of this character. There is further consideration that this evidence such as it is was undoubtedly not given before the Police and that the doctor who made the *post mortem* very rightly reserved his opinion as to the cause of death until he was satisfied that it could not have been due to poison. In our view of the evidence, and of the whole history of the case it is not nearly so improbable that the accused might have been responsible for the death of his wife as it is that the alleged eye-witnesses saw anything whatsoever of what actually happened. In the result, we must reject the reference made by the District Magistrate and we must further set aside the conviction of the accused under s. 323, I. P. C., and direct that he be acquitted. The fine, if paid, will be refunded.

Roxburgh, J.—I agree.

D. *Reference rejected.*

OUDH CHIEF COURT

Appeal No. 3 of 1937

January 3, 1941

BENNETT AND GHULAM HASAN, JJ.

THE MUNICIPAL BOARD OF LUCKNOW

PLAINTIFF—APPELLANT

versus

Lala RAMJI LAL—DEFENDANT

—RESPONDENT

Transfer of Property Act (IV of 1882), s. 100—U. P. Municipalities Act (II of 1916), s. 177—Execution sale of immovable property—Municipal taxes in arrears—Auction-purchaser should be presumed to have constructive notice of charge—His failure to make enquiry—Effect—Duty of Municipality—Bye-laws of Lucknow Municipality—Municipality, if can follow property in hands of auction-purchaser in execution of decree.

The principle of constructive notice in the case of a transaction relating to immovable property which is required by law to be and has been registered by a registered instrument, should be applied to arrears of taxes which form a charge under the Municipalities Act on property sold at an auction sale. Even if any difficulty had been experienced by the auction-purchaser or was likely to be experienced by him in obtaining information regarding arrears of Municipal taxes standing against the immovable property, directly from the Municipal authorities, that would not be a valid defence. Rule 19 of the Municipal Account Code provides for the affixation to the assessment list of fly-leaves containing columns 5 to 13 of Form 3 appended to that Code. This form clearly shows what arrears are due. There are bye-laws of the Lucknow Municipality regulating inspections and the giving of copies of Municipal records and documents, and although permission has to be given by the Executive Officer, it may be presumed that where a house is being sold in execution of a Civil Court decree

permission would be given. If on application being made permission was refused and the would-be purchaser could not otherwise obtain the necessary information, constructive notice could not of course be imputed to him. Intending purchaser is not bound to presume that the taxes have been paid. It must be presumed that a person who buys house property situated in a Municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. When a charge has been expressly imposed in the Municipalities Act upon property for the payment of Municipal taxes, the Municipality is entitled to follow the property in the hands of a transferee who has not cared to make any enquiry as to whether payment of the taxes is in arrears. 27 Ind. Cas. 261 (1) and 191 Ind. Cas. 148 (3), considered, 185 Ind. Cas. 597 (2) and 191 Ind. Cas. 148 (3), held Overruled. [p. 292, col. 2; p. 293, cols. 1 & 2.]

A. against the order of Mr. Justice Zia-ul Hasan, dated August 20, 1936.

Mr. *K. P. Misra*, for the Appellant.
Mr. *R. K. Bose*, for the Respondent.

Judgment.—This is an appeal under s. 12 (2) of the Oudh Courts Act against the order passed by Mr. Justice Zia-ul Hasan on August 20, 1936, setting aside in second appeal the order of the learned Subordinate Judge, Lucknow, dated January 25, 1935, confirming the order of the learned Munsif, South Lucknow, dated October 10, 1934, decreeing the appellant's suit.

The suit was brought by the Municipal Board of Lucknow against Lala Ramji Lal to recover a sum of Rs. 48 4 on account of house and water taxes due for the period from April 1, 1931, to May 31, 1932. The house in respect of which these taxes were due had been purchased by Ramji Lal at a Court sale in execution of a decree obtained by him against Abdullah, the former owner of the house. The auction took place in March 1932, and the sale to Ramji Lal was confirmed in May 1932.

The defence put forward by Ramji Lal was that he was not liable to pay these taxes as they were due for a period prior to his purchase. This defence was not accepted either by the trial Court or by the learned Subordinate Judge in first appeal. It was, however allowed by Mr. Justice Zia-ul Hasan in second appeal. Mr. Justice Zia-ul Hasan first referred to s. 177 of the U. P. Municipalities Act of 1916 which reads as follows:—

"All sums due on account of a tax imposed on the all annual value of building or lands or of both shall, subject to the prior payment of the land revenue (if any) due to His Majesty thereupon be a first charge upon such buildings or lands."

It was in view of this provision that the Municipal Board claimed a charge over the house purchased by Ramji Lal for the arrears in suit. Mr. Justice Zia-ul Hasan then considered the effect of s. 100 of the T. P. Act under which it is necessary for the enforcement of a charge against any property in the hands of a person to whom it has been transferred for consideration that he had notice of the charge. It was contended by the Municipal Board that Ramji Lal should be deemed to have had constructive notice of the charge in view of the provision in s. 3 of the T. P. Act which reads:

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made or gross negligence, he would have known it."

Ramji Lal did not claim that he had made any enquiry or search at the Municipal Office to discover whether or not any arrears of taxes were due in respect of the house, and the questions for consideration were whether he wilfully abstained from making an enquiry or search which he should have made, or whether there was gross negligence on his part in not making such enquiry or search. Mr. Justice Zia-ul Hasan answered these questions in the negative. He pointed out that in the bye-laws of the Lucknow Municipal Board house and water-taxes are payable in advance, and the Municipalities Act gives very wide powers to Municipal Boards for their recovery. He thought that in view of these provisions it should be very seldom that any taxes should fall in arrears. He therefore did not consider that it was incumbent on a would-be purchaser to make any enquiry about arrears holding that it would be stretching the doctrine of constructive notice too far to say that in every case in which a person wants to bid for property liable to Municipal taxes he ought to make enquiries, before making a bid, whether any Municipal taxes are outstanding against the property.

Reference was made to the case of *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (I. L. R. 42 Cal. 625) (1), in which a purchaser was held to have had constructive notice of the Municipal taxes due in respect of the property sold, but Mr. Justice Zia-ul Hasan did not think that the ruling in this case was applicable, both because it was not known whe-

(1) 42 C 625; 27 Ind. Cas. 261; 21 C L J 177; 19 C W N 87.

ther the Calcutta Municipal Act that was in force at the time the ruling was given was or was not similar in its provisions to the U. P. Municipalities Act of 1916, and also because the purchaser in that case was the mortgagee himself who had foreclosed the mortgaged property and was, therefore, presumably acquainted with the existence of the arrears.

Learned Counsel for the Municipal Board first drew out attention to a ruling given by a Bench of the Allahabad High Court in *Rai Indra Narain* v. *Muhammad Ismail*, (I. L. R. 1939 All. 885) (2). In this case it was held that s. 100 of the T. P. Act as amended by Act XX of 1929, does not apply to auction sales or auction purchasers. The word "transfer" in s. 100 of the T. P. Act must be read as difined in s. 5 of the same Act and the definition would not, it was held, include an execution purchase. Moreover s. 2 (*d*) provided that nothing in the Act shall apply to any transfer in execution of a decree, save as provided by s. 57 and Chap. IV of the Act, and while s. 100 is in Chap. IV, it does not refer to auction sales. Section 100 can therefore have no application to the case of an execution decree, and it is not necessary that the purchaser should have had notice of the Charge.

Learned Counsel conceded that this view had been dissented from in the following year by another Bench of the Allahabad High Court, namely, in *Municipal Board, Cawnpore* v. *Roop Chand Jain*, (1940 A. L. J. R. 560) (3). In this case it was observed that the amendment to s. 100 introduced no change in the law as it stood before the amendment. It was held that s. 100 applies to transfers by auction sale in execution of decrees and therefore a *bona fide* purchaser takes property he buys free of all charges of which he has had no notice actual or constructive.

It will appear, therefore, that while in 1939 the Allahabad High Court held that no question of notice arises in such cases because s. 100 of the T. P. Act has no application to an auction sale, in 1940 the view taken was that s. 100 applies equally to transfers by auction sale as to transfers by act of parties, and, therefore it becomes necessary to consider whether a *bona fide* purchaser at such a sale has had notice, actual or constructive.

(2) I L R (1939) All. 885; 185 Ind. Cas. 597; A I R 1939 All. 687; (1939) A L J 849; 12 R A 337.

(3) (1940) A L J 560; 191 Ind. Cas. 148; A I R 1940 All. 456; 13 R A 217.

On the view which we take of the primary question under consideration in this case, namely, whether the auction purchaser Ramji Lal had or had not constructive notice of the charge upon the house, it is not necessary to consider which view of the Allahabad High Court should be followed.

After careful consideration we have come to the conclusion that the principle of constructive notice in the case of a transaction relating to immovable property which is required by law to be and has been registered by a registered instrument, should be applied to arrears of taxes which form a charge under the Municipalities Act on property sold at an auction sale.

Learned Counsel for the respondent Ramji Lal based his arguments largely on certain observations of the Allahabad High Court in *Municipal Board, Cawnpore* v. *Roop Chand Jain* (3). It was observed in that case:—

"If for instance the charge is created by a registered document then the purchaser would be held to have constructive notice of that charge inasmuch as a prudent purchaser would in ordinary course search the registers before effecting the purchase. There is no register, so far as we know, of arrears of taxes or of charges in respect thereof. It has not been shown that the Municipality of Cawnpore intimated to the public in the "Press' or by other publication a list of the properties which are charged in respect of arrears to taxes. There is nothing upon the record to justify the conclusion that the defendants could have demanded any information from the Municipality in regard to charges on immovable property within the Municipal limits."

It has not been suggested in the present case that the respondent could not have ascertained by enquiry from the Municipal authorities whether there were or were not any arrears of taxes due in respect of the house. But even if any difficulty had been experienced by him or was likely to be experienced by him in obtaining such information directly from the Municipal authorities, that would not in our opinion be a valid defence. Rule 19 of the Municipal Account Code provides for the affixation to the assessment list of fly-leaves containing columns 5 to 13 of Form 3 appended to that Code. This form clearly shows what arrears are due. There are bye-laws of the Lucknow Municipality regulating inspections and the giving of copies of Municipal records and documents, and although permission has to be given by the Executive Officer, it may be presumed that where a house is being sold in execution of a Civil Court decree permission would be given. If on application

being made permission was refused and the would-be purchaser could not otherwise obtain the necessary information, constructive notice could not of course be imputed to him.

It appears to us, however, that no difficulty would have been experienced by the respondent in ascertaining whether there were any arrears of taxes in respect of this house.

It was also observed in the case of *Municipal Board, Cawnpore* v. *Roop Chand Jain* (3) :—

"No intending purchaser is bound to presume that the taxes upon the property which he contemplates purchasing have not been paid in the ordinary course in the absence of any special intimation by the Municipality. If there has been negligence in the present instance it has been on the part of the corporation of Cawnpore. They should have taken steps long ago to recover the arrears of taxes from defendant No. 1 and they certainly should have taken steps to intimate and proclaim at the auction sale to intending purchasers that they held a charge over the property in respect of these arrears."

With the greatest respect we are unable to accept this view. In our opinion, the question is not whether an intending purchaser is bound to presume that the taxes have not been paid, but whether he is entitled to presume that they have been paid. We do not think that he is. We have given full consideration to the observation of the learned single Judge of this Court that in view of the wide powers given to Municipal Boards for the collection of taxes it should be very seldom that any taxes should fall in arrears. It is, we think, well known that despite these wide powers taxes do fall into arrears very often. We need only refer in this connection to the annual resolution of the Local Govt. on Municipal Administration and Finances, which shows how such collections fall below the demand.

It must be presumed that a person who buys house property situted in a Municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. Whatever negligence the Corporation of Cawnpore may have been gilty of in the Allahabad case, we are unable to find that there was any negligence on the part of the Lucknow Corporation in the present case, apart from their failure to recover the arrears of taxes from the judgment-debtor to whom the house previously belonged. We doubt whether the duty should be placed on a corporation to ascertain what auction sales of the property situated in the Municipality are taking place, and then intimate at them to intending purchasers to what Municipal charges the property is subject. Unless and until some intimation is given to the corporation it cannot, we think, be expected to know what auction sales are in contemplation. In these circumstances, we consider that when a charge has been expressly imposed in the Municipalities Act, upon property for the payment of Municipal taxes, the Municipality is entitled to follow the property in the hands of a transferee who has not cared to make any enquiry as to whether payment of the taxes is in arrears.

We have considered the Calcutta case already referred to *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (1), and we do not think that there is sufficent reason for distinguishing that case from the case under consideration. Mr. Justice Zia-ul-Hasan observed that we do not know whether the Calcutta Municipalities Act, that was in force at the time the ruling was made was or was not similar in its provisions to the U. P. Municipalities Act, 1916. The Calcutta Municipal Act, then in force was, as appears from the judgment in that case, the Act of 1899. The judgment also shows that s. 228 made the consolidated rate a first charge on the premises and that it reads as follows :

"The consolidated rate, due in respect of any building or land, shall, subject to the prior payment of the land revenue, if any, due to the Govt. thereupon, be a first charge upon the said building or land and upon the movable property, if any, found within or upon such building or land and belonging to the person liable for such rate."

There is no substantial difference between the provisions of this section and the provisions of s. 177 of the U. P. Municipalities Act of 1916. The facts in the Calcutta case were somewhat different from those in the present case, but we see no reason why the same principle in regard to constructive notice should not be applied. It has been argued that there was not in the present case either a wilful abstention from an enquiry or search which ought to have been made, or gross negligence. But we have to consider the meaning of these expressions in the light of the first Explanation to s. 3 of the T. P. Act. This explanation shows that where no enquiry has been made in respect of any transaction relating to immovable property which is required by law to be and has been effected by a registered instrument, the person guilty of the omission is considered either to have wilfully abstained from making it or to have been grossly negligent in not making it, and we see no

reason to differentiate between an enquiry into a transaction relating to immovable property in respect of which there has been or should have been registration, and an enquiry which it was equally his duty to make in the case of arrears of Municipal taxes.

For these reasons, we are unable to uphold the view taken by Mr. Justice Zia-ul-Hasan and we accordingly allow this appeal with costs, set aside the decree of the single Judge of this Court and restore the decrees of the Courts below.

D. *Appeal allowed.*

RANGOON HIGH COURT

Letters Patent Appeal No. 7 of 1940
July 29, 1940
ROBERTS, C. J. AND MOSELY, J.
DAW SHIN AND ANOTHER—APPELLANTS
versus
ARJANDAS AND ANOTHER—
RESPONDENTS

Administration suit—Co-sharers—Partition—One heir mortgaging his undivided share in entire joint estate, during pendency of suit—Subsequent partition—Other heirs, if take their allotted share free from encumbrance—Lis pendens.

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. Where, therefore, in the course of an administration suit for partition one of the heirs mortgages his undivided share in the whole of the joint estate, the other heirs take the allotted properties, in the absence of fraud, free from the mortgage, irrespective of the doctrine of *lis pendens* and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share, *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1), *Byjnath Lall* v. *Ramoodeen Chowdhury* (2), *Chatterput Singh* v. *Maharaj Bahadoor* (3), 108 Ind. Cas. 312 (4) and 139 Ind. Cas. 85 (5), relied on.

L. P. A. from the decree of the High Court, in S. A. No. 192 of 1939 dated February 29, 1940.

Mr. *P. K. Basu*, for the Appellants,
Mr. *K. C. Sanyal*, for the Respondents,

Mosely, J.—This letters patent appeal must be allowed. The facts are briefly that in the course of an administration suit one of the parties, a co-owner (Maung Aung Pe) mortgaged his undivided share of the properties. The mortgage-deed specifies the various properties which comprised the estate. At that time Aung Pe presumably thought that he was entitled to a one-eighth share and mortgaged that. He was subsequently awarded a one-third share and again mortgaged the balance of that to the respondents. After this a final decree was passed on a compromise between Aung Pe and the only other co-heir, Ma Saw Kin, who was entitled to a share in the properties, for the third co-heir, U Tun Aung Gyaw, had admittedly by then taken out more than his share of the estate. At this partition the house and site now in question went to Ma Saw Kin with other properties while Aung Pe again received other properties still. After this Ma Saw Kin transferred the properties in suit, the house and site, to her children, who again transferred them to the present appellants, Daw Shin and Daw Tin. The respondents sued Aung Pe and obtained a mortgage-decree against him, and at the auction bought the property themselves. They then sued Daw Tin and Daw Shin in the suit now under appeal for possession of Aung Pe's one-third share in this house and site. The suit was dismissed in the trial Court and in appeal by the learned District Judge, it being held that the suit was not maintainable. In second appeal to this Court, however, it was said that Aung Pe had only mortgaged his one-third interest, and that that transaction did not affect Ma Saw Kin's interests. The registered mortgage by Aung Pe was constructive notice to Ma Saw Kin. The learned Judge held that what Ma Saw Kin received at partition was only a two-thirds share in this house and site, or that what she received was subject to the mortgage of Aung Pe's one-third share in it. It was said that the doctrine of *lis pendens* does not necessarily apply to administration suits, which are not suits for the recovery of specific immovable property, and that for the above-mentioned reasons it should not be applied here.

Authorities were not cited to the learned Judge in second appeal, which convincingly show that irrespective of the doctrine of *lis pendens* this suit was not maintainable. One of these authorities was cited in the trial Court, namely *Jogendra Chunder Ghose* v. *Fulkumari Dasi* (1), which itself followed one of the leading authorities cited to us, *Byjnath Lall* v. *Ramoodeen Chowdhury* (2). It was laid down there that a mortgage of an undivided share in land may be enforced against

(1) 27 C 77; 4 C W N 254.
(2) 1 I A 106; 21 W R 233; 3 Sar. 333; 2 Suther 942 (P C).

lands which under a revenue partition have been allotted in lieu of such share, whether such lands be in the possession of the mortgagor or of one who has purchased his right, title and interest. But lands allotted in severalty by the revenue partition to the co-sharers of the mortgagor are not subject to the mortgage. Another decision of their Lordships of the Privy Council is *Chutterput Singh* v. *Maharaj Bahadoor* (3), at p. 16 where it was said that when the estate of a deceased person is under administration of the Court, a purchaser from an heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In that case the transaction in question was one dealing with one specific property only. In *Puran Chand* v. *Monmotho Nath* (4), their Lordships dealt with a case similar to the present one. The head-note reads as follows:

"In a suit to ascertain and administer the trusts under a deed a decree was made declaring one of the parties entitled to a one-sixth share in the surplus income, and that the trustees should have their costs out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit part of the property was sold to realize the trustees' costs. *Held*, that the mortgagee's rights were subject to the sale and the mortgage was consequently not an encumbrance upon the title of the purchasers."

Perhaps the authority most on all fours with the present case is another decision of their Lordships of the Privy Council, *Mohamed Afzal Khan* v. *Abdul Rahman* (5). The decision there was to the effect that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to other co-sharers, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share. That was a case of mortgage of an undivided share of some only of the properties held jointly. This case, like *Byjnath Lall* v. *Ramoodeen Chowdhury* (2) and *Puran Chand* v. *Monmotho Nath* (4), was a mortgage of an undivided share in all the properties. But that distinction makes, I conceive, no difference. It is clear then that the respondents could not enforce their mortgage against this property, which had been transferred by partition by Aung Pe, and this appeal must be allowed. In the result, the suit will be dismissed with costs throughout costs of this appeal five gold *mohurs*.

Roberts, C. J.—I agree and have nothing to add.

D. *Appeal allowed.*

(3) 32 I A 1 (16); 32 C 198; 7 C L J 395; 9 C W N 225; 8 Sar. 713 (P C).

(4) 55 C 532; 108 Ind. Cas. 342; A I R 1928 P C 38; 55 I A 81; 26 A L J 131; 27 L W 336; (1928) M W N 149; 54 M L J 473; 47 C L J 396; 32 C W N 629; 30 Bom. L R 783 (P C).

(5) 13 L 702; 139 Ind. Cas 85; A I R 1932 P C 235; 59 I A 405; Ind. Rul. (1932) P C 285; 9 O W N 829; 36 C W N 1129; 36 L W 456; (1932) M W N 1063; 63 M L J 664; (1932) A L J 909; L R 13 A 350; 16 R D 522; 56 C L J 324; 35 Bom. L R 1; 34 P L R 63 (P C).

OUDH CHIEF COURT

Privy Council Appeals Nos. 3, 6, 7, 8 and 12 of 1939

January 20, 1941

YORKE, AND GHULAM HASSAN, JJ.

MR. H. HUNTER—APPLICANT

versus

Chaudhri EHSAN HUSAIN AND OTHERS—OPPOSITE PARTY

***Civil Procedure Code** (Act V of 1908), ss. 109, 110—Limitation Act (IX of 1908), s. 12—Application for leave to appeal to Privy Council—Time requisite for obtaining copy of decree and copy of judgment, if can be excluded in computing limitation.*

Section 12 (3), Lim. Act, is to be read as enabling an applicant for leave to appeal, to exclude in computing the period of limitation for his application, the time requisite for obtaining a copy of the judgment on which it is founded. A party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment. 90 Ind. Cas. 601 (6), 66 Ind. Cas 88 (7), 139 Ind. Cas. 236 (8) and 80 Ind. Cas. 862 (9), approved 92 Ind. Cas. 897 (2), 157 Ind. Cas. 170 (3), 179 Ind. Cas. 912 (4) and 78 Ind. Cas. 953 (5), not approved.

P. C. Ap. application for leave to appeal to His Majesty in Council.

Mr. *R. B. Lal*, for the Appellant Applicant.

Mr. *I. A. Abbasi*, for Respondents Opposite Party Nos. 1 to 4.

Order.—These are five applications arising out of the judgment of a Bench of this Court, of which one of us was a member, re-

ported as *Matinuzzaman Khan, Khan Bahadur Moinul Mulk* v. *H. Hunter, Liquidator, Bank of Upper India Ltd.* (1939 O. W. N. 420) (1). That was a judgment in eight appeals arising out of two Suits Nos. 2 and 3 of 1935 filed on the original side of this Court but transferred to and decided by a Civil Judge specially deputed to hear them. One of these was a suit by trustees to recover possession of a trust estate and the other was an administration suit. Of the present applications No. 3 is an application by Mr. H. Hunter defendant in the trust suit. That suit was dismissed by the trial Court but the appeal was successful and the suit was decreed by this Court. The valuation is much in excess of Rs. 10,000 and, therefore, the applicant of this application No. 3 is entitled to the grant of the certificate asked for.

Applications Nos. 6, 7, 8 and 12 are applications by parties to the administration suit. The administration suit was decreed in part by the trial Court which gave directions to the trustees how to administer the trust and adjudicated upon the rights of the various creditors who were defendants to the suit. By our decree in appeal we varied the decree of the lower Court so as to include the applicant of application No. 3, Mr. H. Hunter, among the creditors in respect of whom the Court below will pass a final decree showing the claims and liabilities of the various beneficiaries. It is not in dispute that the valuation of all these appeals is in excess of Rs. 10,000, and it follows that as we have varied the decree of the lower Court by our decree in appeal, the applicants are all subject to any other objections, entitled to the grant of the certificate prayed for.

In the case of the applicants of applications Nos. 6, 7 and 8 no objection has been raised. In the case of the application of Chaudhri Sharafuzzaman No. 12, it is contended that the application is barred by limitation, on the ground that the application was filed after the period of 90 days allowed under Art. 179, of the Indian Lim. Act.

In calculating the period of limitation the office has allowed the period occupied in the obtaining of copies of the decree and the judgment.

It is pointed out that O. XLV, r. 3 does not require that a copy of the judgment be filed along with an application for leave to appeal to the Privy Council, and it is contended that s. 12 of the Lim. Act does not permit this time requisite for obtaining a copy of the decree and the judgment to be excluded.

Had it even been shown that this was a correct view of the law we should, we think, have been bound to take into consideration the admitted practice of the office of the Court in making allowance for the time occupied in obtaining these copies, and to have applied s. 5 of the Lim. Act. On a careful consideration, however of the terms of s. 12 of the Lim. Act and the cases quoted at the bar with reference to this section, we are of opinion that the practice of the office of this Court is founded on a correct view of the law and that a party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment.

On behalf of the opposite-party reliance has been placed particularly on two Allahabad cases and a Lahore case. In *Walayati Begum* v. *Firm Jhandu Mal Mithu Lal* (A. I. R. 1926 All. 286) (2), it was held that,

"sub-s. (3) of s. 12 does not apply to a case of an application for leave to appeal to His Majesty in Council, and so such an applicant is not entitled to exclude the time for obtaining a copy of the judgment of the High Court."

This decision was based on the view that the language of sub-s. (3) when contrasted with that of sub-s. (2) clearly contemplated the exclusion from the scope of sub-s. (3) of the case of an application for leave to appeal. Further the learned Judges took note of the tact that the rules of the Allahabad High Court did not make it necessary that the applicant should, at the time of filing his application for leave, file also a copy of the judgment on which the decree was founded.

The same view was taken by another Bench of the Allahabad High Court in *Gaekwar Baroda State Railway* v. *Muhammad Habib-Ullah*, (I. L. R. 57 All. 751) (3).

In Lahore, in the case of *Punjab Co-operative Bank Ltd., Amritsar* v. *Punjab National*

(1) (1939) O W N 420; 181 Ind Cas. 155; 1939 O L R 274; A I R 1939 Oudh 161; 14 Luck. 548; 11 R O 289.

(2) A I R 1926 All. 286; 92 Ind. Cas. 897; 24 A L J 349.

(3) 57 A 751; 157 Ind. Cas. 170; A I R 1935 All. 256; (1935) A L J 291; (1935) A L R 723; 8 R A 124 (2).

Bank Ltd., Amritsar, (A. I. R. 1939 Lahore, 43) (4), a Division Bench held that

"in computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the judgment cannot be excluded."

The view taken in this judgment also was that

"the wording of sub-ss. (2) and (3) of s. 12 of the Lim. Act is so unambiguous that it is not necessary to refer to any authorities at all."

It was considered that sub-s. (3) had no reference to applications for leave to appeal but referred only to actual appeals or applications for review of judgment.

The same view was taken by the Sind Judicial Commissioner's Court in *Nur Mahomed* v. *Hassomal*, (78 Ind. Cas. 953) (5).

On behalf of the applicants it is pointed out that the decisions quoted appear to have lost sight of the fact that the wording with which sub-s. (3) begins repeats exactly the words with which sub-s. (2) closes. Sub-sections (2) and (3) run as follows :—

"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded."

It is to be noted that although sub-s. (2) relates to the computation of the period of limitation prescribed for (1) an appeal, (2) an application for leave to appeal and (3) an application for a review of judgment, the time which is to be excluded is stated to be the time requisite for obtaining a copy of the decree, sentence or order, (1) appealed or (2) sought to be reviewed. There is no mention in these closing words of the decree, sentence or order "sought to be appealed from" or "from which leave to appeal is sought" that is to say that the enactment under the words "appealed from" has lumped together cases of (1) an appeal and (2) an application for leave to appeal. The argument proceeds as we think, logically that the words "appealed from" or sought to be reviewed" in sub-s. (3) of this section must properly be interpreted as carrying the same meaning which they carried in sub-s. (2), and it will follow that the words "appealed from" are sufficient to cover not only an appeal but also an application for leave to appeal. We are of opinion that there is much force in this argument.

The view suggested is the view which is apparently held in at least four of the High Courts in India. In the *Secretary of State for India. In re*, (I. L. R. 48 Mad., 939) (6) it was held that

"in the case of an application for leave to appeal to the Privy Council the time requisite for obtaining a copy of the judgment appealed against, can, under s. 12 (3) of the Lim. Act, be excluded in calculating limitation."

Their Lordships pointed out that in any case this was a very reasonable position, because a proper application for leave to appeal could not be drawn up, unless the party or his Pleader had before him a copy of the judgment. The reasoning upon which the interpretation of the section was based is the same reasoning which has been put before us.

The same view was taken by the Patna High Court in *Mahabir Prasad Tewari* v. *Jamuna Singh*, (A. I. R. 1922, Pat., 255) (7) and the case of *Commissioner of Income-tax, Bengal* v. *M. Shaw Wallace & Co.*, (I. L. R. 59, Cal., 251) (8) also supports the applicant's contention. In that case a learned Judge of the Calcutta High Court in delivering judgment on an application for leave to appeal remarked,

"I also think that, under s. 12, a party in a case, such as this is entitled to the time required to obtain a copy of the judgment."

That the same is the practice in Bombay is shown by the case of *Nagindas Motilal* v. *Nilaji Moroba Naik*, (I. L. R. 48 Bom., 442) (9). In the judgment of one of the Judges at p. 446* we find the remark,

"deducting the time requisite for obtaining the copy of the judgment it would appear that according to the period of limitation prescribed by Act XXVI of 1920 for such an application, the application should have been filed by July 2, 1921."

It is clear from this remark which is confirmed by a remark in the judgment of the learned Chief Justice at p. 443* where he says: "allowing for the time required for obtaining the copy of the judgment, the three months expired on July 3, 1921," that in the Bombay High Court the practice is that s. 12 (3) is

(4) A I R 1939 Lah. 43; 179 Ind. Cas. 912; 11 R L 651; 41 P L R 152; I L R 1939 Lah. 156.

(5) 78 Ind. Cas. 953; A I R 1925 Sind 60; 17 S L R 306.

(6) 48 M 939; 80 Ind. Cas. 601; A I R 1925 Mad. 1241; 49 M L J 418; 22 L W 330; (1925) M W N 783.

(7) A I R 1922 Pat. 255; 66 Ind. Cas. 88; 3 P L T 289; (1922) Pat. 193; 1 Pat. 429; 4 U P L R (Pat.) 33

(8) 59 C 251; 139 Ind. Cas. 236; A I R 1932 Cal. 587; 36 C W N 127; Ind. Rul. (1932) Cal. 588.

(9) 48 B 442; 80 Ind. Cas. 862; A I R 1924 Bom. 399; 26 Bom. L R 395.

*Pages of 48 Bom.—[*Ed.*]

read as enabling an applicant for leave to appeal to exclude in computing the period of limitation for his application the time requisit for obtaining a copy of the judgment on which it is founded.

In our opinion, the view taken by the High Courts at Madras, Bombay, Calcutta and Patna is preferable to that which has been taken by Allahabad, Lahore and Sind, and it is moreover in accordance with the practice current in this Court. We have no hesitation in holding that application No. 12 is not barred by limitation.

We order accordingly, that the necessary certificates as required by O. XLV of the Civil P. C., be granted to the applicants of these five applications.

S. *Order accordingly.*

MADRAS HIGH COURT

Second Appeal No. 560 of 1935,
April 19, 1939
WADSWORTH, J.
NAGI REDDI—APPELLANT
versus
NANJUNDAPPA—RESPONDENT

Hindu Law—Adoption—Illatom adoption—Incidents to be determined by evidence in each case—Held, that plaintiff was illatom son-in-law and agreement must be inferred from facts, on basis of which affiliation was carried out—Second appeal—Finding of fact—Illatom adoption.

An illatom affiliation is a creature of agreement. But this does not mean that in every case of an illatom affiliation there must be a detailed contract embodying all the incidents of the arrangement in the particular case. The incidents of illatom affiliation have not been completely established by judicial decisions and these incidents should ordinarily be settled by evidence in the particular case. 128 Ind. Cas. 561 (1), relied on.

One *K* when he had no children took the plaintiff into his family with the idea of a regular adoption. Subsequently when sons and a daughter were born to him he formed the idea that, in due course, he would marry his daughter to the plaintiff and take the plaintiff as an illatom son-in-law. On this understanding the plaintiff continued to live in the family. On his death-bed *K* instructed his wife to complete the illatom affiliation by marrying the daughter to the plaintiff. The plaintiff was duly married to *K's* daughter and lived in the family and was treated as the illaton son-in-law;

Held, that the plaintiff was an illatom son-in-law. The plaintiff performed his part by marrying the daughter and was thereafter treated as an illatom son-in-law. From these facts it must be inferred that there was an agreement on the basis of which the illatom affiliation was carried out.

It is not open in second appeal to attack the findings of fact on the essential questions of the authorization by the prospective father-in-law to his wife to complete the affiliation after his death and of the subsequent marriage and the status recognized in favour of the adoptee as an illatom son-in-law.

S. A. against the decree of the Sub-Judge, Salem, dated February 1, 1935.

Messrs. *M. S. Ramachandra Rao* and *D. R. Krishna Rao*, for the Appellant.

Messrs. *T. M. Krishnaswamy Ayyar* and *A. Balasubramania Iyer*, for the Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff claimed properties on the basis of an alleged illatom affiliation. The plaintiff married the daughter of one Konda Reddi who died about the year 1909. The facts found are that Konda Reddi at a time when he had no children took the plaintiff into his family apparently with the idea of a regular adoption. Subsequently, there were born to Konda Reddi first a son, then a daughter and then another son. After the birth of the son it is found that Konda Reddi, no longer being able to adopt the plaintiff, formed the idea that, in due course, he would marry his daughter to the plaintiff and take the plaintiff as an illatom son-in-law. On this understanding the plaintiff continued to live in the family. But an epidemic of plague intervened, the eldest son being the first victim, followed by Konda Reddi himself about a week later. It is found as a fact that on his death-bed Konda Reddi instructed his wife to complete the illatom affiliation by marrying the daughter to the plaintiff. It would appear that the plaintiff was a major at the time of Konda Reddi's death. After his death the marriage of the plaintiff to Konda Reddi's daughter was duly carried out by the widow and it is found as a fact by the Courts below that thereafter the plaintiff was treated as the illatom son-in-law of the deceased Konda Reddi, that he lived in the family and managed the properties for his mother-in-law. It is not open in second appeal to attack the findings of fact on the essential questions of the authorization by Konda Reddi to his wife to complete the affiliation and of the subsequent marriage and the status recognized in favour of the plaintiff as an illatom son-in-law. It is however, contended that there is no finding nor proof of such an agreement as is necessary to form the basis of an illatom adoption.

The case has certain peculiarities. In the first place it comes from the Salem District which is not one of the Districts in which the illatom custom is widely recognized. Another peculiarity is that, according to the Subordinate Judge, the parties belong to the Kammala caste. But I am con-

strained to conclude that this must be a mistake due to the unfamiliarity of the learned Judge with the Telgu caste name, for the learned Judge, after stating that the parties are Kammala Reddis, states that this is one of the castes in respect of which Mayne's Hindu Law recognises that the illatom practice prevails. Actually the learned author recognizes the existence of the custom in the Kamma and Reddi castes not in the Kammala caste which is quite a different community and one in which, so far as I am aware, it has never been suggested that this practice peculiar to the various castes which call themselves Reddis can apply. The Kammala caste is essentially a Tamil caste of artisans not to be confused with the Telugu Kamma caste, which not infrequently adopts the title of Reddi and has strong affinities with the numerous Kapu castes, the members of which are normally known as Reddis. But I am unable to find any basis in the record for the Subordinate Judge's description of this community as Kammala Reddi The witnesses describe themselves as Reddis simply. Presumably, they must be Kamma Reddis wrongly described by the Subordinate Judge as Kammala Reddis.

It was not disputed in the Courts below that the community to which the parties belonged was one which recognizes the custom of illatom affiliation. I do not think that the Subordinate Judge is quite right in saying that the validity of the particular affiliation alleged was not denied; for it is in fact put in issue. The incidents of the very widespread practice of illatom affiliation have not been completely established by judicial decisions and it was recognized by a Bench of this Court in *Subbaro* v. *Mahalakshmamma* (1) that these incidents should ordinarily be settled by evidence in the particular case. There are however certain incidents of the custom which have been established by decisions. It is well recognised that an illatom affiliation is a creature of agreement. *Narayadu* v. *Venkamma* (2). But I do not think that this means that in every case of an illatom affiliation there must be a detailed contract embodying all the incidents of the arrangement in the particular case. Normally, there would be an agreement between the father of the boy, if he was a minor and the prospective father-in-law or, if the prospective son-in-law was a major, between the son-in-law himself and the prospective father-in-law, that the proposed illatom son-in-law should be taken into the family by his prospective father-in-law with a view to his marriage with a daughter of the house and the conferment upon him of the illatom status, with its customary incidents. These customary incidents being well known would not ordinarily be the subject of specific agreement.

It is settled by the Privy Council's decision reported in *Krishnamma* v. *Venkatasubbayya* (3) that the practice of illatom affiliation is frequently followed even when the family into which the son-in-law had been taken has a natural born son living. There is also authority in *Venkayalapathi* v. *Negandla* (4) for the proposition that, when a boy has been taken into a family on the understanding that he would be married to a daughter and given the status of an illatom son-in-law, the arrangement may be completed by the solemnization of the marriage even after the death of the prospective father-in-law. So far as I am aware, it has never been held that a mere arrangement to take a boy as an illatom son-in-law, followed by living in the prospective father-in-law's household but not followed by marriage to the proposed bride will complete an illatom affiliaton. In the present case it has been found that the plaintiff was taken into the household of Konda Reddi originally with a view to a regular adoption but, after the birth of a son to Konda Reddi he coutinued there under a proposal that he should be married to the daughter and treated as an illatom son-in-law. It has been found that on his death-bed Konda Reddi asked his wife to complete this arrangement by marrying the daughter to the plaintiff giving him a share in the property as an illatom son-in-law. It has also been found that the arrangement was completed and the marriage performed and that the plaintiff did live in his mother-in law's household as an illatom son-in-law. These findings of fact are in my opinion sufficient to warrant a legal inference that the plaintiff was an illatom son-in-law. It is true there is no specific evidence of any actual agreement for an illatom affiliation but the whole of the evidence postulates the assumption that, at the time when the plaintiff was a major, Konda Reddi authorized the completion of

(1) 54 M. 27; 128 Ind. Cas. 561; A I R 1930 Mad. 883; 59 M L J 558; 32 L W 233; 26 M L T 35; 23 C W N 1010; 30 C L J 145; 10 L W 193; 21 Bom. L R 906; (1919) M W N 551.

(2) 22 M L J 265; 13 Ind. Cas. 866.

(3) 42 M 805; 51 Ind. Cas. 1; A I R 1919 P C 162; 46 I A 168; 17 A L J 662; 37 M L J 1 (P C).

(4) 11 Ind. Cas. 25.

an arrangement for illatom affiliation by the marriage of the plaintiff to his daughter. The plaintiff performed his part by marrying the daugher and was thereafter treated as an illatom son-in-law. From these facts it must, I think be inferred that there was an agreement on the basis of which the illatom affiliation was carried out. In this view, therefore, I dismiss the appeal with costs. Leave refused.

N.-S. *Appeal dismissed.*

OUDH CHIEF COURT

Civil Reference No. 20 of 1940
February 21, 1941
BENNETT, J.

Mst. GIRJA WATI AND OTHERS—APPLICANTS
versus
QUDRATULLAH KHAN—OPPOSITE PARTY

Court-fee—Appeal—Appeal arising out of suit under s. 33, U. P. Agriculturists' Relief Act (XXVII of 1934)—Ad valorem *court-fee is payable on amount involved therein.*

An *ad valorem* fee should be charged on an appeal in a suit under s. 33, U. P. Agri. Relief Act, on the amount involved therein. 191 Ind. Cas 337 (1), 172 Ind. Cas. 653 (2) and 177 Ind. Cas. 76 (3), referred to.

Where, therefore, in an appeal arising out of a suit brought under s 33, Agri. Relief Act the appellant challenges the amount awarded against him by the trial Court and further claims that he should himself have been awarded a certain amount, he is liable to pay a court-fee on an *ad valorem* basis on the total amount, that is, the amount decreed against him and the amount claimed by him.

C. Ref. made by the Chief Inspector of Stamps, U. P. Allahabad, dated November 25, 1940.

Messrs. *M. M. Lal* and *R. N. Shukla*, for the Applicant.

Mr. *H. K. Ghose*, for the Crown.

Order. — This is an application under sub-s. (1) of s. 6-B of the Courts Fees Act by the Chief Inspector of Stamps, United Provinces. It arises out of a suit brought under s. 33 of the Agri. Relief Act. In appeal to the Civil Judge of Hardoi the appellants challenged the amount of Rs. 123-1 decreed by the trial Court against them and further claimed that they should themselves have been awarded a sum of Rs. 739-12. They valued their appeal at Rs. 200 plus Rs. 123-1 and paid a total court-fee of Rs. 19-12. The Inspector of Stamps reported that they were liable to pay a court fee of Rs. 86-4 on an *ad valorem* basis on the total amount of Rs. 862-13, that is Rs. 123-1 decreed against the appellants and Rs. 739-12 claimed by them.

The Civil Judge did not agree with the Inspector and in his order holding that the court-fee paid was sufficient, he referred to the amendment introduced in s. 33 of the Agri. Relief Act by Act IX of 1937. Sub-s. (3) of this section now provides that court-fee payable on a plaint in a suit under sub-s. (1) shall be that prescribed by Sch. VI. The Civil Judge appears to have considered that this provision applied also to appeals, though he did not expressly say so.

The Chief Inspector of Stamps in his application referred to a recent case of the Allahabad High Court, *Harendra Shankar* v. *Khaiali Ram* (1940 O W N 1130) (1), in which it was held that a suit under s. 33 of the Agri. Relief Act is a suit for accounts and an appeal against a decree passed in such a suit is governed by s. 7 (*iv*) (*b*) of the Court Fees Act. It had previously been held by the same High Court in *Anis Begam* v. *Shyam Sunder Lal* (1937 A L J R 1194) (2), that such a suit was not a suit for a declaration, but a suit for an account of money and should be so valued; and in *Pahlad Singh* v. *Niadar Singh* (1938 A L J R 708) (3), that an *ad valorem* fee should be charged on an appeal in a suit under s. 33 on the amount involved therein.

The question for consideration is whether the amendment in s. 33 affects the amount of court-fee payable on appeals against decrees passed under that section.

It is contended that the words 'plaint in a suit' should be liberally construed so as to include a memorandum of appeal. There is, however, no authority which would support this contention, and on the other hand it has been held that in appeals in redemption suits brought under the Agri. Relief Act *ad valorem* court-fee must be paid and not the fee payable on an application under that section. It has also been held that in s. 296 of the U. P. Ten. Act of 1939 the word 'suit' does not include appeals.

I am of opinion therefore that the application of the Chief Inspector of Stamps

(1) (1940) O W N 1130; 191 Ind. Cas. 337; A I R 1940 All. 504; 1940 A L J 689; 13 R A 219; 1940 R D 538.

(2) (1937) A L J 1194; 172 Ind. Cas. 653; A I R 1937 All. 792; I L R (1937) All. 965; 10 R A 407; 1937 R D 539; 1938 A L R 14.

(3) (1938) A L J 708; 177 Ind. Cas. 76; A I R 1938 All. 467; I L R (1938) All. 686; 11 R A 159; 1938 R D 698; 1938 A L R 698.

must be allowed and that the appellants must be required to pay *ad valorem* fee on the total amount challenged by them.

I accordingly grant a declaration that the proper court-fee has not been paid in this case and that the deficiency amounts to Rs. 86-4 less the sum of Rs. 19-12 paid, that is Rs. 66-8.

S. *Declaration granted.*

RANGOON HIGH COURT
Special Bench
Civil Reference No. 2 of 1940
January 17, 1941
MYA BU, DUNKLEY AND SHAW, JJ.
MA DUN MAY—PETITIONER
versus
SAW JAMES—RESPONDENT

Divorce Act (Burma) (IV of 1869), ss. 10, 14—Petition must state distinctly facts upon which claim to have marriage dissolved, is founded — Exercise of discretion to excuse delay.

Evidence in divorce proceedings to prove the case of the petitioner must be confined to the pleas set out in the petition. Consequently it is essential, as laid down in s. 10, Burma Divorce Act, to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery.

C. Ref. made by the District Judge, Bassein, in C. R. S. No. 1 of 1940.

Mya Bu, J.—The petitioner filed a petition, under the Burma Divorce Act on February 14, 1940, seeking a dissolution of her marriage with the respondent, upon the ground of adultery coupled with cruelty and desertion without reasonable excuse for over four years. The parties are Karen Christians who are domiciled in Burma. They were married on March 19, 1929 at Kanyinmyaung village, according to Christian rites, by the Baptist Pastor Thra Kya Aung who held a license to perform marriages. They lived in Bassein district for about seven years, after which the respondent left for Rangoon. In the petition it was stated that the respondent committed adultery with one Ma Sein Yin in January 1936, and had two children by her. Ma Sein Yin is now dead. The allegation was taken to mean that the alleged adultery commenced in January 1936 and continued until Ma Sein Yin's death. The evidence given was to the effect that the respondent and Ma Sein Yin lived together as husband and wife until about one year or two years ago when Ma Sein Yin died. The two children of the union are said to be alive. Evidence in divorce proceedings to prove the case of the petition must be confined to the pleas set out in the petition. Consequently, it is essential, as laid down in s. 10, Burma Divorce Act, to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded.

Cruelty is alleged, with no particulars at all, by the mere statement that the respondent cruelly treated the petitioner. It was as well that the charge of cruelty was practically dropped. The only evidence of cruelty was the petitioner's statement that the respondent used to beat her when they were living together in her parent's house The decree granted to the petitioner by the District Court was based upon adultery coupled with desertion without reasonable excuse for a period of two years and upwards. Although the adultery proved went beyond what was strictly necessary acording to the petition, there was evidence which was sufficient to prove that the respondent committed adultery in January 1936 with Ma Sein Yin, taking the letter Ex. A in conjunction with the other evidence. There was also evidence to prove desertion without reasonable excuse for a period of over two years. The Court under s. 14 of the Act, had amongst other things to consider the delay in presenting the petition. That was done, but in coming to the conclusion that there had been unreasonable delay the learned District Judge stated that the petitioner was only an ignorant village woman and she was perhaps hoping that her husband might eventually return to her, especially after his mistress had died. It may have been apparent to the learned Judge that the petitioner was ignorant, but there is no evidence of that or that she was hoping for the return of her husband to her. The petitioner was not questioned to explain the delay in the presentation of her petition.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. There seems nothing in the evidence given in the case to indicate that the petitioner was hoping for her husband eventually to return to her. If Ma Sein Yin died about two years ago, as stated by the Pastor Thra Kya Aung, there was inordinate

delay. But the petitioner mentioned that Ma Sein Yin died "last year" when she gave evidence on May 13, 1940. This matter requires clearing up. In the circumstances, the case must be remanded for additional evidence to be taken, under s. 17, Burma Divorce Act, on the question relating to the delay in the presentation of the petition. The case is remanded accordingly.

D. *Case remanded.*

CALCUTTA HIGH COURT

Death Reference No. 6 and
Appeal No. 223 of 1940
May 3, 1940

BARTLEY AND SEN, JJ.

EMPEROR—
versus
MUJJAFFAR SHEIKH AND ANOTHER—ACCUSED—APPELLANTS

Criminal Procedure Code (Act V of 1898), s. 297—Charge to jury—Case depending on circumstantial evidence—Duty of Judge pointed out—Charge, held defective—Penal Code (Act XLV of 1860), ss. 34, 149, 302—Common intention—Necessity for—Proof of—Constructive liability under s. 34—S. 149, applicability — Murder — Circumstantial evidence—Practice—Precedents—Text books—Notes in, on a case—Reliability.

In a case in which the guilt of the accused is sought to be established by circumstantial evidence, A theoretical discourse of what is circumstantial evidence couched in language which is unintelligible to a *muffasil* jury is quite worthless. The Judge should tell the jury that if the circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused are entitled to be acquitted even if the circumstances raised a strong suspicion against them. He should summarize the circumstances alleged against the accused and ask the jury to decide whether from these circumstances the only reasonable inference to be drawn is the guilt of the accused and should tell them that if that was not the only reasonable inference, they should acquit the accused. [p. 304, col 1.]

The Sessions Judge while concluding the charge said: you should, therefore, consider whether you are prepared to accept the same as showing the guilt of the accused persons:

Held, that these directions in a case depending on circumstantial evidence were quite inadequate. [p. 304, col. 2.]

The Judge summarizes the evidence against each of the accused persons and at the end of each summary he made the following observation: "This is the evidence against the accused. Do you think that he has been falsely implicated?" He used these very words three times at the end of each summary.

Held, that this was wrong method of approach in a criminal case. The issue before the jury was not whether the accused were being falsely implicated but whether the prosecution had proved beyond reasonable doubt that the accused were guilty. A question like this repeated at intervals at the end of the summary of the evidence against each of the accused was very likely to misguide the jury into thinking that unless they were satisfied that the case was false, they should find the accused guilty and amounted to misdirection. [*ibid.*]

Where in placing the evidence before the jury the Judge does not point out, the inherent improbabilities, inconsistencies and important contradictions in the evidence the charge is defective. [p. 305, col 2.]

It is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. In order to make a person constructively liable with the aid of s 34, I. P. C., for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under s. 34, I. P. C., for murder, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved, he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common. [p. 305, col. 1.]

Section 149, I. P. C., cannot come into operation unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons. [p. 305, col. 2.]

The case against two accused rested on circumstantial evidence which was not such as to leave one no alternative but to hold that they were guilty. There was no evidence to show that both of them killed the deceased or that both had the intention to kill him.

Held, that neither could he found guilty of murder. [*ibid.*]

It is sometimes dangerous to accept as accurate the notes appearing in text-books, It is always safer to refer to the decision itself on which the note is based. [p. 305, col. 1.]

Mr. *Satindra Nath Mukherjee*, for the Crown.

Messrs. *J. P. Mitter* and *Bireswar Chatterjee*, for the Appellants.

Sen, J.—Panchkari Sheikh and his two sons Mujjaffar Sheikh and Saifer Sheikh were tried for the murder of one Abdul Rashid by the Sessions Judge of Birbhum and a special jury. By a unanimous verdict the jury found Panchkari not guilty and by a majority of five to four, they found Mujjaffar Sheikh and Saifer Sheikh guilty of committing murder. The learned Judge accepting the verdict of the jury, acquitted Panchkari and sentenced Mujjaffar and Saifer to death; he has referred the case to us for confirmation of the sentence. Mujjaffar and Saifer have appealed. The case for the prosecution, briefly is as follows: Panchkari and his two sons Mujjaffar and Saifer were on bad terms with the deceased Abdul Rashid who is the son of Panchkari's sister. About six months

before the murder, the three accused were sent up on a charge of theft and Abdul Rashid helped the Police against them. This led to further ill-feeling between the parties. On November 2, 1939, Rashid lodged an information at the *thana* complaining that the three accused persons and one Nabuat had been threatening him with bodily harm. On January 16, 1940 in the morning there was a *salis* regarding a dispute between Panchkari and his brother Ekrar, over a wall. At this *salis* Rashid and his brother attended and there Panchkari said that both the brothers should not be allowed to take part in the *salis* and threatened them saying that they should be "removed from this world."

On the same day Rashid left the Co-operative Bank at Rampurhat where he works, at about 5-15 P. M. with one Mir Najim Ali. They were returning home after their work. They first went to a cloth shop where Rashid purchased some cloth and thereafter departed—Rashid going home-ward to his village of Binodepur on a bicycle. He was seen by some persons riding towards the village. Now, to go to his village from Rampurhat one must pass a culvert called Hiranbandi culvert. Rashid was last seen at about 5-40 P. M. by one Roshan Ali, P. W. No. 10 riding on his bicycle about a mile from the culvert. On that day at about 6 P. M. certain persons saw a bicycle lying on the embankment near the culvert about 80 cubits away. They also saw the appellants and another man who looked like Panchkari near about this place. Nothing further was seen of Rashid or of his bicycle on that day. On the next morning at about 7 A. M. certain persons walking along the road saw a corpse in a ditch near the culvert and this corpse was that of Rashid. Nearby there was a bicycle and near the bicycle was the blade of a clasp knife. Later on in the ditch the brass handle of this knife was found. The Police were informed, they came on the scene and took charge of the corpse and after investigation sent up the appellants and Panchkari for trial on a charge of murder. The medical evidence shows that death was due to a punctured wound $3\frac{1}{2}'' \times 1''$ on the neck. The wound penetrated deep down to the thyroid cartilage and the carotod artery was cut. There were other injuries on the face, forearm and finger. The case against the appellants rests entirely upon circumstantial evidence. I propose to set forth the main incriminating facts upon which the prosecution depends. They may be stated thus:

(*a*) There was ill-feeling between the parties and on January 16, 1940, there was a threat by Pachkari that the deceased should be "removed from this world." This threat is spoken to by the brother of the deceased Adul Hamid, P. W. No. 13. Abdul Kader, P. W. No. 18 also speaks to the fact that Panchkari or Saifer spoke in a treatening manner but his evidence does not corroborate that of Abdul Hamid regarding the actual words used. (*b*) The presence of Mujjaffar and Saifer and a person who looked like Panchkari near about the culvert on January 16, 1940, about 6-15 P. M. This fact is spoken to by Kumarish Let, P. W. No. 2, Gopal Bannerjee, P. W. No. 20, Upendra Muchi, P. W. No. 25 Mokram Hossain, P. W. No. 26 and Kasim Sheikh, P. W. No. 27. The evidence is that Mujjaffar was loitering about near the culvert and the other two persons seemed to be pressing something down in the ditch. One of the witnesses also says that he saw Saifer running away. This is Mokram Hossain, P. W. No. 26. (*c*) On that day Mujjaffar was late in attending the dispensary where he worked and when he got there he opened an almirah and took out some iodine without the permission of the person in charge. He applied the iodine to some injuries on his person without showing them to anybody there. The medical evidence shows that there were two slight injuries on Mujjaffar: one was a scratch on the right cheek and the other, an abrasion on his right hand. (*d*) The conduct of Mujjaffar on the day following the murder. On January 17, 1940, certain persons saw the corpse of Rashid in the ditch. Mujjaffar was accompanying some of these persons. They saw the handle of a knife lying near the bicycle. Mujjaffar picked up this handle and threw it into the ditch. When the witnesses asked Mujjaffar why he was doing this, Mujjaffar merely said: "It does not matter." (*e*) When Abdul Hamid, the brother of the deceased, after hearing that his brother's corpse had been found, was going towards the culvert, Mujjaffar came up to him and tried to dissuade him from going there saying: "I passed by the place. It is all false to say that there has been a murder." (*f*) The knife found at the place is said to belong to Saifer. This is spoken to by two witnesses, namely Ali Akbar, P. W. No. 17, and Osman, P. W. No. 32. (*g*) Saifer was seen on the morning after the murder wear-

ing a *dhoti* with blood-stains in front. This was seen by two persons, namely Kalu, P. W. No. 23, and Abdul Sattar, P. W. No. 24. They say that when Saifer's attention was drawn to this blood-stain he hurriedly went to his house, changed the *dhoti* and reappeared in a *sari*. These are the main facts upon which the prosecution depends.

The defence of the accused is that Rashid was carrying on an intrigue with the daughter of a *muchi* and that someone had killed him in that connection. It was suggested that the witnesses were implicating them because of previous enmity. I shall now deal with the Judge's charge to the jury. In my opinion, the charge is unsatisfactory in several respects. The learned Judge has not given adequate directions to the jury as to how they should deal with a case in which the guilt of the accused is sought to be established by circumstantial evidence. This is what the learned Judge says:

"Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but by the bearing upon that fact of other facts which are relied upon as inconsistent with any result other than truth of the principal fact."

A theoretical discourse like this of what is circumstanctial evidence couched in language which must have been unintelligible to a *muffasil* jury is in my opinion quite worthless. The learned Judge should have told the jury that if the circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused were entitled to be acquitted even if the circumstances raised a strong suspicion against them. He should have summarized the circumstances alleged against the accused and asked the jury to decide whether from these circumstances the only reasonable inference to be drawn was the guilt of the accused and should have told them that if that was not the only reasonable inference, they should acquit the accused. Nothing of this kind was done. After giving this definition of circumstantial evidence and after telling the jury that they had to arrive at a decision on circumstantial evidence the learned Judge concludes thus:

"You should therefore consider whether you are prepared to accept the same as showing the guilt of the accused persons"

These directions in a case depending on circumstantial evidence are in my opinion quite inadequate. The next defect in the charge is this: The learned Judge summarizes the evidence against each of the accused persons and at the end of each summary he makes the following observation: "This is the evidence against the accused. Do you think that he has been falsely implicated?"

He uses these very words three times at the end of each summary. This is wrong method of approach in a criminal case. The issue before the jury was not whether the accused were being falsely implicated but whether the prosecution had proved beyond reasonable doubt that the accused were guilty. A question like this repeated at intervals at the end of the summary of the evidence against each of the accused is very likely to misguide the jury into thinking that unless they were satisfied that the case was false, they should find the accused guilty. The wholesome principle that where jury is in doubt as to whether the case is false or true, they should give the accused the benefit of that doubt, seems to have been lost sight of by the learned Judge when he put this wrong issue before the jury. Again the learned Judge was wrong in his treatment of the application of s. 34, I. P. C., to this case. This is what he says:

"I shall explain to you what s. 34, I. P. C., means. Under this section where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose. As the purpose is common so must be the responsibility."

Now this is not a proper explanation of the provisions of s. 34, I. P. C. This passage in the learned Judge's charge is a *verbatim* reproduction of a passage to be found in the notes under s 34. I. P. C., in Ratanlal's Law of Crimes, Edn., 11, p. 61. The author in making this comment refers to the case in *Ganesh Singh* v. *Ram Rajah* (1) at p. 45. I have consulted the case and I find that the learned author has quoted a passage from the judgment of their Lordships of the Privy Council at pp. 45 and 46*. Now this case has nothing whatsoever to do with s. 34, I. P. C. It was not a criminal case at all. Their Lordships were dealing with a suit for damages instituted against several persons who were alleged to have plundered the property of the plaintiff at the time of the mutiny. They said that each of the plunderers was liable to pay damages and that damages should not be apportion-

(1) 3 Beng. L R 44 (45); 12 W R 38 (P C).

*Pages of 3 Beng. L. R.—[*Ed.*]

ed, inasmuch as each of the plunderers had the common purpose of plunder.

Their Lordships went on to say that the position would be different if it were a criminal case. It is sometimes dangerous to accept as accurate notes appearing in text-books. It is always safer to refer to the decision itself on which the note is based. The note relied upon by the learned Judge and incorporated by him in his charge is entirely misleading and inaccurate and I have no doubt that the jury were misled by this direction of the learned Judge. In my opinion, it is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. For instance, three persons may have the common purpose of robbing a bank; one of these persons, unknown to the others, arms himself with a pistol and shoots one of the bank's assistants who resisted him. The others will certainly not be liable for murder unless it is proved that all of them had the common intention that anyone who resisted them would be shot. In the present case s. 34, I. P. C., would not apply, unless it could be established that Mujjaffar and Saifer had the common intention of murdering Rashid. The learned Judge should have made this clear to the jury. In fact he should have told the jury that unless it could be proved beyond all reasonable doubt that Mujjaffar and Saifer both had the common intention of killing Rashid, neither could be found guilty of murder, as there is no evidence to show who actually struck the deceased. This is the fundamental weakness in the case for the prosecution and the learned Judge seems to have overlooked it.

In order to make a person constructively liable with the aid of s. 34, I. P. C., for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under s. 34, I. P. C., for murder, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved, he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common. Under s. 149 I. P. C., the position would be different. That section runs thus:

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Section 34, I. P. C., deals with quite another set of circumstances. That section runs thus:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The provisions of s. 149 of the Code, cannot be availed of in this case, inasmuch as the number of the persons involved was less than five. Section 149 cannot come into opertion unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons. Another defect in the learned Judge's charge to the jury is that in placing the evidence before them he does not point out, as he should have done, the inherent improbabilities, inconsistencies and important contradictions in the evidence. (After discussing evidence regarding the threats used by the accused against the deceased, his Lordship concluded that the circumstantial evidence in the case was not such as to leave one no alternative but to hold that the appellants are guilty and proceeded). Again the circumstances do not establish which person struck the blow. As I have pointed out before, there is great difficulty in the way of the prosecution invoking the aid of s. 34, I. P. C., in this case, as it has not been established either by direct or circumstantial evidence that both the appellants intended to kill Rashid. Even if one were to take a view unduly favourable to the prosecution in this case, the most that one could say was that one or other of the accused must have killed Rashid. There is no evidence to show that both of them killed him or that both had the intention to kill him. That being so, obviously neither can be found guilty of the murder. We therefore set aside the order of conviction and sentence. In the circumstances of this case we do not think any useful purpose will be served in ordering a retrial. We accordingly acquit the appellants and direct that they be set at liberty forthwith. The appeal is allowed and the reference is rejected.

Bartley, J.—I agree.

D. *Appeal allowed.*

NAGPUR HIGH COURT

First Appeal No. 99-B of 1935
July 16, 1940
STONE, C. J. AND BOSE, J.
UMAR HAJI KARIM—DEFENDANT—APPELLANT No. 15
versus
BADRIDAS RAMRAI AND OTHERS—RESPONDENTS

Registration Act (XVI of 1908), s. 49—Unregistered sale deed—If can be used to explain nature of possession taken under it — Adverse possession — Mortgage —Property burdened with simple mortgage—Stranger entering into adverse possession — His adverse possession against mortgagee, when commences —Stranger entering subsequent to mortgage — Foreclosure suit without joining trespasser as party—Rights of trespasser and mortgagee — Procedure to be followed—Suit on mortgage—Lessee and trespasser, if necessary parties.

Though an unregistered deed of sale is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It may operate as starting point for adverse possession of vendee, if he has set up independent title in himself. 53 Ind. Cas. 901 (1), relied on. [p. 308, col. 1.]

If a stranger enters into adverse possession of property burdened with a simple mortgage, then he only prescribes for the interest of the person entitled to immediate possession, that is to say, of the mortgagor. All that the mortgagor has is the right to redeem. Therefore all that the stranger gets is the right to redeem. He does not get a full title to the property, and as for the mortgagee, his right to possession does not accrue until he has obtained his decree for foreclosure, or in the case of sale, until he has purchased (if he happens to be the purchaser); therefore, adverse possession as against him does not commence until that date. 31 Ind. Cas. 412 (2), 24 Ind. Cas. 997 (3), 37 Ind. Cas. 277 (4) and *Pugh* v. *Heath* (5), relied on. [*ibid.*]

The mortgagee is not affected by anything done behind his back after his mortgage; therefore he is entitled to foreclose his mortgagor, (or bring the property to sale), without joining subsequent purchasers of the right to redeem, (or those in a lesser position such as trespassers whose title had not yet ripened), and by so doing he acquires substantial rights. On the other hand the purchaser of the mortgagor's rights, or the trespasser who has, or is on the way to ousting him and acquiring his rights, is also not without rights: and he is clearly not affected by a litigation to which he was not a party. The only way to do justice between these two conflicting rights is to adjust the equities They are best adjusted by affording the purchaser, or the trespasser, (as the case may be), an opportunity to redeem that portion of the property in which he is interested on paying a proportionate part of the mortgage money. 170 Ind. Cas. 856 (7), relied on. [p 309, col. 2.]

Though the lessee, or the trespasser, (or even the transferee), may be proper parties if their interests accrue subsequent to the mortgage, they are not necessary parties to a suit on mortgage. [p 310, col. 2.]

F. A. from the decree of the Court of the Sub-Judge, First Class, Akola, dated November 9, 1935.

Mr. *A. V. Khare* with Mr. *W. B. Pendharkar*, for the Appellant.

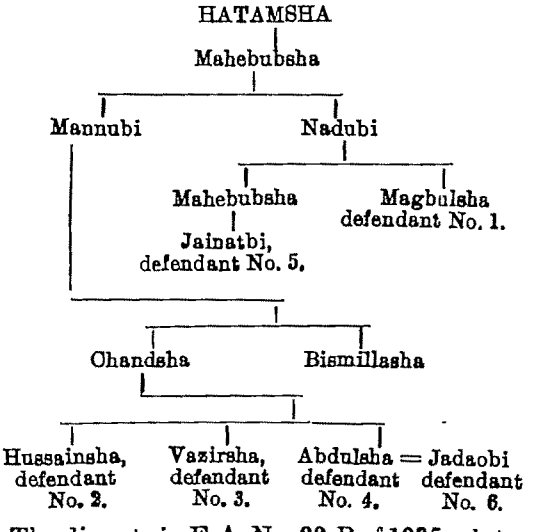
Mr. *V. K. Rajwade*, for Respondent No. 1.

Mr. *A. Ahmad*, for Respondents Nos. 3, 5 and 7.

Judgment.—This judgment will govern F. A. No. 99-B of 1935 as well as F. A. No. 8 of 1936. They both arise out of the same judgment. We will deal with F. A. No. 99-B of 1935 first.

The facts were placed before us in a somewhat confused state but once they are disentangled the questions which remain are not difficult.

The property in dispute consists of a number of different plots which have been shown in a map prepared by the Commissioner appointed for that purpose in the lower Court. It originally belonged to one Hatamsha and from him descended to the defendants, (except the fifth and sixth), as shown in the following tree. The first defendant got an undivided 8 annas and defendants Nos. 2, 3 and 6 an undivided 2 annas 8 pies each. There has been no partition by metes and bounds but the parties being Mubammadans succeeded to separate and distinct shares.



The dispute in F. A. No. 99-B of 1935 relates to plots Nos. 2 and 3. We take the numbers from the Commissioner's map. We will recite the facts relating to plot No. 3 first.

On July 2, 1913, the first defendant leased his undivided interest in plot No. 3 to the 15th defendant (who is the appellant in this appeal) by a document Ex. 15. D-1. Exhibit P-10 is a copy of the same document. It will be convenient however to refer throughout to Ex. 15. D-1.

But though an undivided half interest was leased the 15th defendant was placed in possession of the whole plot and it

appears that he had been allowed to construct a substantial structure on this plot at some time anterior to the lease. Who had allowed him to do this has not been disclosed, but the lease deed refers to this fact and acknowledges that the superstructure on the plot belongs to the 15th defendant, and further states that even after the termination of the lease the lessee is not to be deprived of possession, unless the superstructure is paid for by the lessor.

The recitals so far as they are relevant are as follows :

" Hussainsha Fakir and myself own a land measuring 30 × 30 feet" (this is plot No. 3) "I am entitled to half of the aforesaid land as owner. I have given to you on rent my own half share in the aforesaid land for a period of six yeers...The land is bounded as under...Half the land of the land within the aforesaid boundary limits has as stated above been given to you on rent for six years...

P. S.—The superstructure constructed on the aforesaid land does not belong to us. It is constructed by you.It is owned by you. If after the expiry of the aforesaid period of 6 years I went to take back my land I will pay you the price that the Panchas may fix of your superstructure on the land and then will take possession of the land. I will recover from you Rs. 16 by way of the rent of the land per year until I pay you the amount fixed by the Panchas on account of the superstructure."

It is to be observed that though the deed speaks of "half the land within the aforesaid boundaries" it means an undivided half and not a demarcated half. As a matter of fact we understand that the superstructure covers the whole of this plot.

It is also to be observed that though the deed speaks of the lessor having a half share in this plot that is not strictly accurate. What he had was an undivided half share in the whole of the property which consists of a number of plots and only an expectation of having this plot, or a half of it, assigned to his share at a partition. It will be necessary to take this into consideration when the property is divided at the partition.

Two years after this lease, namely on November 3, 1915, the first defendant mortgaged his undivided 8 annas interest in the whole estate to the plaintiff. Then after this, on May 30, 1917, he sold his undivided half interest in plot No. 3 to the 15th defendant by an unregistered deed of sale, Ex. 15.D-2(A).

Several years later the third defendant mortgaged his undivided 2 annas 8 pies share in the whole estate to the plaintiff by two mortgage deeds, Ex. P.31 dated October 2, 1923 and Ex. P. 32, dated March 11, 1926.

In the year 1927 the plaintiff sued on his mortgages, obtained final decrees for foreclosure and eventually obtained joint possession, (the property was still undivided), on December 21, 1930, in the one case, and on September 1, 1930 in the other. The first and third defendants thus lost their respective intertsts in the estate and the plaintiff stepped into their shoes and became a co-owner to the extent of an undivided 10 annas 8 pies along with the second and sixth defendants. The 15th defendant was not joined in the mortgage suits and consequently, is not bound by them. His interests are not affected by the decrees in any way.

After this, on May 1, 1931, the 6th defendant sold her undivided 2 annas 8 pies interest in plot No. 3 to the 15th defendant by a registered sale deed, Ex. 15. D-2. The recitals state.

"I have this day sold to you the undermentioned immovable property "(plot No. 3)" acquired by me under a deed of Mehar executed and registered in my favour by my husband on September 20, 1928... The entire land of the half joint share in the land within the aforesaid boundary limits...is sold. The entire land within the aforesaid boundary limits is in your possession as a tenant for the last many years. On that entire land there is a *pucca* superstructure of tin roofing belonging to you I having no concern with the said superstructure only owned the land of the half share. My husband had, as owner, given you on rent the aforesaid land and had delivered possession thereof to you In the meanwhile the ownership of the said land was transferred to me under the deed of Meher... '

It is necessary at this stage to explain the positions of the 4th and 5th defendants.

The 5th defendant is a daughter of Mahebubsha, the brother of the 1st defendant. Mahebubsha died before the succession opened out and so the first defendant obtained the entire 8 annas which fell to the share of that branch of the family. The 5th defendant got nothing.

So far as the 4th defendant is concerned. He inherited a 2 annas 8 pies share, but out of this he transferred an undivided 2 annas 8 pies interest in plot No. 3 to his wife, the 6th defendant, in lieu of Meher on September 20, 1923, as Ex. 15. D-2 recites. Thus she became the owner of that share in plot No. 3 to the exclusion of her husband.

The present suit is equal to the plaintiff's mortgage suits. Having obtained an undivided 10 annas 8 pies interest in the whole estate, and having been placed in joint possession thereof, the plaintiff now sues for partition and asks to be placed in undivided possession of such property as may be assigned to his share.

But before this can be done it is necessary to decide the dispute which arises in connection with this plot (No. 3), because it will

be necessary to direct the partitioning officer to assign this plot, so far as that is possible and convenient, to the shares of the first and fourth defendants. It will also be necessary to decide, as between the plaintiff and 15th defendant, what the plaintiff is entitled to receive.

The first problem in the case arises out of the unregistered sale deed dated May 30, 1917. As a deed of sale it was ineffective to pass title. But the 15th defendant pleaded that it was good enough to operate as a starting point for adverse possession. Their Lordships of the Privy Council decided in *Varada Pillai* v. *Jeevarathnammal* (1), that though an unregisiered deed of this kind is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It is quite clear from the document that from the date of its execution the 15th defendant set up an independent title in himself and thus held adversely to the 1st defendant from that day. He has continued to hold in that character down to the present day which is more than 12 years from that date. Therefore as against the 1st defendant the 15th defendant forfeited his title on May 30, 1929.

But this does not affect the plaintiff martgagee. It is well-settled that if a stranger enters into adverse possession of property burdened with a simple mortgage, then he only prescribes for the interest of the person entitled to immediate possession, that is to say, of the mortgagor. All that the mortgagor has is the right to redeem. Therefore all that the stranger gets is the right to redeem. He does not get a full title to the property, and as for the mortgagee, his right to possession does not accrue until he has obtained his decree for foreclosure, or in the case of a sale, until he has purchased, (if he happens to be the purchaser); therefore, adverse possession as against him does not commence until that date. This was decided in *Vyapuri* v. *Sonamma Boi Ammani* (2), *Raj Nath* v. *Narain das* (3) and *Priya Sakhi Debi* v. *Manbodh Bibi* (4). It is also the English Law. See *Pugh* v. *Heath* (5).

(1) 43 M 244; 53 Ind. Cas. 901; A I R 1919 P C 44; 46 I A 285; (1919) M W N 724; 10 L W 679; 24 C W N 346; 38 M L J 313; 18 A L J 274 (P C).

(2) 39 M 811; 31 Ind. Cas. 412; A I R 1916 Mad. 290; 29 M L J 645; 2 L W 1080; 18 M L T 436; (1915) M W N 927 (F B).

(3) 36 A 567 (571); 24 Ind. Cas. 997; A I R 1914 All. 95; 12 A L J 982 (F B).

(4) 44 C 425 (433); 37 Ind. Cas. 277; A I R 1918 Cal. 933; 27 C L J 212; 21 C W N 177.

(5) (1882) 7 A C 235; 51 L J Q B 367; 46 L T 321; 30 W R 553.

But this does not solve the whole problem. All the cases cited above, except the Madras Full Bench, (including the House of Lords case from England) were cases in which the trespasser was joined as a party to the suit on the mortgage, and the question of his adverse possession was considered from that angle. In that class of case there is not much real difficulty.

The principle that the possession of a trespasser who enters into possession after the date of the mortgage is not adverse to the mortgagee, and that therefore the mortgagee's rights are not affected, can readily be accepted. Therefore, so long as the mortgagee sues upon his mortgage to enforce his rights as mortgagee within limitation, it is clear that he can enforce these rights. But if he does not join the trespasser to his mortgage suit and sues later for possession upon his title, the position is not as clear.

When there is a mortgage the original rights to the proyerty are split up between the mortgagor and the mortgagee, some residing in one and the rest in the other. When the mortgagee eventually forecloses, (or buys in a case of sale), the two rights coalesce. But if the mortgagor no longer has that portion of the rights which reside in him at the date of the mortgagee's suit it is by no means clear that the mortgagee can obtain them by foreclosing the mortgagor, (or bringing the mortgaged property to sale), and omitting from the action the person in whom these rights really reside. It is immaterial for this purpose whether the stranger has acquired the mortgagor's rights by purchase or by adverse possession.

We can quite see that the mortgagee could sue again upon his mortgage and foreclose (or sell) as against the stranger, but if he does not do this, or if at the date of his suit for possession such an action would be barred, then the position is by no means clear.

It is even more difficult when, as here, the trespasser's title to the mortgagor's rights happens to have been perfected during the pendency of the mortgagee's suit upon the mortgage against the mortgagor.

The division between the interests which the mortgagor and mortgagee respectively have in the property mortgaged is not the same in India and in England, but bearing those differences in mind, the observations of Lord Selbourne in *Heath* v. *Pugh* (6), (which was later confirmed by the House of

(6) (1881) 6 Q B D 345.

Lords in *Pugh* v. *Heath* (5),) bring out the point we are now considering.

"This being the position of the title, as long as the mortgage is redeemable, the effect of an order for foreclosure absolute is to vest the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrance. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released.....There can be no two things said Lord Manners in.....more distinct or opposite than the possession as mortgagor and the possession as owner of the estate."

If these observations reflect the true position then it is difficult to see how the position of the mortgagee after foreclosure of the mortgagor, (or purchase), is better or worse than that of a person who buys property outright from another. If the vendor has lost all right, title and interest at the date of the sale, the vendee gets nothing. If there is a trespasser on the land at the time the vendee gets the vendor's rights to eject him. But he must bring his action within 12 years of the dispossession, because the adverse possession which had commenced against the vendor will run against the vendee as well. That is one point of view.

The other way of looking at the matter is this. The trespasser only prescribes for the limited estate of the mortgagor when the property is burdened with a simple mortgage. Therefore even though a suit on the mortgage may be barred as a suit on the mortgage against the stranger, all that the trespasser has acquired is a right to redeem. It is therefore inequitable to allow him to set up a higher right, namely the right to retain the property unconditionally, against the person in whom the larger title resides.

This difficulty was not considered by the Madras Full Bench in *Vyapuri* v *Sonamma Boi Ammani* (2). The sequence of events given in the report of that case is as follows; 1878 mortgage. 1890 trespasser enters upon the land. 1900 suit on the mortgage; trespasser not joined. November 1900 decree for sale. October 1906 mortgagee's successor (his widow) purchases. 1910 suit for possession against the trespasser.

It will be seen that the position there was exactly the same as here. When the mortgagee sued on his mortgage the trespasser had not perfected his title, but he had had more than 12 years' adverse possession before the mortgagee obtained his decree for sale. Unfortunately the only question referred for the consideration of the Full Bench was this:

"Whether the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is advers to the simple mortgage."

The question was answered in the negative, and with that answer we fully agree. But what then? Was the mortgagee allowed to eject the trespasser? Or were the equities adjusted by giving the defendant an opportunity to redeem? And if so, to redeem what? The whole of the mortgaged property which might compromise, as here, many properties, or just the one item of property of which he had been in adverse possession by paying a proportionate part of the mortgage debt? None of these problems was discussed in that ruling nor does the report furnish us with the sequal.

We think the true position has been explained by Ramesam, J. in *Sambasiva Ayyar* v. *Subramania Pillai* (7): namely, that it is the kind of case in which the equities have to be worked out. The mortgagee is not affected by anything done behind his back after his mortgage; therefore, he is entitled to foreclose his mortgagor, (or bring the property to sale), without joining subsequent purchasers of the right to redeem, (or those in a lesser position such as trespassers whose title had not yet ripened). And by so doing he acquires substantial rights. This is also the view of Lord Selbourne, (whose judgment was later upheld by the House of Lords), in the English case which we have cited above, though there the subsequent purchaser was as a matter of fact joined to the action on the mortgage. But the learned Lord Chancellor enunciates the principle that the mortgagee is not affected by his mortgagor's actions, (or absence of action), subsequent to the mortgage.

On the other hand the purchaser of the mortgagor's rights, or the trespasser who has, or is on the way to ousting him and acquiring his rights, is also not without rights: and he is clearly not affected by a litigation to which he was not a party. The only way to do justice between these two conflicting rights is to adjust the equities We think that they are best adjusted by affording the purchaser, or the trespasser, (as the case may be), an opportunity to redeem that portion of the property in which he is interested on paying a proportionate part of the mortgage money.

(7) 59 M 312 (334); 170 Ind. Cas. 856; A I R 1936 Mad. 70; 44 L W 887; 10 R M 235.

Another question was also raised and was more fully argued in the other appeal (F. A. No 8 of 1936), but it will be convenient to to deal with it here. It was contended, that a mortgage is one and indivisible and consequently if a person interested in the equity of redemption is omitted from a suit on the mortgage the mortgagee obtains no title as against him and loses his cause of action on the mortgage for ever. It was argued that every person interested in the equity of redemption must be joined and that this includes subsequent purchasers of the mortgagor's rights, lessees, tenants, trespassers, and so forth. The following rulings relied on: *Ramnath* v. *Hazari* (8), *Sheoram* v. *Jamnabai* (9), *Jagatchandra Deo* v. *Abdul Rashid* (10), *Umesh Chunder Sircar* v. *Zahur Fatima* (11) and *Niharmala Debee* v. *Sarojebandhu Bhuttacharjya* (12).

We need not go into this question here because it is possible to decide this matter on another ground. All we say now is that if that is really the law, then it will raise many practical difficulties and will seriously disturb the existing practice in this Province. It will mean that whenever a mortgagee sues a *malguzar*, or other landlord of a village with tenants in it, then he will be obliged to join every tenant of the village, and every holder of every trumpery interest in it; and in large villages that may well run the defendants up to several hundreds.

We also observe that it is possible that there is a difference between the words "interest in .... the property mortgaged or the right to redeem" used in s. 91 of the T. P. Act, and the words "right to enjoy" which occur in s. 105. If the "right to enjoy" specified in s. 105 is different from the "interest" mentioned in s. 91, then the lessee who has only "a right to enjoy", and not an "interest", would not appear to be entitled to redeem. But the matter is debatable and we say no more about it.

The ground on which we proceed is this, namely that though the lessee, or the trespasser, (or even the transferee), may be proper parties if their interests accrue subsequent to the mortgage, they are not necessary parties. If the principle which we have enumerated above that the mortgagee cannot be affected by anything which is done behind his back and after his mortgage is correct, then he is entitled, if he so desires, to ignore these interests and proceed against his mortgagor on his contract. Having foreclosed his mortgagor, or purchased his interests at the auction in accordance with his contract, then he obtains all the interests which his mortgagor has in the estate at the date of the mortgage, subject however to subsequent equities. Those equities entitle him either to sue again upon his mortgage, if such a suit is still within time, or to sue upon his title, provided he affords the holder of the subsequent interest an opportunity to redeem such interest upon payment of a proportionate part of the mortgage amount.

We have now to determine the extent of the mortgaged property in which the 15th defendant is interested. In our opinion, it includes only the site of plot No. 3 and does not include the superstructure which stands on it. In this particular case we do not think that the superstructure can be said to form an accretion to the mortgaged estate.

The plot, or rather, the 1st defendant's half share it, was leased to the 15th defendant before the mortgage. The superstructure was then standing on it, and a condition of the lease was that the lessee was not to be evicted without the lessor paying for this building. The mortgagee was bound by these conditions when he later took his mortgage.

Of course the lease has now merged in the higher rights which the 15th defendant has acquired by his adverse possession. But we are not here dealing solely with legal rights. We are endeavouring to adjust the equities and in doing that we think that the fact that the superstructure was constructed by the 15th defendant under the conditions mentioned above is a relevant consideration.

As regards the other 2 annas 8 pies share in plot No. 3 which the 15th defendant claims, he obtained it by a registered sale deed from the 6th defendant. This defendant is not the plaintiff's mortgagor, and the plaintiff has not stepped into her shoes, or those of her husband the 4th defendant. The 15th defendant has consequently a clear title to an undivided 2 annas 8 pies share in this plot.

This leaves us with a complicated situation. We think that the fairest method of

(8) 25 N L R 19 (26); 123 Ind. Cas. 462; A I R 1929 Nag. 246; Ind Rul. (1930) Nag. 222.
(9) 19 N L R 18; 65 Ind. Cas. 503; A I R 1923 Nag. 273.
(10) 62 C 75 (77); 154 Ind. Cas. 818; A I R 1935 Cal. 148; 38 C W N 1178; 7 R C 542.
(11) 18 C 164 (179); 17 I A 201; 5 Sar. 507 (P C).
(12) 60 C 948; 148 Ind. Cas. 42; A I R 1933 Cal. 728; 37 C W N 897; R C 444.

working out the equities will be to assign an undivided half share in the plot to the share of the plaintiff's mortgagor the 1st defendant (into whose shoes the plaintiff has now stepped), and an undivided 2 annas 8 pies share to the share of the 6th defendant (who stands in the shoes of her husband the 4th defendant). As regards the remaining 5 annas 4 pies share that will be turned into cash and the money will be thrown into hotchpot.

The 15th defendant will be allowed to reedem within 6 months an undivided 8 annas share in the plot (site only) on paying to the plaintiff a proportionate share of the mortgage amount, the proportion to be calculated on the basis of the site without its superstructure.

The 15th defendant will also buy out the remaining undivided 5 annas 4 pies share (site only) by paying into Court, within 6 months, its market value at the date of the suit. This money will be thrown into hotchpot and will be treated as a cash asset available for distribution at the partition.

On failure of the 15th defendant to redeem as above and to pay for the 5 annas 4 pies share, or either, the property, including the superstructure, will be put to auction, and the proceeds will be distributed over the site and the superstructure by the lower Court. Such sum as the lower Court apportions to the superstructure will be handed over to the 15th defendant, and such sum as represents the site will be thrown into hotchpot.

We now turn to plot No. 2. There is no real dispute about this. The 15th defendant pleaded that he was a lessee of this plot under an oral lease granted before the mortgage by the first four defendants. His original statement dated July 26, 1933 is a little confused and the plaintiff appears to have read an assertion of adverse possession into it, and the issue has been framed accordingly. But we do not think that was meant. The allegation of adverse possession related to plot No. 3* and not to plot No. 2. In any case the matter was cleared up in the 15th defendant's statement of August 10, 1933 where he stated that he was prepared to pay the rent to the plaintiff if this field was allotted to the share of his mortgagors. The only contention the plaintiff raised in respect of this plot was that defendant was a lessee and not an owner. The parties are therefore not really at issue on this point. It is accepted that an oral lease would be good.

It is possible that disputes will arise hereafter when and if the plaintiff endeavours to determine the lease. But all that is premature now. Both sides agreed before us that these matters may be left open, that is to say, they accept the position that the 15th defendant is a lessee and that he will attorn to whoever gets this plot at the partition, and that he will be bound by the terms of the lease (what-ever they were) as also will his new landlord. It is however necessary to state that the 15th defendant claims the superstructure on this plot as his own. The lower Court finds that this is so and there has been no appeal by the plaintiff against that finding. It will therefore have to be accepted that the superstructure is the 15th defendant's but the other questions relating to this are left open. That is to say, we do not decide whether the 15th defendant will have to remove the superstructure on the determination of the lease or whether the plaintiff will have to pay him its price as a condition precedent to eviction.

The decree will accordingly contain a declaration to the effect that the 15th defendant is a lessee of plot No. 2 and that he will continue to hold on the old conditions, (conditions which are not determined in this suit), after partition, and that he will have to attorn to whichever person receives this plot at the partition.

This concludes F. A. No. 99-B of 1935. The success and failure in it are about equal. As regards plot No. 2, there was never any real dispute. As regards plot No. 3 each side claimed the plot as his own. In the result neither gets it without being compelled to recognise the rights of the other. We consider therefore that each side should bear his own costs *vis-a-vis* each other both here and in the lower Court.

We turn now to F. A. No. 8 of 1936. The 16th defendant is the appellant and he is interested in plot No. 1.

The position here is a curious one. The plaintiff impleaded this defendant on the ground that he was in possession of plot No. 1 as a lessee from the 1st and 2nd defendants, (para. 17 of the plaint), and that he (the plaintiff) did not want to be obstructed in his enjoyment of whatever property might be assigned to his share.

The 16th defendant thereupon set up a title

in himself adverse to that of the plaintiff. He said that he had been sold this plot by the 1st defendant about 40 years before the suit, that is to say, long before the mortgages under which the plaintiff claims title. The sale is said to have been an oral one. It is admitted that in these days an oral sale was effective to pass title in Berar because the T. P. Act had not then been introduced there.

The plaintiff denied this sale, and the lower Court upheld his contention and found that the sale was not proved. That leaves us with the position that this defendant was, on the plaintiff's allegation, a lessee. As such he was not a necessary party to the suit and should have been discharged; in fact that is what he asked for at one stage. But since then he has taken up the attitude, and has maintained it before us, that the plaintiff could get no title whatever to the property as against him because he was not joined as a party to the plaintiff's mortgage suits. We have already dealt with this argument in the other appeal and do not think it is well-founded. We have no doubt that the plaintiff obtained a good title. All that has happened, or rather that will happen if this plot is assigned to the share of the plaintiff, is that there will be a change of landlords.

In view of the fact that the matter has been fought out up to this stage, we think that instead of discharging this defendant and thus allowing him to raise all these pleas over again it will be more satisfactory all round to embody a declaration about this plot in the decree as in the other case. The declaration will state that the 16th defendant is a lessee of plot No. 1 holding from the 1st and 2nd defendants on the old terms, (terms which are not decided in this suit), and that he will have to attorn to whichever party obtains plot No. 1 when the property is divided. This is virtually what the lower Court had done. This appeal therefore fails and is dismissed with costs.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Letters Patent Appeal No. 109 of 1939
April 4, 1940
THE CHAND AND DALIP SINGH, JJ.

BHOLA SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

RAMAN MAL—DECREE-HOLDER—RESPONDENT

Punjab Relief of Indebtedness Act (VII of 1934), s. 35—House let out—Onus lies on judgment-debtor to prove length of occupation—Words 'for a period .....more'—Construction—Interpretation of Statutes—Punctuations.

The house of an agriculturist judgment-debtor is exempt under s. 35 unless it has been let out on rent for a period of a year or more. The mere negative form of s. 35 would not, shift the onus from the judgment-debtor. Even if it did do so, still once it is proved that the property had been let on rent, the period for which it had been rented being a matter specifically within the knowledge of the judgment-debtor, the onus would lie on him to show the length of the period.

The words "for a period of a year or more" in s. 35 only qualify the words "left vacant."

A statute must be interpreted without regard to punctuation.

L. P. A. from the judgment of Skemp, J., in Exn. S. A. No. 127 of 1939, dated April 14, 1939.

Mr. *F. C. Mittal* for Mr. *Achhru Ram* for the Appellant.

Mr. *Tirath Ram*, for the Respondent.

Dalip Singh, J. — In this appeal one Raman Mal obtained a decree against Bhola Singh and in execution attached three properties, but we are only concerned in this case with one of them, namely, a double-storeyed house with a shop. The judgment-debtor pleaded that he was an agriculturist. The trial Court held that the judgment-debtor was an agriculturist, but that the shop had been let out to one Abdul Majid on rent and, therefore, under s. 35, Punjab Relief of Indebtedness Act, the shop was not exempt from attachment in the decree of Raman Mal. It released the rest of the house. On appeal, the learned District Judge held that Abdul Majid was probably paying for the shop, but he had only occupied the shop for a very short period, largely, it appears, because Abdul Majid stated that he had left the shop about a month before the date on which he gave evidence in the lower Court. I do not see how the fact that Abdul Majid had left the shop on the date on which he gave evidence could throw any light on the length of his previous occupation of the shop. However,

the learned District Judge considered that this brought the shop within the exemption of s. 60, Civil P. C., read with s. 35, Punjab Relief of Indebtedness Act, accepted the appeal of Bhola Singh and released the shop from attachment.

On appeal to this Court the learned Judge in Single Bench held, firstly, that the onus of proving the length of the occupation lay on the judgment debtor because the proviso to s. 60 created an exception to the general proposition that the property of a judgment-debtor was liable to satisfy decrees obtained against the judgment-debtor. He considered that it was false that Abdul Majid had only held the shop for a period of eight or nine days. He, therefore, considered that the judgment-debtor on whom the onus lay had failed to prove that the occupation of Abdul Majid as tenant was only for a short period. Further, he considered that the words "for a period of a year or more" qualified only the words "left vacant" and did not qualify the words let out on rent or lent to others." He referred to the commentary of Sir Chhotu Ram and pointed out that punctuation was no part of the statute, and should not be regarded in the interpretation of a statute. He referred to the commentary of Dr. Shuja-ud-Din in which the learned commentator appears to think that the words "for a period of a year or more" only qualify "left vacant." He further considered that on principle there was a reason why the words "for a period of a year or more" should qualify 'left vacant", as vacancy might arise owing to accident though the house was being used for agriculture, whereas if a house was let for rent or lent to others, the agriculturist by his own act has shown that the building or the house was not necessary for the purpose of agriculture and hence on principle was not exempt.

It appears to me that the learned Judge was right in both of his conclusions. It seems amply proved on the record that Abdul Majid did occupy the shop and paid rent for it. It is difficult to believe that he only took it for eight or nine days, and it appears to me, therefore, that the length of the occupation was not proved by the judgment-debtor and that the onus did lie on the judgment-debtor—and I see no reasons why the onus should not lie on the judgment-debtor—to prove the exemption which he claimed. The learned Counsel for the appellant contends that as the words read "not let out on rent" and this is a negative proposition, therefore, the onus lies on the decree-holder to prove that the property has been let out on rent for a year or more. I do not agree. As pointed out by the learned Judge in Single Bench, the matter is generally within the special knowledge of the judgment-debtor. The section originally stood "belonging to an agriculturist and occupied by him." It is clear that the onus of showing occupation was on the agriculturist judgment-debtor. In Sir Chhotu Ram's own commentary, it is pointed out that the change was introduced in order to do away with the discussion that arose as to the nature of the occupation. It is now clear that whatever the nature of the occupation, the house is exempt unless it has been let out on rent for a period of a year or more. The mere negative form of the section would not, in my opinion, shift the onus from the judgment-debtor. Even if this negative form did do so, still once it was proved that the property had been let on rent, it would appear to me that the period for which it had been rented being a matter specifically within the knowledge of the judgment-debtor, the onus would lie on him to show the length of the period.

As regards the second question whether the words "for a period of a year or more" only qualify the words "left vacant" or qualify the words "not let out on rent or lent to others", with great deference to the learned commentator. Sir Chhotu Ram, it seems to me that in strict grammar if the words qualify all the three, there should have been a comma after "left vacant." The absence of a comma would rather suggest that the words "for a period of a year or more" only qualify the words "left vacant". We are, however, not called upon to decide on this question as it seems to me that it is clear law that a statute must be interpreted without regard to punctuation. Nothing has been stated by the learned Counsel for the appellant to repel the reasoning of the learned Judge in Single Bench on the principle of the matter, I, therefore, consider that the decision of the learned Judge in Single Bench was correct, and I would dismiss this appeal with costs.

Tek Chand, J.—I agree.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Appeal No. 147 of 1936
December 2, 1938
ABDUR RAHMAN, J.

NALLANGAL—APPELLANT
versus
ARASAPPAPPILLAIPATTI CO-OPERTIVE SOCIETY BY SECRETARY, A. MANGAYANA PILLAI —RESPONDENT

Trusts Act (II of 1882), ss. 88, 90, 94—Person applying for issue of pattah *depositing amount for survey stones and trees and dying—His widow making fresh application and obtaining* pattah—*Land attached by husband's decree-holder—Ss. 88, 90 and 94, if apply—Ss. 88 and 90, how far exhaustive.*

A person applied to the Govt for issuing a *pattah* and deposited certain amount for the value of survey stones and of the trees growing on the land but before the grant could be made he died. His widow made a fresh application for the same purpose and a *pattah* was issued to her The husband's decree-holder attached this land on the ground that it was liable to be sold in execution of his decree:

Held, that the widow could not be said to have acquired the property for the benefit of her husband's estate. The widow could not be said to be a person holding any fiduciary character and of such a nature as to be bound to protect the interests of the creditor of her deceased husband and s. 88, Trusts Act did not apply. Nor did s. 90 apply as a Hindu widow could neither be described to be a tenant for life nor qualified owner in the sense in which these expressions have been used in that section. Moreover the expression "persons interested" did not cover the creditors of the widow's deceased husband:

Held, further that since the widow could not be held to have owed any duty to the creditor of her husband or to be holding the property for his benefit, the provisions of s. 94 of the Act were not applicable [p 316, col 2.]

The terms of ss. 88 and 90, Trusts Act are not exhaustive only in the sense that if a person cannot be brought within these sections, and held liable as a trustee, he must be found to fall under the residuary section *i. e.*, s. 94. In other words where no trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is termed in English Law, as a constructive trustee. [p. 316, col. 1.]

A. against the appellate order of the Sub-Judge, Dindigul, dated February 4, 1936.

Mr. *K. S. Ramamurthi*, for the Appellant.

Messrs. *K. Rajah Ayyar* and *R. Rangachari*, for the Respondent.

Judgment.—This appeal arises in consequence of an attachment of a property made at the instance of the respondent company on the ground that it was liable to be sold in a decree passed in its favour against one Karuppan Samban. His widow Nallangal objected to the attachment and claimed that the property belonged to her. This objection prevailed in the executing Court, but the order was reversed by the learned Subordinate Judge of Dindigul on appeal. Aggrieved by this order Nallangal has preferred the present appeal. The *pattah* in regard to the land attached by the decree-holder was issued by the Govt, in favour of the widow on March 25, 1933 (Ex. I). But it appears that a *darkhast* for this land was originally made by her husband Karuppan Samban on July 19, 1931 during his lifetime (Ex. A). Before passing any final orders on this application, the Tahsildar called upon Karuppan Samban first to deposit a sum of Rs. 37-9-5 for the value of survey stones and of the trees growng on the land. This money was paid on August 8, 1932, but before the grant could be made. Karuppan Samban died on January 19, 1933. The appellant then submitted a fresh application on January 21, 1933 in which after relating all then facts stated above she referred to her impecunious condition and prayed for the grant to be made in her favour for her and her daughter's subsistence. This application was accepted by the Govt. and the *pattah* was issued to the widow on March 25, 1933 (Exs. I and V).

The widow had alleged in the executing Court that the money which was deposited in pursuance of the Tahsildar's notice was hers, but there is a concurrent finding by both the lower Courts that the price of the trees was paid by Karuppan Samban himself and not by the widow. This is a finding of fact and cannot be questioned in this appeal. In view of this finding, it must be held that the survey stones and the trees on the land belonged to Karuppan Samban and would therefore be attachable by the decree-holder in execution of its decree. The next question is whether the *pattah* issued by the Govt, to the widow should be considered to have been issued for the benefit of her husband's estate or for the benefit of the widow and her daughter. It has been found by both the Courts that under the rules the application made by the husband for the grant of a *pattah* or the deposit of the value of the trees made by Karuppan Samban during his lifetime would not have made it obligatory on the Govt. to issue the *pattah* after his death to his heirs. The Govt. had a complete discretion in the matter and could very well have refused to make a grant in favour of the widow. It is however urged on behalf of the respondent that the widow should, in

the circumstances, be held to have taken the property in trust for the estate of her deceased husband. The question is if it can be so regarded. It is obvious from what has been said that Karuppan Samban was not and could not be the owner of the property at the time of his death and the widow could not therefore have inherited it as her husband's heir. It has been however contended that in view of the application made by the husband for the grant during his lifetime and bearing the deposit made by him for the value of the survey stones and trees in mind, it must be presumed that the application was made by the widow in a representative capacity, and even if she may be assumed to be holding an absolute right against the Govt., this could not prevent the company from attaching the property in its decree against the husband. A constructive trust is thus alleged to have arisen under which the widow should be held to be holding the property on behalf of her deceased husband.

Having heard the learned Counsel for the parties, I am of opinion that the widow cannot be said to have acquired the property for the benefit of her husband's estate. It is hardly necessary in this case to refer to a large number of cases cited on behelf of the parties regarding the grant of service on personal *inams*. It may be that when a personal *inam* held by the husband is enfranchised in favour of the widow, the grant of the *inam* title deed will not constitute her to be an absolute owner. Karuppan Samban held no *inam* in this case from the Govt. and the grant made to the widow for the first time by the Govt. after her husband's death cannot by governed by the principle on which these cases were decided. It has been found by the lower Courts and the finding was not challenged before me that the property was at the disposal of the Govt. when Karuppan Samban died and alienable to whomsoever Govt. was pleased to grant. It was urged on behalf of the respondent that the widow should be held in the circumstances to have a fiduciary character and since she gained an advantage by availing herself of that character, she must hold the property for the benefit of the estate. In the alternative, it was suggested that the widow was a qualified owner and gained an advantage for herself in derogation of the rights of the other persons interested in the property and she must therefore hold the property for the benefit of the persons so interested. Both these contentions are based on ss. 88 and 90, Trusts Act.

A perusal of s. 88, would show that it is inapplicable to the present case. Under the provisions of the section, a person is to hold the benefit gained by him for another person only when he holds a fiduciary character, is bound in that character to protect the interests of the other person, and availing himself of that character gains any pecuniary advantage for himself. How can the widow in this case be said to be a person holding any fiduciary character and of such a nature as to be bound to protect the interests of the respondent company which was a creditor of her deceased husband? Could she be said to hold any fiduciary character towards her husband who was no more? Can it be seriously argued then that she was bound to apply to the Govt. for the grant in the interest of her husband's creditor and acquired it so as to enable the latter to sell it through Court in the execution of its decree? The answer to all these questions must be in the negative and the provisions of this section cannot, therefore, be held to apply.

Turning to s. 90 of the Act, I find that it applies in terms to a tenant for life, co-owner, mortgagee, or other qualified owner of any property. A Hindu widow can neither be described to be a tenant for life or qualified owner in the sense in which these expressions have been used in this section. Her position in regard to her husband's estate is that of an owner with limited rights. She can alienate the property inherited by her absolutely under certain circumstances which need not be stated here. In the absence of those circumstances, the property left by her husband may devolve on the reversioners. But she cannot be said to be a tenant for life only because she inherits a life estate and as a qualified owner her right of alienation is restricted and may be questioned by her husband's reversioners, if she exceeds it. Even if either of these expressions are assumed to cover a widow, which in my opinion, they cannot, she could not in any case be held responsible until she gained an advantage in derogation of the rights of the other "persons interested" in the property. The expression "persons interested" has been held by a Full Bench of the Allahabad High Court not to cover the reversioners: *Sriram Jankiji Birjman Mandir* v. *Jagadamba Prasad* (1). Much less can it be

(1) 43 A 374; 61 Ind. Cas. 3; A I R 1921 All. 11; 19 A L J 139 (F B).

said to cover the creditors of a widow's deceased husband. So far as one can glean the facts from the evidence on the record, the only property which Karuppan Samban is shown to have left behind him was the amount held to have been paid by him for the value of the stones and trees. When she is proved to have paid nothing out of her husband's estate for obtaining the grant from the Govt., she cannot be held to have gained an advantage in derogation of the rights of the persons interested in the property left by her husband. The illustration to this section, to which my attention was drawn by the learned Counsel for the respondent does not help his contention.

It was contended that even if these two sections are not held to be in terms applicable they are not exhaustive and the principles underlying them and particularly under s. 90, would make the widow liable to surrender the property acquired by her for the discharge of her deceased husband's debts. In that connection reliance was placed on *Babani Soiroo* v. *Dulba Gobind* (2), the leading English case in *Keech* v. *Sandford* (3), commonly called the Ramford Market case, and *Yem* v. *Edwards* (4). But before these cases are considered, it might be observed that the terms of ss. 88 90 are not exhaustive only in the sense that if a person cannot be brought within these sections, and held liable as a trustee, he must be found to fall under the residuary section in this Chapter, *i. e.*, s. 94. In other words where no trust has been declared a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is termed in English Law, as a constructive trustee. These obligations have been described in Chap. IX, Trusts Act. Having already held ss. 88 and 90 of the Act to be inapplicable to the facts of the present case, I must now ascertain if the appellant as required by s. 94 has no beneficial interest in the property granted to her by the Govt. If she is found to be holding the property for the use of others and not for herself, the doctrine of constructive trust would be held to apply to her and she would be assumed to be holding it for their benefit as provided by s. 94 of the Act. But can the appellant in the abovementioned circumstances be said to be holding the property for the benefit of the respondent company? The grant was made to her by the Govt. and she did not stand in any fiduciary position towards her husband who had died or towards a creditor of her husband, whom she was under no obligation to repay from out of the property acquired by her, without any help from or detriment to her husband's estate. It was held in *In re Bliss* (5), that a person cannot be held to be a constructive trustee unless his possession is such that he owed some duty to the other persons interested. Since the widow cannot be held to have owed any duty to the respondent company or to be holding the property for its benefit, the provisions of s. 94 of the Act cannot be held to apply.

Turning to the English cases cited on behalf of the respondent, I find that the facts in *Keech* v. *Sandford* (3) were that a lessee of the profits of a market had devised the lease to a trustee for an infant. The trustee applied for renewal on behalf of the infant, but his application was refused on the ground that the minor was incapable of entering into a contract and that there could be no distress of the profits of a market. The trustee then took the lease for himself. In a suit on behalf of the infant it was held that the trustee could not take advantage of his position and he was therefore ordered to assign it to the infant. This case was decided on the principle that the trustee was "the only person of all mankind," who could not have the lease for his benefit. This was simply because he was an express trustee for the infant while the appellant is neither an express nor a constructive trustee. The next English case relied upon on behalf of the respondent was that in *Yem* v. *Edwards* (4). There it was held that a grant having been obtained by a widow by virtue of a possession referable to her husband's will must be treated in equity as made for the benefit of the devisees, to whom the husband had bequeathed the remainder after giving merely a life interest to the widow. It was decided in those circumstances, and if I may say so with great respect, rightly, that the widow, who had got into possession of a property belonging to the Crown for her life under a will of her husband, cannot be held to have acquired any interest in that property if the Crown allowed persons, who had encroached on the properties, to take a conveyance on payment of a nominal consideration.

It will thus be seen that both the English

(2) A I R 1932 Bom. 240; 137 Ind. Cas. 355; 34 Bom. L R 357; Ind. Rul. (1932, Bom. 259.
(3) 25 E R 223.
(4) 44 E R 855.
(5) (1903) 2 Ch. 40.

cases do not help the contention raised on behalf of the respondent. In the first case, the trust in favour of the infant was an express one and the trustee was, on account of his fiduciary capacity, held to have acted for the infant's benefit alone. In the second case, the widow was found to have purchased the land encroached upon on very easy terms as she was put into possession of the land for her life under her husband's will and was held to have no beneficial interest in the land. Once it is found that the widow in this case was not a trustee on behalf of her deceased husband or that of the creditor company and the acquisition under the Govt. grant on a *darkhast* made by her was not an unfair gain or benefit obtained by her in a fiduciary or semi-fiduciary capacity, the doctrine of 'graft' embodied in s. 90, Trusts Act, must be held to be inapplicable. I would therefore find that the property acquired by the widow from the Govt. on her *darkhast* is her own property and not liable to be attached in the execution of a decree obtained by the respondent company. The same however cannot be said of the survey stones and the trees which were paid for by Karuppan Samban during his life. The appeal is therefore accepted to that extent with costs of both this and the lower Appellate Courts. If the trees or the stones have been removed by the appellant, she will have to account for the same in appropriate proceedings.

N.-S. *Appeal partly allowed.*

LAHORE HIGH COURT

Criminal Revision Petition No. 604 of 1939
July 28, 1939
BLACKER, J.

SURAIN SINGH—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT

Punjab Municipal Act (III of 1911), ss. 195-A, 215—Notice under s. 195-A signed on behalf of executive officer by person authorized to do so, is valid—Presumption in such cases—Notice, if should specify in detail how sanctioned plans had been contravened—Expression "delivered to" if means "served upon"

Where notice under s. 195-A, Punjab Municipal Act has not been signed by the executive officer but by another person who has been specially authorised by the executive officer to sign such notices, the notice is valid.

The legal maxim *omnia praesumuntur rite esse actæ* has been embodied in an illustration to s. 114, Evi. Act, and if a person receives a notice purporting to be signed by somebody on behalf of the executive officer, the presumption is that it is signed by a person who has been authorized to sign it, and if the person receiving that notice presumes otherwise and disobeys the notice, he is taking a risk. The burden lies on him to rebut the presumption of regularity.

There is nothing in the language of s. 195-A of the Act, as it now stands, which requires the notice to state any more than that the sanction has been contravened. The notice is invalid if it does not specify in detail how the sanctioned plans had been contravened.

The words "service" or "served" are technical terms implying a definite process of the law; and where those terms are used, that process has to be carried out. The words "delivered to" do not appear to me to mean or to be intended to mean the same as "served upon." They are words of much wider meaning.

C. R. P. from an order of the Additional Sessions Judge, Amritsar, dated January 11, 1939.

Mr. *Amar Nath Chona*, for the Petitioner.

Mr. *Muhammad Monir*, Assistant to the Advocate-General, for the Crown.

Order.—These are three petitions by one Surain Singh for revision of the order of the Additional Sessions Judge of Amritsar, upholding his conviction under s. 195-A, Municipal Act, III of 1911 and a fine of Rs. 100 in each case with a sentence of four months' simple imprisonment in default. The petitions are identical and each proceeds on the same grounds. The first ground is that the notices in each case were invalid as they had not been signed by the executive officer. It appears that they were signed by one Lala Bihari Lal for the executive officer. Lala Bihari Lal is the legal adviser of the Municipality and has, it appears, been specially authorized by the executive officer to sign such notices. Under s. 215, Municipal Act, as now amended, the executive officer can authorize another person to sign such notices on his behalf. This ground therefore has no force in it. It has been contended by Counsel for the petitioner that he could not know who Lala Bihari Lal was; but as the notice was signed "for" the executive officer, he had to presume that it was signed by a person authorised to sign it. The legal maxim *omnia præsumuntur rite esse actæ* has been embodied in an illustration to s. 114, Evi. Act, and if a person receives a notice purporting to be signed by somebody on behalf of the executive officer, the persumption is that it is signed by a person who has been authorized to sign it. and if the person receiving that notice presumes otherwise and disobeys the notice, he is taking a risk. The burden lies on him to rebut the presumption of regularity. In this case the petitioner has not rebutted it.

The second ground is that the notices were invalid as they did not specify in detail how the sanctioned plans had been contravened. Counsel for the petitioner has relied upon a judgment reported in *Mohammad Yasin* v. *Municipal Committee*, 9 Ind. Cas. 889 (1) for his contention that such a notice must clearly specify the contravention. That ruling does not appear to me to have any application to the facts of the present case as it refers to an entirely different set of circumstances. That case was under s. 95 of the old Act, which is now embodied in ss. 172 and 175 of new Act. I can see nothing in the language of s. 195-A of the Act, as it now stands, which requires the notice to state any more than that the sanction has been contravened. This may or may not be a lacuna in the law but it is not for me to legislate in the matter. I have to interpret the law as I find it. I cannot, therefore, find that there is any defect in the notice on this ground. The third objection is that the notice was not properly served upon the petitioner himself. It appears that copies of the notices were delivered in the first instance to one Ismail, a contractor of the petitioner. As the learned Additional Sessions Judge has pointed out, there is definite evidence that the petitioner had received these notices as he came to the building Muharrir to ask for his advise as to what he should do with regard to them. Counsel for the petitioner suggests that this evidence is false but he has given no reason whatever why I should consider it false; and it has been accepted and acted upon by both the Courts below.

Counsel appears to think that s. 195-A requires that notice should be "served" on the owner of the building. Actually the section, as framed in the new Act, says that the notice should be "delivered" to the owner. The words "service" or "served" are technical terms implying a definite process of the law; and where those terms are used, that process has to be carried out. The words "delivered to" do not appear to me to mean or to be intended to mean the same as "served upon." They are words of much wider meaning. If the Legislature had intended that the legal process of serving the summons should be carried out in this case, there was no difficulty in using those words in this section and the fact that different words, namely "delivered to," have been used, shows that this was not the intention of the Legislature. What actually happened in this case was that the notices were handed over to Ismail who delivered them to the petitioner. It is clear that they were duly delivered and there is, therefore, no force in this ground also. There is also a prayer by Counsel for the petitioner that the sentence should be reduced. No real reasons have been given for this prayer and I see no reason why I should interfere. The petitions are accordingly dismissed.

D. *Petitions dismissed.*

(1) 9 Ind. Cas. 889; 56 P R 1911; 130 P L R 1911; 91 P W R 1911.

RANGOON HIGH COURT

First Appeal No. 170 of 1939
May 16, 1940

MYA BU AND MOSELY, JJ.

P. L. S. P. SUBRAMANIAN CHETTIAR—APPELLANT

versus

L. N. CHETTYAR FIRM AND OTHERS—RESPONDENTS

Limitation Act (IX of 1908), s. 5—Applicability to execution applications — Limitation — Execution — Decree transferred to another Court — Question whether execution is time-barred can be determined by either transferee Court or decree Court—It depends on convenience — Res judicata — *Question of limitation not raised in transferee Court — If barred in decree Court — Burma Courts Act (XI of 1922), s. 7 (c)—"Original proceedings"—Meaning of—Amendment of Act in 1932 — Creation of Assistant District Court — Whether deprives District Court, which passed decree, of its jurisdiction to execute its decree not exceeding pecuniary limits of Assistant District Court's jurisdiction — Proper Court, which is.*

Section 5, Lim. Act, does not apply to applications in execution at all. [p. 319, col. 2.]

Where the decree has been sent to another Court for execution, both, the Courts to which the decree is sent and the Court which passed it have jurisdiction to determine the question whether the execution of the decree is time-barred or not. The question which of the two Courts is more suitable depends upon the question of convenience and priority.

Even if the plea that application for execution is time-barred is not raised in the Court to which the decree is transmitted for execution, the plea cannot be *res judicata* in the Court which passed the decree because the plea can be raised at any time in the transferee Court. *Srihari Mundul* v. *Murari Chowdhury* (5), relied on.

The words "original proceeding" in s. 7 (c), Burma Courts Act are not used in contradistinction to "proceeding in appeal", and can only mean proceedings which initiate something, such as, for example, pauper applications. These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. [p. 321 col. 1.]

Just because an inferior Court, (Assistant District Court) has been constituted under Burma Courts Amending Act, 1932, for the same local area after the passing of the decree, with jurisdiction to hear and

determine suits or original proceedings of a certain value, the Court of a higher pecuniary jurisdiction (District Court) which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's (Assistant District Court) jurisdiction but is the proper Court which should execute the decree. [p. 322, col. 2.]

F. A. from an order of the District Court, Maubin, dated September 22, 1939.

Mr. *E. Hay*, for the Appellant.
Mr. *P. K. Basu*, for the Respondents.

Mosely, J.—This is an appeal from an order in execution passed by the District Judge of Maubin. The facts of the case are as follows: A decree was passed in favour of respondent No. 1, L. N. Chettyar Firm, in the District Court, Maubin, in Suit No. 2 of 1928 for some Rs. 8,000 odd against the appellant P. L. S. P. Subramaniam Chettiar and his partner, respondent No. 2 Karuppan Chettyar, who has not entered appearance in this appeal and is only a *pro forma* party. Execution of this decree was taken out in civil execution case No. 2 of 1929 and in civil execution case No. 18 of 1931 of the District Court of Maubin, which was closed on December 5, 1931, and again in a third execution proceedings No. 8 of 1934 of the Assistant District Court of Maubin. Assistant District Courts were not constituted by the Burma Courts Act, XI of 1922, but were only established under a further Act to amend that Act, Burma Act IV of 1932, which came into force in that year—1932 This execution proceeding was instituted on November 9, 1934, but was not proceeded with, and was closed on January 21, 1935. Then a fourth execution proceeding, the one with which the present appeal is concerned, execution case No. 5 of 1936, was instituted on August 5, 1936, for execution for a sum of Rs. 4,800 odd. This was an application that the decree be sent for execution to the subordinate Court of Sivaganga in the Madras Presidency. The decree was sent (as usual without notice to the judgment-debtors) with the necessary certificate on that date.

Execution was proceeded with in the Sivaganga Court, but nothing further was done in execution case No. 5 of 1936 of the District Court of Maubin until October 21, 1938, when the appellant applied that the decree be re called and the certificate of non-satisfaction corrected by the showing of a sum of some Rs. 2,000 as having already been satisfied by a payment in 1931. On October 31, this application was followed by a further application by the appellant pleading that execution of the decree was time-barred. Respondent No. 1, the decree-holder, then filed a written objection, and later, in April 1939, an application was made to condone the delay. The present order now under appeal was passed on this application and on the application by the judgment-debtors, to say that the appeal was time-barred. The learned District Judge found in the first place that execution case No. 8 of 1934 had not been transferred to the Assistant District Court nor had it been presented to the proper Court as defined in Art. 182 read with Expln. 2 to that article. In the explanation it is said "proper Court" means the Court whose duty it is to execute the decree or order. The learned Judge, however, went on to quote s. 5, Lim. Act, and to say that the Court had power to condone delay if it was satisfied that the decree-holder had sufficient cause for not making his application within the period of limitation. Section 5, however, does not apply to applications in execution at all. The learned Judge proceeded to hold that the mistake was a *bona fide* one and that the delay should and could be condoned under s. 14 (2), Lim. Act, forgetting that s. 14 (2) could only operate to exclude from limitation the actual time during which this application in execution to the Assistant District Court was pending. Admittedly that period would not be sufficient to make the present application within time.

This appeal is on the ground that ss. 5 and 14, Lim. Act, have no application and that the proceedings in execution in question are on the face of them time-barred. A preliminary objection is made by the respondent that any objection on the score of limitation should have been made to the Sivaganga Court in which proceedings in execution were being conducted and not to the Maubin Court. This question was discussed, but not decided, in an appeal to a Bench of this Court, *Nachimai Achi* v. *S. N. Subramonian Chetty* (1). This was a case where a decree of the Chief Court of Lower Burma was sent for execution to the District Court of Ramnad in Madras and was returned with a certificate of non-satisfaction for the purpose of enabling the decree-holder to bring the legal representatives of the deceased defendant on the record. This was done and it was then ordered that the decree be re-sent to the Ramnad Court. In appeal it was contended that the decree and the application to bring the legal

(1) 5 R 775; 106 Ind. Cas. 857; A I R 1928 Rang. 40; 6 Bur. L J 225.

representatives on the record were both time-barred. The learned Judge on the original side of the High Court had taken the view that both questions were questions which should ordinarily be decided by the Chief Court, but that in the circumstances of the case they ought to be decided by the District Court of Ramnad as the whole of the previous proceedings in execution had been taken in that Court and all necessary materials for a decision were, therefore, available there.

It was contended in appeal that the appellant was entitled to have those questions decided by this Court. *Banku Behary Chatterji* v. *Naraindas Dutt* (2), a decision of their Lordships of the Privy Council was quoted, where it was expressly said that an order of transmission would be rightly made *ex parte* and as a ministerial act, and it followed by necessary implication that an order permitting execution against the legal representatives could also rightly be made *ex parte*. That case affirmed the decree of the Calcutta High Court in *Narain Dass Dutt* v. *Banku Behari* (3), where the other question had arisen as to which was the proper Court to decide an objection on the part of the judgment-debtor that execution was time-barred. In that case Richardson, J., had briefly said that under the scheme of the Code the Court transmitting a decree was not the Court to decide such an objection, and that such objection should be taken and determined by the Court to which the decree is transmitted. All that was said in *Nachiamma Achi* v. *S. N. Subramonian Chetty* (1), was that this Court could have rightly left both questions, in the circumstances of that case, to the Ramnad Court.

Another ruling quoted, *Maharaja of Bobbili* v. *Narasaraju Peda* (4), is to the effect that after a decree is sent for execution, the Court which passed the decree has no jurisdiction to entertain another application in execution unless concurrent execution had been ordered or the proceedings in the Court to which the decree was sent had been stayed. But the present application is not one to execute but that the decree be declared incapable of execution and, it may be remarked, execution has been stayed in the Sivaganga Court for the purpose of allowing this question of limitation to be decided by the District Court of Maubin. I myself can find nothing in the Act to show that it is intended that objections as to limitation which go to the root of execution can only be taken in the Court to which a decree is transmitted. No doubt that is often the most convenient course, and is usually the most convenient course when the executing Court lies in the same province as the Court which passed the decree and can easily obtain full materials and information. But the Court which passed the decree is the Court which has and retains control of the proceedings: *vide* O. XXI, r. 28, which says that

> "any order of the Court by which the decree was passed...in relation to the execution of such decree shall be binding upon the Court to which the decree was sent for execution."

Of course applications that the decree has been wholly satisfied in Burma after its transmission to Madras would naturally and normally be made to the Court in Burma which passed the decree, and there is, in my opinion, nothing in the Act or in the scope or intention of the Act to prevent similar applications in regard to matters concerning limitation which go to the root of execution. It is merely the question of convenience or of priority of application which determines the Court which shall decide such questions. If this preliminary objection had been well-founded and the District Court had had no power to decide the question of limitation, the District Court would have had no power to transmit the decree to the Sivaganga Court. Another objection that this plea of limitation is *res judicata* because it was not raised in the Sivaganga Court may be dismissed on the short ground that it would be raised at any time in the Sivaganga Court and cannot therefore be *res judicata* here: see a case decided on these lines, *Srihari Mundal* v. *Murari Choudury* (5). As to the main grounds of appeal we must first refer to the Burma Courts Act of 1922 and to the amending Act of 1932 by which the Assistant District Court was constituted. By s. 6 of Act XI of 1922 it was enacted that the Local Govt. shall establish District Courts, Sub-Divisional Courts and Township Courts. Section 7 defined the original jurisdiction of those Courts, and sub-cl. (c) said that the District Court shall have jurisdiction to hear and determine any suit or original proceed-

(2) 54 I A 129; 101 Ind. Cas. 24; A I R 1927 P C 73; 54 C 500; 52 M L J 565; (1927) M W N 336; 4 O W N 474; 31 C W N 589; 29 Bom. L R 850; 38 M L T 90; 45 C L J 507; 26 L W 180 (P C).

(3) A I R 1925 Cal. 213; 78 Ind. Cas. 1001.

(4) 37 M 231; 15 Ind. Cas. 738; A I R 1914 Mad. 435; 23 M L J 236; (1913) M W N 731; 12 M L T 119.

(5) 13 C 257.

ing without restriction as regards the value.

It appears to me that the words "original proceeding" are not used in contradistinction to "proceeding in appeal" and can only mean proceedings which initiate something, such as, for example, pauper applications, (the same words are used with reference to the jurisdiction of Sub-Divisional and Township Courts). These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. Section 24 is the first section of Chap. IV, which is headed "Provision for Pending and Past Proceedings," and s. 24, sub-s. (2) says that every proceeding pending in any other Civil Court in Burma (*i. e.*, other than the High Court, mentioned in s. 24 (4)) at the commencement of this Act shall be deemed to be transferred to the Court exercising the jurisdiction under this Act, which corresponds to the jurisdiction of the Court in which the proceeding was instituted, and the Court to which any such proceeding is transferred shall proceed to try, hear and determine the matter as if it had been instituted in such Court. Section 26 refers to execution of past decrees and orders, and says that all decrees and orders passed by the Divisional Court shall be deemed to have been passed or made by the District Court which would have had jurisdiction if this Act had been in force at the time the decrees or orders were passed or made.

The Amending Act (Burma Act IV of 1932), by sub-s. 2 (1) established a new grade of Court in Burma in addition to the already established Courts, namely the Assistant District Court, and by sub-s. (4) of that Act it was laid down that the Assistant District Court shall have jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rs. 15,000. It would appear clear on a plain reading of this last provision, read with s. 24 (2) of the Act of 1922, that the Assistant District Court had only jurisdiction to try suits or original proceedings within its pecuniary jurisdiction which were instituted after Act IV of 1932 came into force, or, it may be added, which were transferred to it under s. 24 of the Code by the District Court. Section 26 of Act XI of 1922 was not amended so as to make it deemed that decrees of the District Court had been passed by the Assistant District Court. It connot be said that the Court which passed the decree (s. 38 of the Code) had ceased to exist or to have jurisdiction to execute its decrees. If that were the case, of course, the Assistant District Court would be the Court to which applications in execution of the proceedings of the District Court within the pecuniary jurisdiction of the Assistant District Court would lie under the provisions of s. 37 (*b*) of the Code. But the District Court has not ceased to exist, and in practice District Courts have been executing decrees passed in suits of a value less than Rs. 15,000 passed prior to 1932 ever since then, and applications for execution of such decrees have not been filed in the Assistant District Courts. The proper procedure was pointed out by a circular of this Court in 1933. I do not see that s. 150 of the Code can help the respondents here. That section enacts:

"Save as otherwise provided, where the business of any Court is transferred to any other Court, (*i. e.*, the business of any Court is, in whole or part, transferred to any other Court), the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

I do not wish to allude to cases which have been quoted where a Court had ceased to exist or had ceased to exercise territorial jurisdiction. This argument presupposes that the District Court had ceased to exist or had ceased to exercise jurisdiction in respect of decrees to the value of under Rs. 15,000 passed by it. I will only refer to one case cited by the respondents, *Aminuddin Mullick* v. *Atormoni Dasi* (6). In that case a Munsif who was empowered to try suits up to Rs. 2,000 had passed a preliminary decree but was then transferred, and the final decree in the case was passed by the subordinate Judge. Application for execution of the decree was subsequently made to a successor of the Munsif, who was also empowered to try suits up to Rs. 2,000. It was said in the judgment in that case (p. 1103 *ibid*) that since the second Munsif's Court was vested with the powers to try suits up to Rs. 2,000 in value the business in the subordinate Judge's Court so far as it related to suits up to the value of Rs. 2,000 must be taken to have been transferred to the Munsif's Court, and that that Court therefore would have the same powers and would perform the same duties as those conferred and imposed by the Code upon the Court of the subordinate Judge from which the business was transferred. The decision

(6) 47 C 1100 (1103); 57 Ind. Cas. 879; A I R 1920 Cal. 532; 24 C W N 899.

purported to be one under the provisions of s. 150 of the Code, but I cannot see myself that that section had any application in that case. Section 150 starts "Save as otherwise provided," and it certainly could not have been said in that case, in the words of s. 37 that the Court of the subordinate Judge had ceased to exist. For these reasons I think that the trial Court was right in coming to its conclusion that execution case No. 8 of 1934 had not been instituted in the proper Court. This being so, it must be held that execution in the present case now under appeal is time-barred. This appeal will be successful and there will be a finding to this effect. Respondent No. 1 is to pay the costs of this appeal *ad valorem*. The proceedings in execution will be recalled from the Court of Sivaganga.

Mya Bu, J.—I agree with my learned brother. As regards the respondent's objection to the jurisdiction of the District Court of Maubin, the principle underlying the rule in O. XXI, r. 28, and the decision in *Srihari Mundul* v. *Murari Chowdhury* (5) make me incline to the view that the Court which passed the decree possesses jurisdiction to determine the question whether the execution of the decree is time-barred or not, although it has sent the decree to another Court for execution; but for the purpose of this case, I am content to adopt the view that the authorities relied on in support of the contention do not lay down that the Court which passed the decree is deprived of jurisdiction to determine the question after it has sent the decree to another Court for execution, and I am in entire agreement with my learned brother that both, the Court which passed the decree and that to which the decree is sent for execution, have jurisdiction to determine this question, and which is the more suitable of the two depends upon tthe question of convenience and priority.

Coming to the main question for determination, namely, whether the application for execution in civil execution No. 8 of 1934 of the Assistant District Court of Maubin was an application made to the proper Court, the arguments addressed in support of the affirmative view seem to have proceeded upon the supposition that by the creation of the Assistant District Court by the Burma Courts (Amendment) Act 1932, the jurisdiction of the District Court to execute its own decrees under s. 38, Civil P. C., was extinguished, where the amount does not exceed the pecuniary limit of the jurisdiction of the Assistant District Court. The authorities relied on by the learned Advocate for the respondents (other than the one already quoted by my learned brother) are cases where the Court which had jurisdiction to pass the decree had ceased to exist and another Court had come into being to exercise that jurisdiction. The fallacy of the argument can, however, be illustrated by simple illustrations, such as, for example, in a suit for Rs. 20,000 filed in the District Court in which the District Court passes a decree for Rs. 500 only, it is still the District Court which has jurisdiction to execute the decree for Rs. 500, although the decretal amount happens to be within the jurisdiction of the township Court which, of course, will have jurisdiction to execute the decree only if it be transferred to it. This illustration, in my opinion, is sufficient to show that, just because an inferior Court has been constituted for the same local area after the passing of the decree with jurisdiction to hear and determine suits or original proceedings of a certain value, the Court of a higher pecuniary jurisdiction which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's jurisdiction but is the proper Court which should execute the decree. For these reasons I agree in the order proposed by my learned brother.

D. *Appeal allowed.*

MADRAS HIGH COURT

Criminal Revision Case No. 227 of 1940
Criminal Revision Petition No. 218 of 1940
August 8, 1940

LAKSHMANA RAO, J.

In re GURUSWAMI CHETTIAR AND OTHERS—ACCUSED—PETITIONERS

Penal Code (Act XLV of 1860), s. 467—Prosecution under—Complaint of Court, if necessary.

A complaint of the Court is not necessary for prosecuting the accused who were not parties to proceedings under Legal Practitioners' Act, for an offence under s. 467 of the I. P. C.

P. under ss. 435 and 439 of the Criminal P. C., 1898, praying the High Court to revise the order of the Court of the Town Sub-Magistrate of Coimbatore, dated March 5, 1940, and made in R. C. No. 2 of 1940.

Dr. *V. K. John* and Mr. *D. Noronha*, for the Petitioners.

The Public Prosecutor, for the Crown.

Order.—The complaint against the first accused is only under ss. 403, of the I. P. C.

and accused Nos. 2 to 4 were not parties to the proceedings under the Legal Practitioners' Act. A complaint of the Court is not necessary for prosecuting these accused for an offence under s. 467 of the I. P. C. nor does any question of evading the provisions of s. 195 of the Criminal P. C. arise as in *Appadurai Nainar In re* (1). The Court was moved to make a complaint against them and the making of a complaint by the Court for an offence under s. 193 of the I. P. C. was considered unnecessary as accused Nos. 2 to 4 could be prosecuted for the graver offence under s. 467 of the I. P. C. without a complaint of the Court. There is, therefore, no ground for interference and the revision petition is dismissed.

N.-S. *Revision dismissed.*

(1) 59 M 165; 159 Ind. Cas. 853 (2); (1935) M W N 946; 69 M L J 812; 8 R M 565; 37 Cr. L J 159; A I R 1936 Mad. 89; (1936) Cr. Cas. 85.

LAHORE HIGH COURT

Letters Patent Appeal No. 46 of 1939

April 11, 1940

TEK CHAND AND DALIP SINGH, JJ.

Mst. KAMMON AND OTHERS—APPELLANTS

versus

ALLAH BAKHSH AND OTHERS—RESPONDENTS

Muhammadan Law—Waqf—Mutawalli—*Nomination by, of successor during* marz-ul-maut—*Effect—Diarrhoea or general debility due to old age, if* marz-ul-maut—De facto mutawalli *whether can get declaration that he is proper* mutawalli—*Civil Procedure Code (Act V of* 1908), *s.* 2 (11), *O. XXII, r.* 3—*Suit by plaintiff and* mutawalli *for declaration that certain property is* waqf—*Appeal from decree*—Mutawalli *dying—Plaintiff managing property of deceased and doing all his duties—Plaintiff held legal representative of deceased for purposes of appeal.*

Under Muhammadan Law the nomination of his successor by the *mutwalli* for the time being is valid only if it is made while he was in death illness (*marz-ul-maut*). Neither diarrhoea nor "general debility due to old age" can be called mortal maladies and, therefore, nomination of successor during such illness is not valid.

Quære.—Whether a *de facto mutawalli* can get a declaration from the Civil Court that he is the properly constituted *mutawalli.*

A decree was passed in a suit by the plaintiff and a *mutawalli* of a mosque for a declaration that the mosque was *waqf* and while the appeal was pending the *mutawalli* died. Since then the plaintiff had been managing the mosque and the properties and performing the same duties as the deceased was alleged to have performed during his lifetime :

Held, that the plaintiff could be treated as the legal representative of the deceased for the purpose of the appeal.

L. P. A. from the judgment of Skemp, J., in S. A. No. 1173 of 1938, dated January 12, 1939.

Mr. *Muhammad Alam*, for the Appellants.

Malik *Barkat Ali* for Mr. *Sardar Khan* and Mr. *Daulat Ram Kalia*, for Respondent No. 2.

Tek Chand, J.—This is an appeal under cl. 10 of the Letters Patent from the judgment of Skemp, J., affirming the appellate decree of the District Judge, whereby he had dismissed the plaintiffs-appellants' suit. The suit had been instituted by *Mst.* Kamon, Sardar Mohammad and others for declaration that a certain mosque in Ferozpore City, together with the properties attached to it and described in detail in the plaint, was *waqf* that the *waqf* had been created by the ancestors of the plaintiffs and that the plaintiffs were the present *mutwallis.* An injunction was also asked for restraining the defendants from interfering with the plaintiffs' management of the *waqf* properties and requiring the defendants to demolish a wall which they had constructed on a part of the *waqf* property. The defendants admitted that the mosque and the other properties were *waqf*, but denied that the plaintiffs' ancestors had created the *waqf* or that the plaintiffs were the *mutwallis.* They admitted having constructed the wall but alleged that it had been built for the benefit of the *waqf* properties. They alleged that this mosque had no *mutwalli* at all and that it was managed by the *mohalladars.* The trial Judge found that the *waqf* had been created by *Mst.* Amiro, who was the ancestor of *Mst.* Kammon plaintiff. He also found that Sardar Mohammad plaintiff was the present *mutwalli* and the defendants had no right in the management. He, therefore, granted the plaintiffs a declaration in these terms and also issued a permanent injunction restraining the defendants from interference Sardar Mohammad's managment of the mosque and the other properties in dispute and directing them to demolish the wall. The defendants appealed to the Additional District Judge who held that there was no proof that *Mst.* Amiro had dedicated the properties in dispute or that she was the ancestor of the plaintiffs. He further found that Sardar Mohammad plaintiff was not the properly appointed *mutwalli* of the mosque. As to the alternative claim put forward before him, the learned Judge

found that the evidence was not sufficient to establish that Sardar Mohammad was the *de facto mutwalli* and that, even if he was so, he was not entitled to get a declaration from the Civil Court that he was a properly appointed *mutwalli*. On these findings he accepted the defendants' appeal and dismissed the suit.

On second appeal, the learned Judge in Single Bench affirmed the decision of the Additional District Judge. He however, granted a certificate for a Letters Patent appeal. After the institution of this appeal, Sardar Mohammad one of plaintiffs-appellants died on March 5, 1939. An application under O. XXII, r. 3, Civil P. C., was made by *Mst.* Kammon praying that she be allowed to prosecute the appeal as the legal representative of Sardar Mohammad deceased, as he by his will dated July 17, 1938, had appointed her as the next *mutwalli*. As the respondents did not admit the execution or validity of the will we, by our order of June 14, 1939, remitted an issue to the trial Court under O. XLI, r. 25, Civil P. C., for enquiry and report on this point. The learned Subordinate Judge after an exhaustive enquiry, has submitted his findings that the will produced by *Mst.* Kammon had been executed by Sardar Mohammad while he was in full possession of his senses but that it was not valid under Muhammadan Law as it had not been executed while the testator was in death illness (*marz-ul-maut*). He however held that since the death of Sardar Mohammad *Mst.* Kammon had been acting as the *de facto mutwalli* and therefore she was his "legal representative" within the meaning of s. 2 (11), Civil P. C.

Before us, the due execution of the will has not been disputed by either party, but the appellants maintain that it was executed while the testator was suffering from *marz-ul-maut*. The respondents on the other hand contend that the evidence does not establish that *Mst.* Kammon had in fact been acting as *mutwalli* since the death of Sardar Mohammad and that even if she did so she could not be regardad as his legal representative. After examining the evidence and hearing Counsel at length we have no hesitation in holding that it has not been established that Sardar Mohammad was suffering from *marz-ul-maut* at the time when he had nominated *Mst.* Kammon as his successor. As stated above, the will was executed on July 17, 1938, and all that is proved is that he was suffering from diarrhoea at the time. He died seven months later and in the death register the cause of his death is described as "general debility due to old age." Now, neither diarrhoea nor "general debility due to old age" can be called mortal maladies nor is there any evidence on the record to establish that at the time of the execution of the will the testator had "a preponderance of the apprehension that death was imminent." It cannot therefore be said that he was suffering from *marz-ul-maut*. It is conceded that under Muhammadan Law the nomination of his successor by the *mutwalli* for the time being is valid only if it is made while he was in death illness (*marz-ul-maut*). But as this had not been established in this case, the nomination of *Mst.* Kammon as *mutwalli* by Sardar Mohammad assuming that he had the power to do so cannot be held to be valid.

With regard to the alternative claim there is some evidence on the record that since the death of Sardar Mohammad, *Mst.* Kammon has been managing the mosque and the properties and performing the same duties as Sardar Mohammad is alleged to have performed in his life-time. Therefore for the purposes of prosecuting this appeal, we allowed her to be treated as his "legal representative". On the merits, however, this appeal is concluded by findings of fact. The Additional District Judge has found as a fact that *Mst.* Amiro had not been proved to be the ancestor of the plaintiffs nor has it been established that it was she who had founded the *waqf*. This finding has not been challenged by the appellants' learned Counsel before us. It follows, therefore, that Sardar Mohammad was not the *de jure mutwalli* of the mosque. It was contended however that he was the *de facto mutwalli* and had acted as such for more than six years. On this point also the learned Judge has recorded a clear finding. In his discussion of Issue No. 2, he has definitely found

> "that the evidence in this case was not sufficient to show that the plaintiff (Sardar Mohammad) was the *de facto mutwalli* of the mosque."

The learned Judge has summarized the evidence bearing on the point and has found the oral evidence to be unworthy of credence and the documentary evidence insufficient to establish that he was the *de facto mutwalli*. Counsel has not been able to show that this finding is vitiated by any substantial error or procedure, which might justify interference in second appeal. He merely pointed out that the

evidence of one of the witnesses produced by the plaintiff had not been considered by the learned Additional District Judge. We allowed him to read the statement of this witness to us but do not find anything in it which is helpful to the plaintiffs. The finding that Sardar Mohammad was not the *de facto mutwalli* being final and conclusive, it is not necessary to decide the further question whether a *de facto mutwalli* can get a declaration from the Civil Court that he is the properly constituted *mutwalli*. The appeal fails and is dismissed, but having regard to all the circumstances the parties are left to bear their own costs of this appeal.

Dalip Singh, J.—I agree.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Letters Patent Appeal No. 102 of 1938
November 30, 1939
LEACH C. J. AND KRISHNASWAMI AYYANGAR, J.

K. S. R. M. SIVASUBRAMANIAM CHETTIAR—APPELLANT

versus

MURUGESA MUDALIAR AND ANOTHER—RESPONDENTS

Execution — Application necessitated by Court's striking off previous application, whether fresh application for execution or merely one for revival—Execution sale — No bidders on date of auction — Decree-holder if can, in same proceeding ask Court to put property for sale at later date—Civil Procedure Code (Act V of 1908), O. XXI, rr. 71, 87—Application for re-sale can be made at any time within three years—Delay of eleven months cannot justify Court in rejecting decree-holder's application for payment of deficit.

An application in execution which is necessitated by the action of the Court in striking off a previous application for execution, is not in law a fresh application, but must be taken to be an application to revive or continue the former application. [p. 327, col. 1]

[Case-law relied on.]

The fact that there are no bidders on occasion of the auction does not prevent the decree-holder from asking the Court in the same proceedings to put up the property for sale at a later date. [p. 325, col. 1; p. 326, col. 2.]

The Civil P. C., contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Lim. Act, applies. Delay of eleven months does not justify the Court in rejecting the application for an order directing the payment of the amount of the deficit. [p. 326, col. 1.]

L. P. A. against the judgment and order of Abdul Rahman, J., in C. M. S. A. No. 53 of 1936, dated November 14, 1938.

Mr. *T. S. Anantharaman*, for the Appellant.

Messrs. *K. Rajah Ayyar* and *V. Sankaran* for the Respondents.

Leach, C. J.—The appellant obtained a money decree against respondent No. 2 in the Court of the District Munsif of Tirupur and in execution of that decree attached immovable property belonging to the judgment-debtor. The property was sold by the Court in execution proceedings on February 23, 1932, respondent No. 1 being the purchaser. Respondent No. 1 immediately deposited 25 per cent. of the purchase price, which was Rs. 715, as required by r. 84 of O. XXI, Civil P. C. The sale proclamation disclosed that there was a mortgage on the property, but it indicated that the mortgage was invalid. The mortgage was in fact a valid one and subsequently the mortgagee obtained a mortgage decree. Respondent No. 1 did not pay the balance of the purchase money within fifteen days, as required by r. 85 of O. XXI, but on February 29, he applied for an order setting the sale aside on the ground of material irregularity in the publication of the sale inasmuch as the mortgage had been described as being invalid. As the balance of the purchase money had not been paid into Court, the District Munsif held that there had in law been no sale and therefore there was no need for an order setting aside the sale. On this ground he dismissed respondent No. 1's application and by a subsequent order directed that his deposit of 25 per cent. of Rs. 715, namely Rs. 178-12-0, should be refunded to him.

On March 30, 1932 the District Munsif, for what has been described as "statistical reasons," struck off his list of pending cases the application of the appellant for the sale of respondent No. 2's property. The Court closed for the summer vacation on May 11, 1932 until June 28, 1932. On the re-opening day the appellant filed a fresh application for the sale of the same property. He was compelled to do so in consequence of the District Munsif's action on March 30, 1932, which action was illegal. As the result of the fresh application the property was advertised for sale by the Court on September 24, 1932. There were no bidders at the auction and the District Munsif dismissed the application. This again constituted unlawful action on his part. The fact that there were no bidders on this occasion did not prevent the ap-

pellant from asking the Court in the same proceedings to put up the property for sale at a later date. The September 25, 1932 was a Saturday and the Court was closed. When it re-opened on Monday, September 27, the appellant filed a further application for the sale of the property and on this application the Court directed the auction to take place on January 3, 1933. At this auction the property was sold to one Somasundara Naidu for Rs. 301 leaving a deficit of Rs. 414. On November 25, 1933 the appellant applied for an order against respondent No. 1 for the payment of this sum under the provisions of O. XXI, r. 71, which states that any deficiency of price which may happen on a re-sale, by reason of the purchaser's default, and all expenses attending such re-sale, shall at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser.

The District Munsif dismissed the application on three grounds, namely: (1) there had been material irregularity in the publication of the sale of February 23, 1932 (2) the property which was sold to Somasundara was not in law the same property as was sold to respondent No. 1, a mortgage decree having been passed in the meantime; and (3) even if the property was the same there had been undue delay in filing the application which had led to the second sale, namely the application of September 27, 1932. The appellant appealed to the Court of the Subordinate Judge of Coimbatore. The Subordinate Judge allowed the appeal. He found that the appellant had not been guilty of culpable delay and that the property which was sold to Somasundara was the same property which was sold to respondent No. 1. He also held that there was no material irregularity in the conduct of the first sale, but in any event it had caused no injury to the auction-purchaser. Respondent No. 1 then appealed to this Court and his appeal was heard by Abdur Rahman, J. who allowed it on the ground that the appellant was not entitled to recover because there had been a delay of about eleven months in filing the application which had resulted in the sale to Somasundara. The learned Judge recognized that the delay was not due to any fault of the appellant, but nevertheless he considered that the appellant was not entitled to payment of the balance because delay had taken place. He agreed with the Subordinate Judge that there had been no irregularity in the publication of the first sale and that respondent No. 1 had suffered no injury. He also agreed that the property sold on the second occasion was identical with the property which was sold on the first occasion.

Only three questions have been argued before us. They are these: (1) whether the learned Judge was right in holding that there had been delay and that as the result of that delay the appellant has lost his remedy; (2) whether in order to recover from respondent No. 1 the deficit the second sale must have taken place under the same application; and (3) whether the property sold on the second occasion is identical with the property sold on the first occasion. It is manifest that the appellant had been diligent throughout and there is no ground for holding that there had been delay in the filing of the application of September 27, 1932. The delay which took place in the second sale was due entirely to the improper action of the District Munsif in closing for "statistical reasons" the first application for sale and his improper action in dismissing the second application when there were no bids made at the auction which was fixed for September 24, 1932. But even if there had been a delay of eleven months this would not justify the Court in rejecting the appellant's application for an order directing the payment of the amount of the deficit. The learned Judge has in effect read into the Civil P. C. something which is not there and something which should not be there. When there has to be a re-sale as the result of the default of the auction-purchaser the decree-holder has to apply for a re-sale.

Order XXI, r. 87, as framed by this Court, says that every re-sale of immovable property in default of payment of the amount mentioned in r. 85 (the full amount of the purchase money plus the amount required for the general stamp for a certificate under r. 94) shall be made after the issue of a fresh proclamation. The Civil P. C. contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Lim. Act, applies It may be thought that this period is too long in such a case, but the Court is not concerned with that. Its duty is merely to apply the law. The learned Judge relied on the observations of Kumaraswami Sastriar, J. in *Venkata-*

chalamayya v. *Nilakanta Girjee* (1) at p. 485, where he said that :

"the reasonable construction to place on r. 71 is that the re-sale should be within a reasonable time after the first sale."

Abdur Rahman, J. rightly observed that this statement can only be regarded as *obiter*, but he considered that the principles governing the assessment of damages in cases of breach of contract apply here, and that the defaulting auction-purchaser should not suffer for any fall in prices which may take place after his default. I am unable to agree. Order XXI, r. 71 says that the defaulting purchaser shall be responsible for the deficit and there is no qualification of this statement. But even if it were the case that an application for a re-sale is not governed by Art. 181, Lim. Act, and that it is incumbent upon the decree-holder to apply for a re-sale within a reasonable time, that condition has been fulfilled in the present case. The appellant took prompt steps for the securing of an order for re-sale and, as I have pointed out, the re-sale did not take place as early as it should have been done because of the erroneous orders passed by the District Munsif, not passed in a judicial capacity but in pursuance of an administrative practice which I trust has long been discontinued.

Mr. Rajah Iyer on behalf of respondent No. 1 has contended that the re-sale took place in execution proceedings different from those originally instituted, but this argument does not call for discussion. It has been decided over and over again that an application in execution which is necessitated by the action of the Court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application. I need only mention *Sasivarna Tevar* v. *Arulanandam Pillai* (2), *Suppa Reddiar* v. *Avudai Ammal* (3), *Chalavadai Kotiah* v. *Poloori Alamelammal* (4), *Tripura Sundaramma* v. *Abdul Khader* (5) at p. 503 and *Abdul Aziz Sahib* v. *Chokkan Chettiar* (6) at p. 901. The application which the appellant was compelled to file on June 28, 1932 by reason of the order of March 30, 1932 and the application of September 27, 1932 which was necessitated by the order of September 24, 1932 are not fresh applications, but are applications to revive or continue the application which led to the sale of February 23, 1932, and therefore it must be held that the sale to Somasundara was a sale in the original proceedings. There is also no substance in the third contention raised on behalf of respondent No. 1. The property sold to Somasundara was in truth and in fact the same property which was sold to respondent No. 1. In the first case the property was bought subject to a mortgage; in the second case, the property was the same but the mortgage had been replaced by a mortgage decree, The property was the same property and what was sold was the right, title and interest of the judgment-debtor in it. For the reasons indicated the appeal succeeds and the appellant is entitled to his costs throughout.

N.D. *Appeal allowed.*

(1) 41 M 474 (485); 43 Ind. Cas. 685; A I R 1919 Mad. 1014; 34 M L J 156; 23 M L T 9; 7 L W 159; (1918) M W N 121.

(2) 21 M 261; 8 M L J 18.

(3) 28 M 50 (F B).

(4) 31 M 71; 18 M L J 46.

(5) 56 M 490 (503); 143 Ind. Cas. 1; A I R 1933 Mad. 418; 64 M L J 664; Ind. Rul. (1933) Mad. 274; 37 L W 607; (1933) M W N 566.

(6) 58 M 893 (901); 159 Ind. Cas. 279; A I R 1935 Mad. 803; 69 M L J 821; (1935) M W N 926; 42 L W 375; 8 R M 483.

LAHORE HIGH COURT

Second Appeal No. 1415 of 1939

January 30, 1940

DIN MUHAMMAD, J.

Mst. FAZAL BEGUM—APPELLANT

versus

HAKIM ALI—RESPONDENT

Dissolution of Muslim Marriages Act (VIII of 1939), s. 4—Suit by wife for dissolution of marriage on ground of her conversion—Act coming into force during pendency of appeal—S 4 if applicable—Evidence—Duty of Court—Judge cannot in rejecting evidence of important witness rely on information gained from other cases—Interpretation of Statutes—Declaratory statute.

A wife instituted a suit for a declaration that her marriage had come to an end on account of her conversion to Christian faith. After the decision of the suit but during the pendency of the appeal Act VIII of 1939 came into force :

Held, that the right claimed by the wife had not vested in her under any statute and consequently she could not insist that that right was indefeasible. The law applicable to the question was as contained in s. 4 of Act VIII of 1939, by which no marriage was dissolved merely on account of change of faith.

A Judge cannot travel beyond the record of the case before him and rely for the rejection of the important witness in the case on information gained from other cases heard by him.

A declaratory statute has a retrospective effect.

S. A. from the decree of the District Judge, Gujranwala, dated June 20, 1939.

Mr. *Harbhajan Dass*, for the Appellant.

Mr. *Shahzada Sher Jan Khan*, for the Respondent.

Judgment—The suit out of which this appeal has arisen was instituted by *Mst.* Fazal Begam for a declaration that her marriage with Hakim Ali had come to an end on account of her conversion to Christian faith. The senior Subordinate Judge in a judgment which is improperly brief decreed the suit. On appeal, the District Judge reversed the judgment of the trial Court and dismissed the suit. Hence this appeal. Counsel for the appellant contends that the finding of fact arrived at by the District Judge on the basis of which the suit has been dismissed cannot be maintained in law, inasmuch as he has travelled beyond the record of the case before him and relied for the rejection of the only important witness in the case on information gained from other cases heard by him. The objection raised by Counsel is no doubt valid. The District Judge in rejecting the evidence of Pastor Abdul Karim on the grounds taken from some other cases disposed of by him has no doubt departed from the fundamental rules of evidence and has thus laid himself open to attack but his order dismissing the suit must be maintained on another ground. This suit was instituted on August 31, 1938 and was decided by the trial Court on November 28, 1938. An appeal against the order of the trial Court was instituted in due course and disposed of on June 20, 1939. In the meantime Act VIII of 1939 came into force on March 17, 1939. The preamble stated that it was:

"an Act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by woman married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie."

By s. 4 of the Act, it was provided that the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam would not by itself operate to dissolve her marriage. An appeal is a continuation of the suit, and as soon as Act VIII of 1939 came into operation, it affected all questions relating to the dissolution of marriage on the ground of renunciation of faith. Consequently, when the appeal was pending, the law applicable to the question before the District Judge was as contained in s. 4 of Act VIII of 1939 by which no marriage was dissolved merely on account of change of faith Counsel for the appellant however contends that inasmuch as this statute came into existence after the appellant's renunciation had cancelled her marriage the statute should not be given a retrospective effect so as to deprive her of a vested right. In my view however there is no force in this contention. In the first place, no right vested in the appellant. The interpretation put by certain Courts on the Muhammadan Law in relation to the effect of apostasy on marriage no doubt favoured the appellant at the time when renunciation took place, but that interpretation was not the final word in the matter and the possibility of a contrary view being more in consonance with the Muhammadan Law was not altogether excluded. The right claimed by the appellant had not vested in her under any statute and consequently she cannot insist that that right was indefeasible. Secondly even if any right had vested in her under a statute or otherwise, she could be deprived of it, so long as the case was not decided, by the new statute, the object of which was merely to resolve doubts arising in the matter.

Therefore as soon as the enactment was passed, it amounted to a declaration that all the interpretations put by the Courts upon the Muhammadan Law in regard to the effect of apostasy on a subsisting marriage, that apostasy *ipso facto* cancelled the marriage, were wrong. A declaratory statute has a retrospective effect. References in this connexion may be made to Maxwell on the Interpretation of Statutes, p. 192 and Craies on Statute Law, p. 341. As an instance, it is cited in both the treatises that in *Attorney-General* v. *Theobald* (1) s. 11 Customs and Inland Revenue Act, 1889, as to the liability of voluntary settlements to stamp duty was held retrospective although the litigation in which its terms were involved had commenced before it was passed. "Acts of this kind" as remarked by Craies, "like judgments, decide like cases pending when the judgments are given, but do not reopen decided cases." Further, as observed by Craies at p. 342:

'if a statute is passed for the purpose of protecting the public against some evil or abuse, it will be allowed to operate retrospectively although by such operation it will deprive some person or persons of a vested right."

I am clear therefore that although when the suit was instituted by the appellant, she could urge that her marriage had been *ipso facto* cancelled on account of her change, of faith, the plea was not open to her when the appeal against her was being heard by the District Judge and that consequently

(1) (1890) 24 Q B D 557; 62 L T 768; 38 W R 527.

her suit could not but be dismissed. I accordingly dismiss this appeal, but in the circumstances of the case make no order as to costs.

S. *Appeal dismissed.*

MADRAS HIGH COURT

City Civil Court Appeal No. 28 of 1939
February 21, 1940
KING AND LAKSHMANA RAO, JJ.
SUBHADRAMMAL—APPELLANT
versus
KANNAMMAL—RESPONDENT

Provident Funds Rules, r. 17, Note 1—Hindu wife obtaining decree for separate maintenance from husband, whether judicially separated from husband—Depositor's death — Proceedings to recover provident fund — Parties, if should obtain succession certificate.

Main purpose of the Provident Fund Rules is to preserve for the members of the depositor's family the right to receive his provident fund, and the framers of the rules did not intend to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and there is no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should for any purpose be considered as outside the list of those who are entitled to benefit under the rules.

The parties to a proceeding to recover provident fund after depositor's death are under no liability to obtain any succession certificate; the amount vests in them upon the death of the depositor.

A. against the decree of the Additional Judge, City Civil Court, Madras, dated March 7, 1939.

Messrs. *A. V. Viswanatha Sastry* and *S. Amudachari*, for the Appellant.

Messrs. *A. Subramaniam* and *C. Vedagirirama Sastry*, for the Respondent.

King, J. — The subject-matter of this appeal is the sum standing to the credit of one D. G. Chetty in Provident Fund. D. G. Chetty was a Govt. servant who died in the year 1937. In 1928, the present plaintiff, who is D. G. Chetty's widow filed a suit against him for separate maintenance and in May 1929, was given a decree. In August 1929, D. G. Chetty made a fresh nomination under the rules of the Provident Fund by which he appointed defendant No. 1 his mistress, as the person entitled to receive the amount of the fund in case of his death. The question before us is whether the plaintiff or defendant No. 1 is entitled to this money, or to put it in other words, whether the nomination made by the subscriber in August 1929, is a valid nomination under the rules or not. The learned Additional City Civil Judge has held that the nomination is valid and comes within the scope of Note 1 to r. 17. Rule 17 deals with the disposition of a provident fund upon the death of a subscriber before retirement and mentions the various contingenies which will arise. Under Note, 1, it says that :

"A husband may make a written application for the exclusion of his wife from participation under cl. (*b*), if she has been judicially separated from him....."

The question before us can therefore once again be stated in this way. "Is a Hindu wife who has obtained a decree for separate maintenance judicially separated from her husband ?" If she is judicially separated from him, it is conceded that the nomination in this case is within the powers of the depositor under the rule. If she has not been, the effect of the Provident Fund Rules is to vest the whole of his fund in the plaintiff. The learned Additional City Civil Judge holds that the words 'judicially separated' in this note must be given an extended meaning. In para. 32 in setting out the argument of the learned Advocate for defendant No. 1, he says that "judicially separated" has to be interpreted as "meaning and including the judicial recognition or adjudication of the right of a person to live separately from her spouse." The learned City Civil Judge then goes on to point out various analogies between the position of a Hindu wife who has obtained a decree for separate maintenance and a Christian wife who has obtained a decree for judicial separation in the technical sense. We are emphatically of opinion that in arriving at the meaning of the words "judicially separated," we must take their technical meaning rather than a more popular and extended meaning unless there are very good reasons shown to the contrary from an analysis of the Provident Fund Rules themselves. The expression "judicial separation" and its cognate form "judicially separated" are not expressions to be found in the ordinary language. They are expressions of the law with a distinct and exact technical meaning. It is impossible in technical language to speak of a Hindu wife or husband as being judicially separated from one another. No doubt, if the words were construed apart from their legal context, it might be possible to say that when a Judge holds that a wife was justified in living apart from her husband, she had

been separated from her husband, by judicial action. But, as we say, there must be cogent reasons to compel up to adopt any such extended meaning for these words.

When we examine the Provident Fund Rules as a whole, we are led to the irresistible conclusion that their main purpose is to preserve the rights of the family of the subscriber to receive his provident fund in the event of his untimely death. The word 'family' is defined in the rules and of course includes the depositor's wife. We think that there must be some strong reasons why a person who is still a member of the depositor's family should be excluded from the benefit of these rules. According to the interpretation which the learned Advocate for the respondent would have us adopt, the plaintiff, although she has herself suffered ill-treatment from her husband, has to be excluded from the benefit of these rules. We can see no reason why if the general purpose of the Provident Fund Rules is to ensure that a depositor's fund shall go in the absence of other members of his "family" to his wife, the fact that a wife has been driven by her husband's conduct to live apart from him and to sue for the maintenance to which she is entitled as a wife, should prevent her from receiving the amount of his provident fund after his death. The provisions of the law with regard to judicial separation are contained in ss. 22 to 25, Divorce Act (IV of 1869). According to s. 22 a decree for judicial separation is to replace a decree which had theretofore been in force for a divorce *a mensa et toro*. According to s. 24 :

"In every case of a judicial separation under this Act, the wife shall, from the date of the separation and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her."

According to s. 25 ;

'In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into or done, omitted or incurred by her during the separation."

Under s. 23, a decree for judicial separation may be granted on the application of either the husband or the wife. As already mentioned, the learned City Civil Judge has drawn several analogies between the position of a Hindu wife who obtains a decree for separate maintenance and a Christian wife who obtains a decree for judicial separation under the Divorce Act. But this analysis of the sections of the Divorce Act shows that judicial separation is a separation far wider than the relationship existing between a Hindu husband and wife in the situation of the depositor and the plaintiff in this case. We think that the first note to r. 17 of the rules was inserted not in order to give the depositor wider lattitude in the disposition of his own property, but in order to exclude for the purposes of the rules a wife who has been in the strict sense of that term "judicially separated" because such a wife although not completely divorced from him and therefore not completely excluded from his family, is yet, partly excluded from his family, to the considerable extent shown by the various sections to which we have referred. A Christian wife judically separated from her husband is therefore very near in status to a stranger, and we think the intention of the framers of the rules of the provident fund must have been to allow the depositor to ignore her as if she had been completely divorced from him.

When we look at the rules from this point of view, that their main purpose is to preserve for the members of the depositor's family the right to receive his provident fund, we can see no reason to think that the framers of the rules would have intended to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and we can see no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should for any purpose be considered as outside the list of those who are entitled to benefit under the rules. We accordingly are of opinion that the decision of the learned Additional City Civil Judge is wrong, and that this appeal must be allowed and that the plaintiffs' suit with respect to the provident fund must be decreed with costs throughout. The learned Additional City Civil Judge has appended a note to para. 43 of his judgment to say that

"the decree in this suit shall not be treated as exonerating either the plaintiff or defendant No. 1 or defendant No. 2 from obtaining the necessary certificate under the Succession Act or the Administrator General's Act."

It was, in our opinion, quite unnecessary for this note to have been added to the judgment. The parties to a proceeding of this kind are under no liability to obtain

any succession certificate; the amount vests in them upon the death of the depositor.

N.-D. *Appeal allowed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 593 of 1939

November 12, 1940

AGARWALA, J.

Mst. KRISHNA VATI BABU AND OTHERS —DEFENDANTS—APPELLANTS

versus

Mst. GUNJARI—PLAINTIFF RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant during pendency of suit —Person brought on record not real legal representative of deceased defendant—Decree passed against such person—Whether binding on real legal representative—Conditions necessary for making such representation effective against true representative stated.

When a person who is impleaded in a suit as a legal representative of another, which he is not, sufficiently represents the estate the result is that a decree passed against him in an assumed representative character is binding on the true representative though the latter was no party to the same. The conditions necessary for making such representation effective against the true representative are that the plaintiff must have acted *bona fide*, the decree obtained must be free from fraud or collusion, and the person wrongly impleaded must have been impleaded in a representative capacity and the decree must have been passed against him as representing the estate of the deceased; the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative and the person having the real title must not have intervened during the pendency of the suit. 120 Ind. Cas. 65 (1) and *Malkarjun* v. *Narhari* (2), relied on, 3 Ind. Cas. 737 (3), distinguished.

Where in a suit for ejectment, on the death of the defendant, the plaintiff instead of bringing on record the deceased's daughter who was the real legal representative of the defendant, has brought on record the daughter's son without attempting to give any explanation of his act in not impleading the daughter of the deceased defendant, he cannot claim to have acted *bona fide* in this matter and the decree passed in his favour is not binding upon the daughter of the deceased defendant who is found in possession of the property in question and cannot be executed against her.

A. from a decision of the Subordinate Judge of 3rd Court, Patna, dated June 9, 1939.

Mr. *S. Barmeshwar Prasad*, for the Appellants.

Messrs. *Sarjoo Prasad* and *K. Deyal*, for the Respondent.

Judgment.—This is an appeal by the defendants and arises out of a suit by the plaintiff for a declaration that a decree obtained by the appellants is not binding on her and for an injunction restraining the appellants from executing that decree. The appellants, case is that one Jhalia was a tenant at will of a certain house belonging to the appellants. On her death the appellants settled it with Jhalia's sister Phulia and Ramkishun, the son of *Mst.* Gunjari, daughter of Phulia as joint tenants. According to the appellants this was a tenancy at will. A suit was instituted to eject these tenants on the ground that they were not rendering service as potters to the appellants as they had agreed to do. While this suit was pending Phulia died. An application was made stating that Ramkishun was her legal representative and should be substituted in her place. The suit resulted in a decree for ejectment being passed in favour of the appellants. The present suit is by Gunjari, the daughter of Phulia, for a declaration that the decree is not binding on her and for an injunction to restrain the decree-holders from disturbing her possession by executing the decree.

The first Court negatived the plaintiff's claim that the tenancy of Phulia and Ramkishun was a permanant one and found that they were mere tenants at will. In that view of the matter the Court dismissed the plaintiff's suit. The Appellate Court has held that it is not necessary in the circumstances of the case to decide whether the tenancy was a permanent one as claimed by the plaintiff or a mere tenancy at will as alleged by the appellants. The Court has taken the view that the plaintiff was a legal representative of her mother Phulia and that as there is no decree passed against her she is not bound by the decree and as she is in possession she is entitled to an injunction restraining the decree-holders from disturbing that possession in execution of their decree.

On behalf of the defendants-appellants it has been contended that in the circumstances Phulia was sufficiently represented by Ramkishun in the suit and that that representation has the effect of binding the plaintiff in the present suit who is the true representative of Phulia. Reliance was placed on the decision in *Sanna Govappa* v. *Rodda Sanna Govappa* (1) in which the circumstances in which a person may be held to be bound by a decree to which he is not a party are discussed. It was there observed that when a person who is im-

(1) A I R 1929 Mad. 482; 120 Ind. Cas. 65; 30 L W 778; Ind. Rul. (1929) Mad. 1025.

pleaded as a legal representative of another, which he is not, in a suit sufficiently represents the estate, the result is that a decree passed against him in an assumed representative character is binding on the true representative though the latter was no party to the same. The conditions necessary for making such representation effective against the true representative are that the plaintiff must have acted *bona fide*, the decree obtained must be free from fraud or collusion, and the person wrongly impleaded must have been impleaded in a representative capacity and the decree must have been passed against him as representing the estate of the deceased, the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative and the person having the real title must not have intervened during the pendency of the suit. That decision is in accord with the principle of the decision in *Malkarjun* v. *Narhari* (2). In such cases the first requisite is that the plaintiff must have acted *bona fide*. In the case of *Kaliappan Servaikaran* v. *Varadarajulu* (3), referred to in the case relied upon by the learned Advocate for the appellants, on the death of the defendant, his divided brother's son was brought on the record as his legal representative ignoring his daughter who was the true legal representative. No attempt was made to justify the plaintiff in ignoring the true legal representative of the deceased defendant. It was held that in the absence of any satisfactory explanation plaintiff could not be held to have acted *bona fide* and accordingly the decree was not binding on the daughter of the deceased defendant. Here in the present litigation, the decree-holder made no attempt to give any explanation of his act in not impleading the daughter of the deceased defendant and, in my opinion, therefore, he cannot claim to have acted *bona fide* in this matter. As the plaintiff has been found to be in possession of the house in question she is entitled to protect that possession until there is in existence a decree which is binding on her.

The decision of the Court below is affirmed and this appeal is dismissed with costs.

S. *Appeal dismissed.*

(2) 25 B 337; 27 I A 216; 5 C W N 10; 2 Bom. L R 927; 10 M L J 368; 7 Sar. 739 (P C.)
(3) 33 M 75; 3 Ind. Cas. 737; 6 M L T 199; 19 M L J 651.

MADRAS HIGH COURT

City Civil Court Appeal No. 65 of 1938

December 7, 1939

BURN AND MOCKETT, JJ.

A. R. KRISHNASWAMI AYYAR AND ANOTHER—APPELLANTS

versus

TRAVANCORE NATIONAL BANK, LTD. AND ANOTHER—RESPONDENTS

Surety—Discharge of—Composition between principal debtor and creditor — Surety is not absolved from liability when he has expressly contracted to remain liable even after principal's discharge — Banker and customer—Surety for customer for payments, made to latter under chit fund — Bank, if bound to disclose to surety its affairs regarding indebtedness of constituent.

Although a composition bond between the principal debtor and the creditor extinguishes the debt to the principal debtor; yet it does not absolve the liability of the surety under the surety bond where the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal. In such a case it cannot be contended that the discharge of the principal is an implied discharge of the surety. *Cowper* v. *Smith* (1) and *Union Bank of Manchaster Ltd.* v. *Beech* (2), relied on.

Where a bank calls upon its customer to furnish surety with regard to the payment made under a chit fund, as such payment cannot be distinguished from any other obligation, it is for the surety to interrogate the debtor on the question of his indebtedness. Under such circumstances that the bank is not compelled to break the confidence of its constitutents and disclose its affairs to the surety in respect of the former's indebtedness. 128 Ind. Cas. 518 (3) and *Balkrishna V. N. Kirtikar* v. *Bank of Bengal* (4), relied on,

A. against the decree of the City Civil Judge, Madras, dated March 22, 1938.

Mr. *S. Athmanathan*, for the Appellants.

Messrs. *John and Row*, for the Respondents.

Mockett, J.—This is an appeal by the defendants in a suit filed against them in the City Civil Court by the plaintiffs the Travancore National Bank, Ltd. The cause of action is very simple. It is on a surety bond Ex. I by which the defendants made themselves liable to pay to the plaintiffs the amount due from one K. E. Sodawalla. Under Ex. I it will be seen that Sodawalla had been declared the successful bidder at the auction chit on February 9, 1935, and that he was paid a sum of Rs. 3,145. The evidence on behalf of the Bank was as given by P. W No. 1 that they refused to pay that amount unless, as was their custom, sureties were furnished by the successful bidder of the chit fund. Two such sureties were forth-

coming and they are now defendants Nos. 1 and 2 in this case. They signed a very formidable document Ex. I from which it will be seen that they made themselves liable in as comprehensive terms as possibly could proceed from the draftsman's pen. The term with which we are immediately concerned is contained in cl. 9 in which it is said :

"It is further agreed that any contract between the borrower and the lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties."

In fact under Ex. II the creditors of Sodawalla including the Travancore National Bank the plaintiffs, in an Insolvency Petition No. 541 of 1935 (High Court, Madras) agreed to accept a sum of four annas in the rupee in full satisfaction of their claims : so that there was as envisaged by cl. 9 a composition. The suit was laid for the whole of the amount due under the bond but it was rightly held in the lower Court that a decree could only be given for the amount less the amount received by the Bank under the composition Ex. II. It has been argued before us that this composition bond extinguishes the debt to the principal debtor and therefore there is no debt for which the sureties can be made liable. These very arguments have been put before the Courts in cases where the document was as identical with the document before us as it is possible for it to be with regard to its terms. In *Cowper* v. *Smith* (1), a document such as this was considered and the same arguments, as will be seen from the report, were put before the Court. Lord Abinger, C. B. stated that the deed entered into by the debtor was a composition deed and was within the express terms of the guarantee. It authorized the plaintiffs to compound with their debtor. Accordingly, as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety. And with that the other learned Judges concurred. In a further decision *Union Bank of Manchester Ltd.* v. *Beech* (2), where *Cowper* v. *Smith* (1), was considered Pollock, C. B. disposed of an argument which has also been put before us in this case. He holds that the only distinction between the case in *Cowper* v. *Smith* (1), and the case before the Bench was that in the case then under consideration there was an absolute release but that in *Cowper* v. *Smith* (1), although there was not in terms a release there was what substantially amounted to the same thing. The learned Judge continues :

"Under a composition, a part is taken in satisfaction of the whole. Money accepted as a part of a debt is not a composition, but a part payment. Where there is a release, the creditor in effect says to the debtor, 'I release you from your debt'; whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing."

It will be seen therefore that the construction of Ex. I has virtually been dealt with by authority which we are content to follow.

The next point argued before us was that there was a duty on the Bank to disclose Sodawalla's overdraft liability at the time the surety was taken. This point was made under two headings, first on the general liability of the bank under such circumstances and secondly a special liability in this case because it was alleged by the witnesses for the defence that in answer to questions by the defence as to the financial position of Sodawalla, the bank representative, P. W. No. 1, Mr. Kuruvilla assured defendant No. 1 that Sodawalla's financial position was beyond reproach. It is said by D. W. No. 2 that Mr. Kuruvilla stated "His account is one of the best. You need not be anxious. Only the rules require two signatures." With regard to the first aspect the contention of the defendants is clearly negatived by the decision of a Bench of this High Court reported in *Imperial Bank of Inaia* v. *Avanashi Chettiar* (3), where it is laid down that there is no general legal obligation on the part of a Bank to volunteer to a surety particulars of one of its constituent's indebtedness, for, this is a matter on which the surty has to inform himself. Section 143, Contract Act, on which the defendants rely, is as follows :

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

This section has been considered and the High Court of Bombay in a judgment delivered by Sargent, C. J. in *Balkrishna V. N. Kirtikar* v. *Bank of Bengal* (4), took the view that the expression "keeping silence"

(1) (1838) 4 M & W 519; 91 R R 709; 150 E R 1534.

(2) (1865) 3 H & C 672; 34 L J Ex. 133; 12 L T (N S) 499; 13 W R 922; 146 R 673; 159 E R 696.

(3) 53 M 826; 128 Ind. Cas. 518; A I R 1930 Mad. 874; 59 M L J 513; 32 L W 745; Ind. Rul. (1931) Mad. 86.

(4) 15 B 585.

in that section clearly implied intentional concealment as distinguished from mere non-disclosure which no doubt was a fatal objection in insurance policies. We agree with that view. In this particular case the facts are very simple. The Bank called upon its customer to furnish surety with regard to the payment made under a chit fund. We see no reason to distinguish a payment under a chit fund from any other obligation and under these circumstances surely it will be for the surety to interrogate the debtor. We agree that there is nothing in the authorities to suggest under such circumstances that the bank is compelled to break the confidence of the constitutents and disclose its affairs to the surety. With regard to the second aspect the learned Judge has disbelieved the evidence of the defendant. He is not prepared to accept the story that by fraudulent misrepresentation they were induced to enter into the surety bond and we see no reason to differ from that view. The result of our conclusion is that this appeal must be dismissed with costs.

N.-S. *Appeal dismissed.*

LAHORE HIGH COURT

Letters Patent Appeal No. 172 of 1939
April 10, 1940

TEK CHAND AND DALIP SINGH, JJ.

MUNICIPAL COMMITTEE, HAFIZABAD—DECREE-HOLDER—APPELLANT

versus

GOPAL DAS AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 48—Court dismissing execution application on ground that case was old one and with intention of removing it from its list—Second application for same relief—Whether in continuation of old one—Second appeal—Question of law or fact—Terms of document—Intention to be inferred from—Question is one of law.

Where an application for execution is dismissed by the Court not because of the decree-holder's default or negligence but on the ground that the case was an old one and the Court intended to remove it from its list, the second application made for similar relief must be regarded as continuation of the first one. 186 Ind. Cas. 860, **reversed.**

Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law, depends on the circumstances of each particular case. The general rule is quite clear. Where intention is to be inferred from the terms of a document, the question is one of law, or mixed question of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact, or again, may be a question of mixed fact and law.

L. P. A. against the judgment of Bhide, J., Reported in 186 Ind. Cas. 860.

Diwan *Mehr Chand*, for the Appellant.

Mr. *S. L. Puri*, for the Respondent (Gopal Das.)

Dalip Singh, J.—A money decree was passed on June 7, 1924, against Gopal Das and Hari Singh in favour of the Municipal Committee of Hafizabad. On March 21, 1925, the amount granted by the trial Court was reduced to Rs. 1,700 and costs by the appellate Court. Thereafter, various execution applications were taken out but we are concerned in this appeal with the seventh execution application which was filed on February 19, 1936, for the arrest of both the judgment-debtors. Objections were put in by the judgment-debtors and on April 5, 1937, an order was passed rejecting the objections and directing the issue of warrants. The case was fixed for April 27, 1937. In the meantime a new Subordinate Judge, Mr. Manohar Singh, had taken over from the previous Judge and on the date in question he wrote the following order:

"Lala Baij Nath, Secretary of the decree-holder, present. He took *dasti* warrants and has returned them back without execution. He did not even care to hand them over to the Naib Sheriff at Hafizabad. Had he given them to the Naib Sheriff, he would have deputed some bailiff to execute them. The case is an old one. The decree-holder has acted very negligently in the matter. I am not prepared to give another opportunity. I dismiss this application. Let the record be consigned to the record room."

On the same date another execution application was put in asking for the issue of a warrant of arrest against the judgment-debtors and asking for any other relief that the Court might think fit and on that date warrants were issued without notice to the judgment-debtors. On the following day the Ahlmad drew the attention of the Court to the fact that this eighth application was barred under s. 48, Civil P. C. On April 29, 1937, the Court passed an order withdrawing the warrants and giving notice to the decree-holder to show cause why the present application should not be dismissed as barred by limitation. This notice was served on the decree-holder on May 3, the date fixed being June 10 for hearing. On June 10, the case was adjourned to July 14, on the ground that there was some talk of a compromise. On July 14, issues were struck in the present application. On July 27, 1937, the decree-holder put in an application

praying for a review of the order of April 27, 1937, and also pleading that the present application was only in continution of the old application and should be treated as such, even though in terms it did not purport to be a revival or continuation of the old application. Having framed the necessary issues the trial Court held that the present application was not a continuation of the old application because the old application had been dismissed by him on the ground of negligence. As regards the petition for review of the order of April 27, 1937, he held that the review was barred by limitation and that there were no circumstances to justify a review. On the other issues he gave various findings and finally came to the conclusion that the present application was barred by limitation.

On appeal the learned District Judge only decided one point which was raised before him, and that was that the present application was not a fresh application but was a continuation of the old application and that the order passed on April 27, 1937, by the learned Subordinate Judge, though purporting to be an order of dismissal on the ground of negligence was really an order passed on the ground that the case was an old one and, therefore, should be dismissed on "statistical and administrative" reasons as put by the learned District Judge. Presumably this means that the learned Subordinate Judge, though purporting to write an order of dismissal for negligence, only endeavoured to show disposal of a case so as to lighten his own list, the fresh application being treated as a new case. On this ground he accepted the appeal and remanded the case back to the trial Court holding that the application was not barred by time.

On second appeal, the learned Judge in Single Bench held that the questions whether the present application was a fresh application or a continuation of the old application was a mixed question of law and fact in the circumstances of the case and that there was nothing in the order to show that the reason for the so-called dismissal was not what it purported to be. Therefore, the learned District Judge was not correct in his interpretation of the order as one really of suspension and not of dismissal and he, therefore, accepted the appeal and dismissed the application as time-barred under s. 4[2], Civil P. C.

From this order the Municipal Committee has come in Letters Patent Appeal and the learned Counsel for the appellant contends that the finding of the learned District Judge was a finding of fact and, therefore, could not be interfered with in second appeal. I do not agree with this contention. Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law, depends on the circumstances of each particular case. The general rule is quite clear. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed question of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the learned Judge in passing that particular order, then the question may be either a question of pure fact or, again, may be a question of mixed fact and law. In the circumstances of this particular case, the question of the interpretation of the order of the learned Subordinate Judge, was considered by the learned Judge, a Single Bench to turn on the interpretation of the document only. Viewed from that aspect, the matter would be one of law and it was open to the learned Judge to differ from the finding of the learned District Judge.

The question, however, remains as the sole question in this appeal, whether having regard to all the circumstances of the case and the facts immediately preceding and following the order passed, the intention of the Subordinate Judge was to dismiss the application of execution for the reason of the decree-holder's negligence, or whether the case being an old one, he intended to remove it from his list, and bring it back in a new form "to start with a clean slate" as put by learned Counsel for the appellant. So far as the terms of the order are concerned, both interpretations are possible, for whereas the learned Judge begins by stating the facts which constitute the negligence of the decree-holder, he also states the fact that the case is an old one before proceeding to the order dismissing the application. There is, however, one circumstance, namely, the issue of a warrant of arrest without notice to the judgment-debtors on the fresh application that was filed on the same date, which tends to show that the learned Judge was getting rid of an old case rather than seriously intending to dismiss the case for the default of the decree-holder. The decree-holder has pointed out that though he took the summonses *dasti*, he took them at his own request and not because of any order of the Court and as the judgment debtors were not found by him, it was no use

handing over the warrants to the bailiff or the Naib Sheriff at Hafizabad and hence all he could do was to return them to the Court at Gujranwala as unserved. Bearing in mind all these facts it seems to us that the intention of the learned Subordinate Judge was not to dismiss the application for negligence but the intention was to remove an old execution application from the list and deal with it afresh under the guise of a new application. I would point out to the learned Subordinate Judge that it is not condusive to the dignity of the Court, or even ethically justifiable to pass orders which purport to be in one form and are intended really to represent a totally different situation, that is if our reading of his intention is correct. However be that as it may, in all the circumstances of the case I would accept this appeal and hold that the present application was a continuation of the old application and was not time-barred under s. 48. The case would, therefore, be returned to the learned executing Court for disposal according to the law. As the Municipal Committee were also in default in not appealing from the order of April 27, 1937, though they received notice that the Judge intended to treat it as an order of dismissal on May 3, 1937, I would leave the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

D. *Appeal allowed.*

PATNA HIGH COURT

Criminal Reference No. 50 of 1940

November 11, 1940

DHAVLE, J.

BHAJOO GOPE—PETITIONER

versus

Haji S. GHOLAM HAIDER—

OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 133—Nali claimed as part of public way—Its long user by other party, if bona fide assertion of claim—Criminal Courts' jurisdiction under s. 133, whether ousted.

Long user by a person of what is claimed to be a part of the public way *e. g., gairmazrua-am-nali*, may be taken as a *bona fide* assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under s. 133 against him. 108 Ind. Cas. 559 (1), followed.

Cr. Ref. made by the Additional Sessions Judge, Patna, dated September 7/10,1940.

Mr. *Saileswar De*, for the Reference.

Messrs. *Syed Ali Khan* and *Ashique Hussain Akbari*, against the Reference.

Judgment.—This reference must be accepted. Instead of attending to the provisions of s. 139-A of the Criminal P. C. the learned Magistrate who dealt with this case began by erroneously noting that no cause had been shown by the petitioners. They had shown cause and what is more, they had denied the existence of the public right alleged by the other side. The Record of Rights showed the land as *gairmazrua-am-nali*, but the claim of the other side was that this was a public passage. It does not appear on what materials the learned Magistrate came to the conclusion that it was a public passage. He has also failed to appreciate the case of the petitioners that the *huts* and *nads* put up by them were put up long ago when the *nali* was filled up, and that, as observed by Jwala Prasad, J. in *Janki Ram* v. *Saukhi Panjara* (1), long user by a person of what is claimed to be a part of the public way may be taken as a *bona fide* assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under s. 133 against him. It is not necessary to refer to several recently reported decisions of this Court under s. 139-A, for the section itself is clear enough in its terms and is, at any rate, not so complicated that a Magistrate of any standing should have much difficulty in complying with its simple requirements. Where, however, as in the present case, the Magistrate is unable, for some unknown reason to read the petitions filed before him, miscarriages of justice are bound to occur even if the Magistrate had been careful enough to attend to the law. The order of the Magistrate is set aside.

S. *Order set aside.*

(1) 9 P L T 587; 108 Ind. Cas. 559; 29 Cr. L J 422; A I R 1928 Pat. 268.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision No. 261 of 1938
September 24, 1940

ALMOND, J. C. AND MIR AHMAD, J.

GURMUKH DASS L. DUNI CHAND—
DECREE-HOLDER—PETITIONER
versus
MOHAMAD KHAN NAMDAR KHAN—
JUDGMENT-DEBTOR—RESPONDENT

Limitation Act (IX of 1908), Arts. 180, 182—Application for possession by decree-holder auction-purchaser—Article applicable.

An application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, Sch. I, Lim. Act and not by Art. 182. There is nothing to indicate that the Legislature intended this article to apply to those auction-purchasers who were strangers. 159 Ind. Cas. 279 (1), followed, 150 Ind. Cas. 11 (2), relied on.

C. R. against an order and decree of the Additional Judge, Peshwar Division, Peshawar, dated May 6, 1938.

Lala *Wazir Chand*, for the Petitioner.
Lala *Madan Lal*, for the Respondent

Mir Ahmad, J.—On February 16, 1934, the petitioner obtained a decree for Rs. 500 against the respondent and also against a house belonging to the respondent The decree was not framed according to O. XXXIV, Civil P. C. In execution of this decree, the house was auctioned and purchased by the decree-holder himself. The sale was confirmed on July 2, 1934 and sale certificate was issued. On December 18, 1934, the decree-holder auction-purchaser applied for possession of the house bought by him. After some proceedings the application was filed on June 27, 1935. The final order is as follows :

"The decree-holder is absent. The judgment-debtor is also for the present absconding. The papers be filed."

On January 14, 1938, the decree holder auction-purchaser presented the application which is now before us. He asked for possession of the house to be delivered to him and referred to the previous petition which was filed on June 27, 1935. Objection was taken by the judgment-debtor that this second petition of the decree-holder auction-purchaser was barred under Art. 180. Lim. Act. The trial Judge rejected the plea and held that Art. 182, Lim. Act, applied. An appeal was preferred to the District Court at Peshawar. The Additional Judge accepted the plea of the judgment-debtor. He followed *Abdul Aziz Sahib* v. *Chokkan Chettiar* (1). The appeal therefore prevailed and the application for delivery of possession was rejected. The decree-holder auction-purchaser has come up on revision to this Court The matter was referred by a Judge of this Court to the Bench because an interesting question of law was involved. The question to decide is whether Art. 180 of Sch. I, Lim. Act, applies to the application dated January 14, 1938 or Art. 182. Article 180 runs thus :

180. By a purchaser of immovable property at a sale in execution of a decree for delivery of possession	Three years.	When the sale becomes absolute.

The relevant portion of Art. 182 is as follows :

For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by s. 48 of the Civil P. C., 1908.	Three years; or where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or . . 5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or . .

The learned Counsel for the petitioner has argued that a decree-holder is a party to the execution proceedings and when he becomes an auction-purchaser he continues to be such a party and consequently his application for taking possession should be treated as an application for execution under Art. 182, Lim. Act. He asked that in the circumstances the previous application given by his client on December 18, 1934 should be considered as a step-in-aid under Art. 182. He pointed out that if the date on which that application was disposed of *i. e.*, June 27, 1935 is taken as the starting point for fresh limitation, then the present application was within time.

The learned Counsel for the respondent on the other hand argued that Art. 180, Lim. Act, was a specific article governing applications for delivery of possession presented by auction-purchasers. He contended that the execution was completed and fully satisfied when the sale certificate

(1) A I R 1935 Mad. 803; 159 Ind. Cas. 279; 68 M 893; 69 M L J 821; (1935) M W N 926; 42 L W 375; 8 R M 483 (F B).

was issued and the decree-holder paid up, and consequently there were no execution proceedings in force to be governed by Art. 182. He therefore concluded that Art. 182 did not apply and Art. 180 applied which gives three years to the auction-purchaser from the date when the sale was made absolute and does not allow any fresh starting point of limitation in the shape of a step-in-aid. He maintained that the order of the lower Appellate Judge was correct on this view of the case.

The only authority directly bearing on the point is that of the Full Bench of the Madras High Court which is reported in *Abdul Aziz Sahib* v. *Chokkan Chettiar* (1). It is in favour of the respondent. There is also a remark in the judgment of their Lordships of the Privy Council in *Chandramani Saha* v. *Anarjan Bibi* (2) which supports the view of the respondent. We would for convenience sake reproduce the relevant passages for reference. Their Lordships of the Madras High Court observed as follows :

"As Art. 180 applies to an application for possession by a decree-holder purchaser, the residuary Art. 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So Art. 182 cannot apply ; Art. 180 being the more specified article must therefore apply."

The question involved in the case before their Lordships of the Privy Council was as to the *terminus a quo* for applications to which Art. 180 applies. The words used in the article are "when the sale becomes absolute." It was urged on one side that the sale became absolute when it was confirmed. On the other side, it was contended that it became absolute when all proceedings including appeals and revisions relating to the sale had been concluded. Their Lordships held that the sale became absolute on the date when the appeal against the order refusing to set aside the sale was disposed of. Their Lordships when discussing the case remarked as follows :

"There is no doubt that Art. 180, Lim. Act, 1908, is applicable to the matter now under consideration. It provides that a purchaser of immovable property at a sale in execution of a decree for delivery of possession, must make the application within three years from the time when the sale becomes absolute."

We are of the opinion that the view taken by their Lordships of the Madras High Court is correct and an application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, Sch. I, Lim. Act. There is nothing to indicate that the Legislature intended this article to apply to those auction-purchasers who were strangers and we do not see any justification for reading into the article any such exception as that suggested by the petitioner's Counsel. We may note that there was no such provision in the previous Lim. Act and Art. 180 was specially introduced in the Lim. Act of 1908. The Legislature was, therefore, devising a special limitation, and distinction between a decree-holder auction-purchaser and a stranger auction-purchaser, if intended would have been clearly brought out when enacting the article. Moreover, the remark of their Lordships of the Privy Council also means that their Lordships were of the view that Art. 180 applies to an application by a decree-holder auction-purchaser for possession. In the case before their Lordships the auction-purchaser was a decree-holder as is indicated by the following sentence.

"The question for determination is whether the appellants who purchased with the leave of the Court at two auction sales certain mortgaged property in execution of two mortgage decrees in their favour are entitled to delivery of possession of the said property."

It was argued by the learned Counsel for the petitioner in the alternative that the second application should be considered a continuation of the first application, because nothing definite was done in connection with the first application. In support of this proposition he referred us to a passage in the head note of *Abdul Aziz Sahib* v. *Chokkan Chettiar* (1) which reads as follows :

"An application for possession of property was made by the purchaser within three years of the confirmation of sale. An order on this application was made by the Court, which order was not on merits of the case and did not amount to a refusal of any of the reliefs claimed by the applicant hence not compelling him to prefer an appeal against the order. Another application was then presented by the applicant within a year of the last application requesting for possession of the property purchased: *Held*, that the latter application was the continuation of the previous one and therefore was within time"

To understand this head note, which lays down more or less an abstract proposition, we would reproduce the portion of the judgment which deals with the facts relating to this aspect of the case :

"Within three years of the High Court's order *i.e.*, September 1, 1930 the decree-holder by M. P. No. 561 of 1930 applied for delivery of possession of the properties purchased. The property purchased comprised a house and certain lands. The house was Item No. 2 of the application. When the Amin proceeded to deliver possession of the house, on Abdul Ghaffar Sahib claiming that his wife Amina

(2) A I R 1934 P C 134; 150 Ind. Cas; 11; 61 I A 248; 61 C 945; 6 R P C 157; 38 C W N 901; 67 M L J 79; 40 L W 65; 36 Bom, L R 717; 59 C L J 547; (1934) M W N 765; (1934) A L J 618; 11 O W N 1213; 36 P L R 289 (P C).

Bi has a share in the house bolted the outer door from inside and locked the same and prevented the Amin and the auction-puchaser from going inside. Afraid of a disturbance the Amin returned and sent his report on September 11, 1930. Nothing is stated by the Amin as to the delivery of possession of the lands. When the matter came up before the District Munsif, he passed the following order 'possession was not given on account of obstruction. Petition dismissed. This is dated September 26, 1930 *i. e.*, four days before the end of the quarter.

It is our duty to point out that this order is a very improper order. In the first place nothing was done by the Amin as to the other item, *viz.*, the lands. Even as to the house, the obstruction was by a person claiming a share in it. It is true that the house is probably not divided by metes and bounds and it is difficult to deliver physical possession of the remaining share as to which there was no obstruction. But in such a case the Court ought to deliver such possession as the intangible interest may be capable of. Instead of doing this the District Munsif simply says that the petition is dismissed. One thing is noticeable that throughout, *i e.*, at the time of the attempted delivery and at the time of the order there was no obstruction or opposition on the part of the judgment-debtors. When there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, there is no reason why the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtors should not be delivered. And it is also clear that the District Munsif never meant to refuse such a relief. The order is passed in a mechanical way without adverting to the details of the matter before him, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter. It has again and again been held that such a disposal is not a judicial disposal on the merits. It cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an Appellate Court."

We do not think that in this case any such question arises. The decree-holder absented himself and the Court had to dismiss his petition. He had therefore to thank himself for the consequences. Consequently, we hold that this argument does not apply to the present case. In the result, we agree with the lower Appellate Court that the application is not competent and we dismiss the petition for revision with costs. Pleader's fee Rs. 16.

D. *Petition dismissed.*

MADRAS HIGH COURT

Case No. 13 of Foruth Criminal Sessions of 1940

September 27, 1940

KRISHNASWAMI AYYANGAR, J.

In re K. KRISHNAN AND ANOTHER—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 287, 209, 342—Purpose for which Court is entitled to put questions to accused under s. 342—Written statement by accused in lieu of answers to questions to be put by Court under s. 209, whether record of examination by or before committing Magistrate within meaning of s. 287—Admissibility in evidence.

The purpose for which the Court is entitled to put questions to the accused under s. 342, Criminal P. C., is identical with the purpose indicated in s. 209, namely to afford the accused an opportunity to explain such circumstances as appear in the evidence against him. The questions which are to be put are qustions to be put by the Court and the answers to be recorded are the answers to those questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited and only to be elicited by questions by the Court. Such a written statement does not come within s. 287, as it cannot be said to be a document containing the examination of the accused duly recorded by or before the committing Magistrate and therefore it cannot be tendered in evidence.

Messrs. *E. A. Lobo* and *T. S. Venkataraman*, for the Accused.

The Crown Prosecutor, for the Crown.

Judgment.—It appears that in this case while the preliminary enquiry was being held by the committing Magistrate, the accused was put the following question after the evidence for the prosecution had been recorded: "Q.—You have heard the evidence of prosecution witnesses; what have you to say?" The accused gave the following answer: "A.—I am filing my written statement." That written statement appears to be a long document consisting of 24 pages of typed matter. The question now arises as to whether this long typed statement filed by accused No. 1 before the Magistrate comes within s. 287, Criminal P. C., and whether it is a document containing the examination of the accused duly recorded by or before the committing Magistrate. If the document contains the record of the examination by or before the committing Magistrate, it is the duty of the prosecutor to tender it and read it as evidence. But for reasons which will be mentioned, it does not appear to be such a document. The written statement was filed in place of the answers to be given by the accused, at the stage at which the Magistrate had to question him under s. 209, Criminal P. C. Section 209, Criminal P. C., defines the purpose for which the Magistrate is authorized to interrogate the accused, and the stage at which he is to do so. Section 209 (1) says:

"When the evidence referred to in s. 208, subss. (1) and (3), has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the

Magistrate, that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly."

What the committing Magistrate is called upon to do by the terms of the section is to place before the accused the circumstances appearing in the evidence against him and afford him an opportunity, if he likes to take advantage of it, to explain those circumstances. Far from the section conferring any privilege on the accused to file a written statement, it merely casts a duty upon the Magistrate to question the accused and record his answers, if any, for the limited purpose specified in the section. There is another section relating to the matter under consideration in Chap. XXV containing the general provisions as to inquiries and trials, namely s. 342. Clause (1) of this section says :

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Clause (2) says :

"The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just."

Clause (3) says :

"The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into or trial for, any other offence which such answers may tend to show, he has committed."

On the face of it, this section indicates the general procedure to be followed in the matter of judicial interrogation of an accused person and the extent to which the answers elicited are to be made use of, for deciding upon the guilt or innocence of the accused. The purpose for which the Court is entitled to put questions to the accused under this section is identical with the purpose indicated in s. 209, namely to afford the accused an opportunity to explain such circumstances as appear in the evidence against him. The questions which are to be put are questions to be put by the Court and the answers to be recorded are the answers to these questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited and only to be elicited by quesions by the Court. I am aware of the practice that has been sometimes followed, of allowing the accused to file written statements in inquiries and trials. Written statements so prepared and filed are generally, as is well known, prepared with the assistance of the friends and legal advisers of the accused in order to present the case in as favourable a light as possible, with a view to exculpate the accused or minimize his guilt. The Code does not contemplate such a procedure. What it contemplates and what would be in fact really useful for the decision of the case is what the accused can himself say by way of explanation, and not what others can say for him. There is no warrant in the Code for the outcome of the labours of more capable and brainy persons being considered by the Court under s. 287. The practice has been time and again condemned but does not appear to have wholly disappeared. I now add my protest also in the hope that it will be laid to rest. The written statement of accused No. 1 in this case is an extreme type and I must exclude it from the records of the case. For the same reasons, the written statement of accused No. 2 though less objectionable in point of length must also be excluded.

N.-D *Order accordingly.*

OUDH CHIEF COURT

Criminal Reference No. 49 of 1940

January 23, 1941

THOMAS, C. J.

EMPEROR—COMPLAINANT

versus

BISHUN NARAIN—ACCUSED

Motor Vehicles Act (IV of 1939), s. 112—Words "this Act", if include convictions under old Act—Three previous convictions for offences under old Act—Proper sentence—Motor Vehicles Rules (1940), r. 79 (viii).

The words "this Act" in s. 112, Motor Vehicles Act of 1939, do not include convictions under the old Act of 1914, which is repealed by the new Act.

Where, therefore, an accused who had three previous convictions for offences under the old Act of 1914, was convicted under s. 112 of Act of 1939, for breach of r. 79 (*viii*) of Motor Vehicles Rules of 1940, for carrying passengers in excess and was sentenced to a fine of Rs. 100 :

Held, that the fine of Rs. 100 was illegal and must be reduced to Rs. 20.

Held, further that the proper course for the Magistrate in such a case was to cancel the accused's licence for a period of at least six months, and if this accused was brought up again for an offence under the Motor Vehicles Act, the Magistrate would do well to cancel his licence either for a period of one year or six months.

Cr. Ref. made by the Sessions Judge of Unao, dated December 12, 1940.

The Assistant Govt. Advocate, for the Crown.

Mr. *Iqbal Ali*, for the Accused.

Judgment.—This is a reference under s. 438 of the Criminal P. C. by the learned Sessions Judge of Unao recommending that the fine of Rs. 100 imposed on the accused be reduced to Rs. 20.

Bishun Narain, motor driver of motor lorry No. 171 of Unao, was convicted under s. 112 of Act IV of 1939 (Motor Vehicles Act) for breach of r. 79 (*viii*) of Motor Vehicles Rules of 1940, for carrying passengers in excess. He was entitled to carry 31 passengers, but was caught carrying 46 passengers of whom four were children.

The learned Sub-Divisional Magistrate of Hasanganj who tried the case sentenced the accused to a fine of Rs. 100 in view of his three previous convictions, or in default to undergo simple imprisonment for three months.

The accused filed a revision against his conviction and sentence, and the learned Sessions Judge has referred the case to this Court as in his opinion, the fine of Rs. 100 under s. 112 of the Motor Vehicles Act of 1939, is illegal.

The section is as follows :

"Whoever contravenes any provision of this Act or of any rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to twenty rupees, or, if having been previously convicted of any offence under *this Act* he is again convicted of an offence under *this Act*, with fine *which* may extend to one hundred rupees."

Section 134 of the said Act repeals the Indian Motor Vehicles Act of 1914 and there if no saving clause in Act IV of 1939.

The question for consideration is whether the three previous convictions of the accused under the Act of 1914 can be taken into account in this case. If so, the imposition of fine of Rs. 100 is correct. If not, the maximum amount under s. 112 is Rs. 20 only.

The learned Assistant Govt. Advocate has conceded that the previous convictions cannot be taken into consideration in view of the wordings of s. 112. The words are "*if having been previously convicted of any offence under this Act*, he is again convicted of an offence under *this Act*." The applicant had three previous convictions under the old Act. In my opinion, the words "*this Act*" do not include convictions under the old Act.

I, therefore, accept the reference and reduce the fine from Rs. 100 to Rs. 20.

I must point out for the benefit and future guidance of the learned Magistrate who tried this case, that the accused seems incorrigible and the fine which is imposed on him probably will be paid by the owner of the motor lorry. It is no punishment to the accused. The proper course for the Magistrate was to cancel the accused's licence for a period of at least six months, and if this accused is brought up again for an offence under the Motor Vehicles Act, the Magistrate will do well to cancel his licence either for a period of one year or six months.

S. *Reference accepted.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 82 of 1940

April 11, 1940

DAVIS, J. C. AND LOBO, J.

EMPEROR—PROSECUTOR

versus

ACHAR HAMZO KUMBHÁR—

RESPONDENT

Criminal Procedure Code (Act V of 1908), s. 562—First offence—Short sentence, passing of—Effect—Offence punishable with imprisonment under Penal Code—Whipping in lieu of punishment for aforesaid offence—Age limit—Ss. 3 and 5 Whipping Act (IV of 1909), should be read together with provisions of Criminal Procedure Code, relating to whipping

The passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime. The young convict when he comes out of prison has the stigma of prison upon him and yet his imprisonment has not been sufficiently long for its disciplinary influence to have effect, while he has been brought into the company of hardened offenders who may further guide him to a life of crime: Therefore, it is wrong to pass upon the accused, whether he is 18 or 20 years of age, a short sentence for the first offence 184 Ind. Cas. 311 (1), followed.

Section 3, Whipping Act, permits whipping in lieu of any punishment for which the offender is liable under the Criminal P. C. to imprisonment, irrespective of age. Hence for whipping for an offence of theft there is no age limit Sections 3 and 5 should be read together along with s. 393, Criminal P. C. and other provisions contained in the aforesaid Code which relate to whipping.

Cr Ref, made by the District Magistrate, Nawabshah, dated March 26, 1940.

Mr. *Partabrai D. Punwani*, Advocate-General, for the Crown.

Davis, J. C.—This is a reference by the learned District Magistrate of Nawabshah who recommends that a sentence of three months' rigorous imprisonment for theft passed by the Resident Magistrate of Nawabshah upon a young offender, in the

opinion of the Superintendent of the Hyderabad Central Prison more likely to be 18 years of age than 20, should be reduced to that already suffered, as, in the learned District Magistrate's opinion, he cannot be whipped, nor is it worth while now taking action under s. 562, Criminal P. C.

We have constantly stressed the harm that short sentences for first offences can cause and have drawn the attention of Magistrates to this particular aspect of punishment, for it is now generally agreed that the passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime. The young convict when he comes out of prison has the stigma of prison upon him and yet his imprisonment has not been sufficiently long for its disciplinary influence to have effect, while he has been brought into the company of hardended offenders who may further guide him to a life of crime: *see Emperor* v. *Nur Muhammad Kalu Khan* (1) at p. 750. Therefore, we think the learned Magistrate was obviously wrong when he passed upon the accused, whether he was 18 or 20 years of age, a short sentence for this first offence.

The District Magistrate thinks that as the convict is over 16 years of age he could not be whipped, but if he would refer to s. 3, Whipping Act, he will notice that for whipping for an offence of theft there is no limit of age. The limit of age is prescribed generally by the Criminal P. C. under s. 393, which in the case of males is over 45 years of age, while in the Whipping Act itself s. 5 refers to juvenile offenders who, according to the explanation to that section, is an offender under 16 years of age. But s. 3, Whipping Act, permits whipping in lieu of any punishment for which the offender is liable under the Code to imprisonment, irrespective of age. Under s. 393, Criminal P. C., on the other hand, a female cannot be whipped. All these sections of the Whipping Act should be read together and these sections must be read with the sections of the Criminal P. C. which relate to whipping. But under the circumstances of this case we do not think it is necessary to order whipping. We agree with the District Magistrate that it is now not worth while taking action under s. 562, Criminal P. C. and we accept his recommendation that the sentence of this Achar should be reduced to that already suffered which is already nearly two months. The District Magistrate should invite the attention of the Subordinate Magistrate to the ruling of this Court referred to above *Emperor* v. *Nur Muhammad Kalu Khan* (1) at p. 750, in which the harmful effects of short sentences are pointed out.

S. *Order accordingly.*

(1) (1939) Kar. 749 (750); 184 Ind. Cas. 311; A I R 1939 Sind 260; 41 Cr. L J 14; 12 R S 102.

*Page of (1939) Kar.—[*Ed.*]

MADRAS HIGH COURT

Application in Case No. 6 of the Fourth Criminal Sessions, 1940

October 2, 1940

KRISHNASWAMI AIYANGAR, J.

In re B. K. NARAYANA REDDI—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 286, 540—Prosecution is not confined to witnesses examined before committing Magistrate—But prosecution is not entitled to have fresh witnesses summoned for purpose of their evidence being taken and considered at trial—Discretion under first portion of s. 540, should be exercised judicially—Criminal trial—Evidence—Accomplice—Corroboration.

Under s 286, Criminal P. C., the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Sessions Court. But the Crown is not entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses ready and available to them for giving evidence, their evidence can be taken, and there is no legal objection to this course.

The first portion of s. 540, Criminal P. C., leaves a discretion in the Court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially.

Evidence of accomplices must be received with caution and not ordinarily to be accepted without corroboration in material particulars.

The Crown Prosecutor, for the Crown.

Messrs. *B. T. Sundararajan, C. S. Rajappa* and *C. S. Soman*, for the Accused.

Order.—The accused B. K. Narayana Reddi was tried along with two others, namely Devanai Ammal and Ethiraja Pillai on August 15, 16 and 19, last. The trial resulted in the conviction of Devanai Ammal and Ethiraja Pillai and they are now serving their respective terms of imprisonment. So far as Narayana Reddi is concerned, the jury brought in a verdict of not guilty by 5 against 4 with the result that I ordered the discharge of the jury. I decided that it was a fit case for Narayana Reddi to be tried again on the charge framed

against him. At the request of his Counsel I ordered his retrial by myself during this sessions. The case comes on for trial tomorrow, October 3, 1940. To-day the Crown Prosecutor makes an application for production before Court of the two prisoners aforesaid, namely Devanai Ammal and Ethiraja Pillai so that they may be examined and their evidence taken. The first question that arises is whether it is permissible for the Crown to examine these two persons as witnesses for the prosecution. That they were not examined—as they could not have been examined—before the committing Magistrate during the preliminary enquiry is not by itself an objection to the Crown having their evidence taken. Under s. 286, as construed by a Full Bench of the Lahore High Court in *Niamat* v. *Emperor* (1) the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Sessions Court. But I am not satisfied that the Crown is entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses ready and available to them for giving evidence, their evidence can be taken, and so far as I can see there is no legal objection to this course. In view, however, of the fact that without the intervention of the Court the evidence of these two witnesses cannot be made available to the prosecution, the learned Crown Prosecutor is thrown back on the provisions of s. 540, Criminal P. C., on which he relies for the purposes of persuading me to summon and examine the two witnesses named by him as Court witnesses. Section 540 runs as follows:

"Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

The first portion of the section leaves a discretion in the Court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially. The second and the latter portion of the section lays a duty on the Court to summon and examine any such person if it appears to the Court that the evidence of such person is essential to the just decision of the case. I have therefore to put myself the qestion whether this is a fit case in which in the exercise of my discretion I should summon these two prisoners who are now undergoing terms of imprisonment or whether I am satisfied that their evidence is essential to the just decision of the case. The relevant facts which I must remember in this connexion are these: According to the case for the prosecution Ethiraja Pillai, one of the two witnesses now sought to be summoned, stole the two postal orders in respect of which the offences charged are alleged to have been committed and passed them on to Narayana Reddi and Narayana Reddi in his turn got the orders cashed through Devanai Ammal, the other witness whose prodcution is now sought. All the three, namely Devanai Ammal, Narayana Reddi and Ethiraja Pillai were tried together with the result I have already mentioned. In the course of the trial it appeared that Ethiraja Pillai had made a statement in the nature of a confession first to the investigating inspector Mr. Mahalinga Aiyar which statement he repeated in substance before Mr. Raghunath Rao, the Presidency Magistrate who recorded his confession under s. 164, Criminal P. C. In the statement before Mr. Mahalinga Ayyar he stated:

"The two orders shown to me were taken out from a cover. I secreted that cover and opened it in the dark behind the privy. I showed them to Narayana Reddi some two days after that and asked him if they will fetch any money. Narayana Reddi took them from me and said that he will get money for them. He did not pay me anything. I asked him and he replied that he threw them away."

In his statement before the Magistrate he said:

"Narayana Reddi would ask us to bring some letters in covers received by post so that if there were notes in any of them they can be extracted. About six months ago one day I gave two such letters from the inland mail to that Narayana Reddi. There were two shilling notes in one envelope. I saw the number "20" on each of the notes. I handed over that letter to him and I do not know what happened to it subsequently. I gave him the other letter also. I was not present when he opened that letter. I do not know what he did with those notes and I never questioned him about them."

I may also add that immediately after Ethiraja Pillai made his statement to Mr. Mahalinga Ayyar he was taken to Mr. Byrne, the Presidency Postmaster, and he again confirmed the statement he had earlier made to Mr. Mahalinga Ayyar. When the case was before the committing Magistrate he retracted from these confessional statements and asserted that those statements were the

(1) 17 L 176; A I R 1936 Lah. 533; 162 Ind. Cas. 976; 37 Cr. L J 742; 38 P L R 421; 8 R L 985; (1933) Cr Cas. 568 (F B).

result of inducements offered to him by Mr. Mahalinga Ayyar and by the Police. The same attitude was taken up by him in this Court when he was being tried here. Devanai Ammal was also examined by Mr. Mahalinga Ayyar. She then stated that the two postal orders had been received by her from her brother Manicka Mudaliar and that she cashed them at the Vepary Post Office receiving Rs. 26-8-0 therefor. She said nothing to indicate that Narayana Reddi had anything to do with the postal orders. In fact her story was a contradiction of the case for the prosecution that it was Narayana Reddi who gave her the postal orders for their being cashed. That story she stuck to during the inquiry before the committing Magistrate though there was some difference with regard to the details of the transaction as spoken to by her.

It will be clear from what I have said that both these persons who are now sought to be produced before the Court for being examined as witnesses are, even according to the prosecution, accomplices whose evidence must be received with caution and not ordinarily to be accepted without corroboration in material particulars. So far as Ethiraja Pillai is concerned, he definitely went back upon the statements he made to Mr. Mahalinga Ayyar and to the Presidency Magistrate who recorded his confession. His statements made at the various stages leave no room for doubt that he is a person having litte regard for truth and who for his own ends would not hesitate to tell lies. As regards Devanai Ammal it is plain that her case is totally at variance with that of the prosecution. She dissociated herself entirely from Narayana Reddi, and far from admitting the receipt of the postal orders from Narayana Reddi, she made the assertion that she got them from a different person, namely her own brother. The difference regarding the details of the story she gave before the committing Magistrate and that given here struck me at the time as a serious infirmity tending to show that her exculpatory statements were pure inventions. Evidence coming from such an untruthful person cannot but be regarded as extremely unreliable.

I have therefore little hesitation in holding that I should not summon either of these two persons or examine them in the trial of the accused in the exercise of my discretion under s. 540. I am equally unable to come to the conclusion that the evidence of such untruthful and unscrupulous witnesses is essential to the just decision of the case. I cannot imagine that justice will be advanced by introducing into the trial the evidence of persons with the antecedents mentioned above; far from advancing justice their evidence might very likely tend in the opposite direction. I must decline to have these two persons, namely Ethiraja Pillai and Devanai Ammal, produced before the Court for their evidence being taken.

N.-D. *Application dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 302 of 1938
February 14, 1941
AGARWAL, J.

Raja JAGDAMBIKA PRATAP NARAIN SINGH—PLAINTIFF—APPELLANT

versus

TIR SINGH BAHADUR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Contract Act (IX of 1872), ss. 137, 134—Surety—Discharge of—Claim against principle debtor allowed to be time-barred—Remedy against surety, if lost.

A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. 181 Ind. Cas. 1 (1), relied on.

S. C. A. against the order of the Civil Judge of Gonda, dated July 25, 1938.

Mr. *S. N. Srivastava*, for the Appellant.

Messrs. *Ali Zaheer* and *S. P. Avasthi*, for Respondent No. 1.

Judgment.—This is a second appeal by the plaintiff, whose claim has been dismissed by both the lower Courts.

Chaudhri Mumtaz Husain, respondent No. 2 was employed by the plaintiff. The other respondent Tir Singh Bahadur Singh stood surety for Chaudhri Mumtaz Husain and executed a deed dated October 6, 1931, in favour of the plaintiff. Rs. 3,836 were embezzled by Chaudhri Mumtaz Husain and the plaintiff came to know of it in October 1932. This suit was instituted on May 17, 1937, against Chaudhri Mumtaz Husain and Tir Singh Bahadur Singh for the amount embezzled.

Both the Courts have dismissed the suit on the ground that since the plaintiff allowed his remedy against the principal debtor Chaudhri Mumtaz Husain to become barred by time, the surety, that is Tir Singh Bahadur Singh was discharged. There is a divergence of opinion between the Allahabad High Court on the one side

and the Calcutta, Bombay, Madras and Lahore High Courts on the other, as to the interpretation of ss. 134 and 137 of the Contract Act. Section 134, provides that the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. Section 137 of the Contract Act runs thus—

"Mere forbearance on the part of the creditor to sue the principal debtor or to enforce another remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety."

The Allahabad view is that the surety is discharged where the creditor has allowed the claim against a principal debtor to become barred by time. The other High Courts are of the opinion that the surety was not discharged when the legal remedy becomes barred by time. This point has been discussed by their Lordships of the Privy Council in *Mahanth Singh* v. *U Ba Yi*, (1939 O. W. N. 401) (1). Their Lordships referred to a case of the Allahabad High Court in *Ranjit Singh* v. *Naubat*, (I. L. R 24 All., 504) (2) and certain decisions of the Bombay, Calcutta, Madras and Lahore High Courts and observed that they preferred to follow the reasoning of the majority of the High Courts in India and that the law in England was also the same. The Allahabad view taken in I. L. R. 24 All.,504 (2), has been followed in subsequent cases by the same Court. The observations of their Lordships of the Privy Council show that the view taken by the other High Courts is correct. It is true as argued by the learned Counsel for the respondent that the point before their Lordships of the Privy Council was not exactly the same because in that case the plaintiff had withdrawn the suit against the principal debtors without liberty to bring a fresh suit and was thus precluded from bringing another suit against them but the observations of their Lordships are entitled to great weight and the view of the majority of the High Courts in India also is the same. There is no decision of this Court. I therefore prefer to follow the view of the Calcutta, Bombay, Madras and Lahore High Courts in preference to that of the Allahabad High Court. I accordingly hold that the plaintiff has not lost his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal.

I therefore allow the appeal and remand the case to the trial Court for decision on other issues according to law. Costs will abide the result.

S. *Appeal allowed.*

(1) (1939) O W N 401; 181 Ind. Cas. 1; A I R 1939 P C 110; 5 B R 576; 11 R P C 213; 1939 O L R 270; 43 C W N 641; (1939) Rang. 358; 41 Bom L R 742; 50 L W 27; 20 P L T 532; (1939) M W N 727; (1939) 2 M L J 253; (1939) A L J 697; 70 C L J 556; 66 I A 198 (P C).

(2) 24 A 504; A W N 1902, 166.

PATNA HIGH COURT

Letters Patent Appeal No. 10 of 1940

January 7, 1941

HARRIES, C. J. AND FAZL ALI, J.

KHAKHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM ISHWAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Co-sharers — No partition of village among co-sharers by metes and bounds but co-sharers in possession of specific plots of bakasht *land—Exchange of plots between plaintiffs and defendants — Under deed plaintiffs entitled to be in possession of house standing on part of land given by defendants—Defendants remaining in possession—Suit by plaintiff alleging that they rented out house to defendants, for arrears of rent, ejectment and mesne profits—Transaction held binding upon defendants — Mesne profits held could not be awarded, as according to plaintiffs, defendants were lawfully in possession.*

There had been no partition of the village among the co-sharer landlords by metes and bounds, but the co-sharers were in possession of specific plots of *bakasht* lands. Out of the lands in possession of the plaintiffs they had given 14 decimals to the defendants for building a *zanana* house, and the defendants gave in exchange certain lands to them in lieu of the land which they had got. The deed of exchange clearly stated that the plaintiffs were entitled to be in possession of the house standing on 3½ decimals of land. The plaintiffs brought a suit alleging that they had after the exchange, let out the house standing on 3½ decimals of land to the defendants and that the defendants had not paid the rent for the house and asked for the following reliefs: (1) a decree for the arrears of rent, and (2) a decree for ejectment and mesne profits:

Held, that the transaction was nothing but a mutual arrangement between two landlords who were in possession of specific plots of *bakasht* land in the village. This arrangement might not be binding on the other co-sharer landlords who were not parties to it and might be disregarded when there would be a partition of the village by metes and bounds ; but so long as the village was not partitioned, it must bind the plaintiffs as well as the defendants.

Held further, that their suit was rightly dismissed in so far as their claim for the rent of the house was concerned as this story was found to be untrue.

Held also, that as the plaintiffs' case was that the defendants were lawfully in possession of the house as tenants, their claim for mesne profits must be disallowed.

L. P. A. against a judgment of Mr. Justice Wort, dated May 8, 1940.

Mr. *B. N. Rai*, for the Appellant.

Messrs. *Hareshwar Prasad Sinha* and *P. Jha*, for the Respondents.

Fazl Ali, J.—This is a Letters Patent Appeal from the decision of a learned Judge of this Court in a Second Appeal.

The plaintiffs and the defendants are co-sharer landlords in *Mauza* Ramcharanpore Gorakhi and are admittedly in possession of specific plots of *bakasht* lands. Some time ago the plaintiffs gave to the defendants 14 decimals of *bakasht* lands for building a *zenana* house, and on December 2, 1935, the defendants executed a deed of exchange by which they declared the plaintiffs' right to be in possession of 50½ decimals of land in exchange for the land which they had previously given to the defendants. From the recitals in the deed it appears that out of 50½ decimals of land there was a house on 3½ decimals, and it was also stated in the deed that

"the claimant should enter into possession and occupation of the property given to him in exchange, bring it under his cultivation, take up his abode in the house and continue to enjoy the same for all time."

In 1937 the plaintiffs brought the suit which has given rise to this appeal, and in this suit they stated, among other things, that after the exchange (the transaction to which reference has already been made) the plaintiffs had let out the house standing on 3½ decimals of land to the defendants on a monthly rent of Rs. 10 per month, and as the defendants had not paid the rent for the house they were compelled to bring the suit. They accordingly asked for the following reliefs (1) a decree for the arrears of rent, and (2) a decree for ejectment and mesne profits.

The trial Court and the first Appellate Court concurrently held that the story of the plaintiffs that they had let out the house on rent to the defendants was not true. Both these Courts also held that the plaintiffs were not entitled to any relief because the other co-sharer landlords of the village had not been impleaded in the suit. The plaintiffs' suit being dismissed, the plaintiffs preferred a second appeal to this Court; but the second appeal also was dismissed, hence this appeal under the Letters Patent.

Now, there is no doubt that there has been no partition of the village among the co-sharer landlords by metes and bounds, but it is perfectly clear on the findings of the Courts below that the co-sharers are in possession of specific plots of *bakasht* lands. As I have already stated, out of the lands in possession of the plaintiffs they have given 14 decimals to the defendants for building a *zenana* house, and it has been found by the first Appellate Court that the defendants gave in exchange certain lands to them in lieu of the land which they had got. The deed of exchange is on the record, and it is clear from it that there was a house on 3½ decimals of the land in possession of the defendants, and the defendants gave this house also to the plaintiffs. The question is whether this transaction is binding upon the defendants or not. In my opinion, it is. It was nothing but a mutual arrangement between two landlords who were in possession of specific plots of *bakasht* land in the village. This arrangement may not be binding on the other co-sharer landlords who were not parties to it and may be disregarded when there is a partition of the village by metes and bounds; but so long as the village is not partitioned. It must bind the plaintiffs as well as the defendants. As I have already stated, the deed of exchange clearly states that the plaintiffs are entitled to be in possession of the house standing on 3½ decimals of land. It is true that the plaintiffs' story that they had let it out to the defendants on rent has been found to be untrue, and, therefore, their suit has been rightly dismissed in so far as their claim for the rent of the house is concerned; but there seems to be no reason why they should not be awarded a decree for the possession of the house standing on 3½ decimals of land.

I would, therefore, allow this appeal, set aside the judgment of the learned Judge against which this appeal has been preferred and direct that a decree be passed in favour of the plaintiffs granting them possession in respect of 3½ decimals of land on plots Nos. 2959 and 2960. As the plaintiffs' case was that the defendants were lawfully in possession of the house as tenants, their claim for mesne profits must be disallowed, but they will be entitled to half the costs in all the Courts.

Harries, C. J.—I agree.

s. *Appeal allowed.*

MADRAS HIGH COURT

Referred Trial No. 45 and
Criminal Appeal No. 212 of 1939
June 16, 1939

MOCKETT AND KRISHNASWAMI AYYANGAR, JJ.

In re RAVUPALLI RAMAMURTHY —ACCUSED

Criminal trial — Evidence — Dying declaration—Corroboration, necessity of—Evidence Act (I of 1872), s. 27—Accused's statement to Police that he threw away knife on certain spot after killing deceased—Accused leading Police to the spot but knife not found—Police broadcasting that whoever has taken knife should return it or houses would be searched — A coming forward and stating that he found a knife on spot mentioned by accused but he has thrown it away — A producing knife from spot where he alleged it was thrown away by him—Statement by accused held admissible under s 27—Statement under s. 27—Mode of recording—Admissibility in part—Duty of Judge.

Dying declarations should be corroborated in material particulars and by independent testimony. [p. 349, col. 2.]

The accused stated that he would show the knife with which he had stabbed the deceased and which he had thrown away. The Sub-Inspector, the accused, and another witness who was requested to go with the Sub-Inspector, proceeded to the spot but no knife was found. The Sub-Inspector broadcast that whoever had taken the knife away should return it or search would be made of the houses. Then *A* came forward and stated in the presence of the accused that he had picked up the knife from that very spot. He took the party to some 40 or 50 yards to the west of his house and showed the knife, the blade sticking in the earth :

Held, that the statement of the accused to the Police was admissible under s. 27, Evi. Act, since it led to the discovery of (1) the fact that a knife had been seen to be thrown away and was later found by *A* at the spot indicated, and (2) the knife itself; the fact that the knife was not actually found at the spot mentioned by the accused was immaterial. 158 Ind. Cas. 764 (3), referred to. 54 Ind. Cas. 479 (2), not approved.

Statements under s. 27, Evi. Act, should be recorded in the first person, that is to say, as far as possible in the actual words of the accused ; they should not be paraphrased. The Judge should admit those parts which he considers admissible but leave some record for the consideration of the Appellate Court of any other words which the prosecution claimed should be received in evidence. [p. 350, col. 2.]

Refd. T. and A. referred by the Court of Session, Vizagapatam Division, dated March 10, 1939.

Mr. *A. Gopalacharlu*, for the Accused.

The Public Prosecutor, for the Crown.

Mockett, J.—The accused has been convicted and sentenced to death for the murder of two women, Annapurna and Savitri. Savitri was his wife, and she was the daughter of Annapurna who had two sons P. Ws. Nos. 15 and 16. The learned trial Judge has described at some length the history of Annapurna, and it is not necessary for us to repeat it. She apparently was at one time the concubine of P. W. No. 17, and Savitri and P. W. No. 16 were children of that union. Annapurna left P. W. No. 17 fourteen years before her death and appears to have become a prostitute, as a result of which habit P. W. No. 15 and another child were born. P. W. No. 17 married P. W. No. 9. The accused who was employed in the Bengal Nagpur Railway Workshop at Vizagapatam, married Savitri, with the approval of P. W. No. 17 and Annapurna. That was about three years before Savitri's death. Annapurna was the tenant of a house at Vizianagaram, at the time of her death, of which P. W. No. 17 was the owner. There are many allegations against the character of Annapurna in the evidence it being alleged that she was attempting to lead Savitri into a life of prostitution. The learned Judge, as we have indicated, has dealt fully with this aspect of the case.

So far as the facts in this appeal, which are material are concerned, they may be shortly stated. A few weeks before October 18, 1938 Annapurna and P. W. No. 15 visited the accused at Vizagapatam. Annapurna was receiving treatment for her eyes from the King George Hospital at Vizagapatam. She returned to Vizianagaram taking Savitri with the consent of the accused. On Saturday October 15, the accused came to Annapurna's house and according to the evidence asked for Savitri to return with him but was put-off on the ground that her clothes were with the washerman, Annapurna saying that she would return on Tuesday the 18th. The accused, it is stated, left for Vizagapatam He is supported to this extent by D. W. No. 5, who says that he was there on Monday the 17th. An examination of the plan Ex. M shows that the deceased's house is next door to P. Ws. Nos. 17 and 9, but a little to the north is the house of P. Ws. Nos. 11 and 18. It leads to the house in the south of P. W. No. 19, and further to the south is the house of P. Ws. Nos. 7 and 13. At about 1 A. M. both these women were stabbed to death, Savitri dying almost instantaneously, Annapurna surviving until next day. Their wounds, the doctor says, could have been with the dagger, M. O. No. 1.

As to the actual event, the evidence is as follows: P. W. No. 15, who is ten years old, says that Annapurna and Savitri were sleeping on the same cot and he too was sleeping near by. He was

awakened by hearing Annapurna cry out "*ammo*" and he says he saw the accused, his brother-in-law, running away. His mother told him, "Your brother-in-law has stabbed us and run away," to which he replied "I too saw him run away." In answer to a question from P. W. No. 16, Annapurna said he stabbed her with a dagger. P. W. No. 17 and other person came. We disregard as inadmissible evidence of this witness and elsewhere where it appears that Savitri had shown M. O. No. 1 to Annapurna stating that the accused was threatening to kill her with it. These we do not consider as within s. 32, Evi. Act, as they do not relate to the circumstances of the transaction which resulted in her death. P. W. No. 15 said that there was some moonlight which enabled him to identify the accused. It appears from the calendar that the moon was new then and just rising. It certainly was not "round shaped" as P. W. No. 15 said in cross-examination. P. W. No. 15 said that on the Saturday and Sunday before the murder the accused and Savitri were talking together "lovingly." P. W. No. 16 who was also sleeping near him gives much the same evidence but does not claim to identify the accused. He says there was slight moonlight the moon having arisen. To him Annapurna said that the accused stabbed both her and Savitri and ran away, and P. W. No. 15, said, "Yes, I too saw him run away." Standing by itself, we should be reluctant to act on this identification of P. W. No. 15. It may well be that having been told by his mother who had been stabbed he thought he recognized him. But that there was any deliberate attempt dishonestly to implicate the accused seems to be negatived by the fact that P. W. No. 16 does not pretend to have seen him, and his evidence with regard to the moonlight is no doubt true.

It has been stated in the evidence that a great hubbub arose and it can well be understood that that would be so. Other people came to the spot. Some of them have been called. P. W. No. 9 the wife of P. W. No. 17, describes how she was sleeping in her house her husband having gone to a *bhajana* in a dancing girl's house. She says that when the night was well advanced she heard a cry, saw a number of people near the cot where Annapurna and Savitri were, and that Annapurna told her, "my son-in-law came here, stabbed us and ran away." We see no reason to suppose that P. W. No. 9 had any animosity towards Annapurna. Her husband's relationship with Annapurna ceased long before. She says also that there was a little moonlight. It appears from the evidence that the corpse of the deceased was in the shade. P.W. No. 17 can tell us no more than that he came back between 1 and 2 and discovered what had happened and that Annapurna also told him that the accused stabbed them both and ran away.

It is convenient here to mention that both P. W. No. 15 and P. W. No. 9 say that the inmates of the deceased's house took their food together just before the lamps were lit, but P. W. No. 16 states that they took their evening meal at 9 o'clock. It must be remembered that P. W. No. 15 was a little body of ten years of age and was likely to have had his meal earlier and gone to bed before his elders. This differance in the evidence was made much of by the defence because it was suggested that if the food was last taken by the deceased Savitri at 7 o'clock the evidence of the doctor would go to show that she must have been killed at about 9 or 10 o'clock, when the accused was at Vizagapatam; in other words, that the murder did not take place after midnight at all. This argument may be dealt with at once. It is founded on a statement in text books that rice takes two to three hours to digest and P. W. No. 3 appears to accept that in cross-examination. But P. Ws. Nos. 4 and 5 who are doctors used to rice diet are not prepared from their experience to accept this limited time for digestion. There are much more potent reasons however for us being satisfied beyond any doubt that these women were stabbed at about 1 o'clock. The body was still warm at 2-30, says P. W. No. 3, and death had only occurred within half to one hour before. It must be remembered too, that all the witnesses who were upon the spot immediately after the occurrence are all unanimous that the time was after midnight. The moon did not rise till after 1 o'clock according to the calendar. P. W. No. 11 speaks to the event being after midnight; and so does P. W. No. 18. P. W. No. 3 describes how Annapurna and the dead body of Savitri were brought to him at 2-30 A. M. We have already given his view on examination then and there as to when death had occurred in the case of Savitri. P.W.No.19 describes how the *bhajana* finished at 1 A. M. He went to the house of Annapurna hearing a noise and found Annapurna wounded. To him also Annapurna told what she told the others. And it must be added that P. W. No. 13 also

said that it was the accused whom he had seen running away. This aspect of the case presents no difficulty whatever. We are satisfied, and we agree with the learned Judge, that these murders took place at the time these witnesses say they took place, at about 1 A. M., on October 18. It must be remembered that among these people watches do not figure very frequently and midnight is a wide term. So it is established beyond any doubt that at 1 o'clock or there-abouts these women were stabbed by some one and that, immediately after the stabbing, to several people Annapurna stated that it was the accused who had stabbed her and Savitri. P. W. No 3, the doctor, took so serious a view of Annapurna's case that he thought it his duty, and we think rightly, to record a dying declaration, that is Ex. B. It clearly implicates the accused.

Before proceeding further with the history of this case, we will go back to the time of the occurrence and consider the evidence of two other witnesses, P. W. Nos. 13 and 20. Their house is indicated in the plan. According to P. W. No. 13, he and P. W. No. 20 were sitting at his house preparing Deepavali sparklers or crackers. He describes the time as midnight. P. W. No. 13 heard a cry and coming into the street he says he saw the accused running from west to east. He gave chase but after running ten yards stopped. Then he says the accused threw something backwards and the thing fell with a metallic sound. He did not see what it was then. He and P. W. No. 20 went to Annapurna's house and he confirms the evidence of the other witnesses that she said that her son-in-law stabbed her and Savitri. P. W. No. 13 says, he said, "I too saw him." Here again, if it were a matter of identification alone, while accepting generally the facts as given by P. W. No. 13 and as borne out by P. W. No. 20, we are unable to accept the identification of the accused by P. W. No. 13 because he subsequently told the Police that he could not identify the runner. We do not attach much importance to whether the accused threw the knife away or threw it at him, or whether he searched for the knife then and there. It must be remebered that he must have been in a state of excitement. We are, however, satisfied that he did chase somebody and, as will later appear, that somebody threw away what subsequently was shown to be a knife. P. W. No. 20's evidence seems to negative the argument put forward with force that the whole of this case is the result of a conspiracy against the accused. This contention so far as it concerns P. W. No. 20 may be rejected as groundless. P. W. 20 does not pretend to identify the runner. Next morning at 6 A. M. these two persons P. Ws. Nos. 13 and 20, got up and went out for purposes of nature, and P. W. No. 13, corroborated by P. W. 20, states that he took up M.O. No. 1, the knife, lying some six yards to the east of his house. His conduct thereafter, although much criticised, is not really so surprising when viewed with any experience of the manner in which this class of persons behave when a crime has been committed. He picked the knife up, but then thinking that it might lead to trouble for him threw it into a bush. He says then there was blood on the blade from the tip. He threw it away some 200 yards to the west of his house. The subsequent history of this knife and the part played by P. W. No. 13 will be dealt with later.

Annapurna was taken to the hospital after some little delay. She died the next day at Vizagapatam where she had been taken in an ambulance after an operation which failed to save her life. But, in the meanwhile, she had made a further dying declaration to P. W. No. 6, the Stationary Sub-Magistrate of Vizianagaram, Ex F. That too, implicates the accused very clearly. It will be noticed that both in Ex. F and in Ex. B, Annapurna states that the accused did not return to Vizagapatam at all but lurked at the station. In answer to a question "What sort of a knife was?" she says, "It is a curved knife admitting of easy handling." In fact that is a fair description of M. O. No. 1. So, in addition to the statements of those who gathered at her house after the stabbing, in two more formal declarations to P. W. No. 3 and P. W. No. 6 respectively, this woman declared that the murderer was the accused. It is a well accepted practice that dying declarations should be corroborated in material particulars and by independent testimony. We are therefore to see to what extent this woman's statement is corroborated. We have already dealt with the events earlier in the evening, and have indicated that from them alone we would be reluctant to hold that the statements have been corroborated. There were however events of great importance next day. An inquest was held on the body of Savitri by P. W. No. 21 the Sub-Inspector of Police. It is well to remember that at 3-30 on that

morning he was aware of the nature of the declarations of Annapurna. The inquest report, Ex. H, dealing with the cause of death is a formal document entered on a form. It will be observed that the duration of the inquest is stated to be two hours commencing at 7 A. M. and closing at 9 A. M. According to P. W. No. 21, at 7-15, that is a quarter of an hour after the inquest started, the accused came and appeared anxious to come in. He was brought in. When he stated that his name was Ramamurthi and that he was the son-in-law of Annapurna and the husband of Savitri, P. W. No. 21 arrested him and searched him but found no bloodstained weapons on him or blood marks on his clothes. In this connection P. W. No. 3 stated that blood need not have spurted out when these woman were stabbed.

Then according to P. W. No. 21, the accused stated that he would show the knife with which he had stabbed Annapurna and Savitri which he had thrown away. The Sub-Inspector, the accused, and P. W. No. 12, who was requested to go with the Sub-Inspector, proceeded to a spot eight yards east of P. W. No. 13's house but no knife was found. The Sub-Inspector, one may say, broadcast that whoever had taken the knife away should return it or search would be made of the houses. Then P. W. No. 13 came forward and stated, the accused being present, be it remembered, that he had picked up the knife from that very spot. He took the party to the easing ground some 40 or 50 yards to the west of his house and showed the knife, the blade sticking in the earth. A *panchayatnama* Ex. J was made out and signed, one of the signatories being P. W. No. 12! P. W. No. 12 entirely bears out this story. Blood was not found on the knife, but as it was sticking in the ground and had been out all night this is not very strange. Here again the vagueness of these people about time is striking and has rightly been made much of by the defence. P. W. No. 12 said the knife was recovered between 10 and 11 A. M. In Ex. N. a list made out on the 20th, that is two days after, the time is put down as 10 and it is signed by the Sub-Inspector. But it must be remembered that the inquest report signed on the 18th by the Sub-Inspector says that the inquest closed at 9. P. W. No. 8 was one of the *panchayatdars* at the inquest. He says that the accused came at 7-15. It appears that a long statement was made by the accused to the Sub-Inspector, a greater part of which was rightly rejected by the learned Sessions Judge although there are parts of it which might well have been received under s. 27, Evi. Act, because we do not quite understand why the fact that he was arrested by the Sub-Inspector and that the accused told him and showed him the spot where he had thrown the knife with which he had murdered his wife and Annapurna could be receivable in evidence rightly, and yet the actual statement taken down should be rejected. It is obviously of importance to ascertain whether in fact the officer recorded the statement from the accused because it will be extremely dangerous to accept the fact when so important a statement was made if it was not recorded. We have therefore thought it right to exercise our powers in the interests of justice under s. 172, Criminal P. C., and look at the case diary. It is enough for us to say we are satisfied beyond any doubt that the learned Judge rightly believed the Sub-Inspector when he said that the accused told him that he would show the spot where he had thrown the knife with which he had stabbed Annapurna and Savitri. The portions of the case diary printed are of little assistance to us being only parts of the original.

It must be remembered the accused made a very long statement taking 20 minutes or more to record. We must observe that the learned Judge has overlooked the decision of a Full Bench of this High Court in *Athappa Goundan* v *Emperor* (1) where the learned Chief Justice emphasizes that these statements under s. 27, Evi. Act should be recorded in the first person, that is to say, as far as possible in the actual words of the accused; they should not be paraphrased. But that is what has been done in this case. The statements made by the accused are given in the third person; that is, it is recorded in the Sub-Inspector's evidence in this form: "He stated that he would show me the knife with which he had stabbed etc.," and then later on in cross-examination, "I went with the accused as he offered to show the spot where he threw the knife." We have no doubt what the effect of the accused's statement was namely that he said that he would show the Sub-Inspector the spot where he had thrown the knife

(1) I L R (1937) Mad. 695; 171 Ind. Cas. 245; A I R 1937 Mad. 618; 38 Cr. L J 1027; (1937) 2 M L J 60; (1937) M W N 442; 46 L W 152; 10 R M 321 (F B).

with which he had stabbed these women. In this case there has been no cross-examination to suggest that the statement was in some other form. The defence is that no such statement was made at all. We feel no anxiety with regard to this part of the case. But in all these cases the exact words of the accused should be recorded in the first person and the learned Judge should admit those parts which he considers admissible but leave some record for the consideration of the appellate Court of any other words which the prosecution claimed should be received in evidence. It has however been contended by the defence that the statement is not admissible under s. 27, Evi. Act as no discovery was made in consequence of information received from the accused. We do not agree.

Section 27 refers to a fact being discovered and s 3 defines "fact" as meaning and including "anything, state of things, or relation of things capable of being perceived by the senses" It seems to us that these facts were discovered: (1) the fact that a knife had been seen to be thrown away and was later found by P. W. No. 13 at the spot indicated, and (2) the knife itself. It was the statement of the accused that led the party to the scene and we consider that the subsequent discoveries were directly in consequence of the information received from him. It would be strange if, for example, an accused person stated that the body of a person murdered by him would be found in a certain spot and on the Police going to that spot not finding it there but in a mortuary to which it had by then been removed by, *e g.*, the village officers, it could be held that the ultimate finding of the body was not in consequence of the information received from the accused. A decision in *Ramasami Boyan* v. *Emperor* (2) has been brought to our notice. With all respect to the learned Judges, we find some little difficulty in following the reasoning therein and are unable to follow it. It does not appear that there was any sort of discussion as to the meaning of the word "fact." This High Court in *Emperor* v. *Ramanuja Ayyangar* (3) has stressed the comprehensive meaning of the word "fact." Thus far, we have considered the admissibility of the accused's statement under s. 27, Evi. Act. So far as a consideration of whether the accused's statement is corroborated is concerned, and Annapurna's statements, it is established that the accused having made a statement that at a certain spot he had thrown away a knife, that statement is shown to be true by the appearance of a man who saw him throw a knife away, because the accused's case is that it was he himself who threw it away. Moreover, a knife was picked up at the very spot indicated by the accused. On these facts the prosecution claim that they have established the guilt of the accused. It is necessary to consider his own statements. It appears that at his request a statement was recorded from him under s. 164, Criminal P. C. In that statement he admits that he was questioned at the inquest at 8-30 but states that he was arrested at 11 A. M. This is wholly incerdible. The Police, of course, would at once, and we are satisfied that they did, arrest a man of whom it had been stated on all sides that he had murdered two women. He then proceeds:

"On the morning of October 18, 1938, I came to Vizianagaram from Waltair by the 6 A. M. train to take my wife back. I heard about this murder at the clock tower. By the time I arrived at the Municipal Hospital my wife's corpse was lying at the gate. I saw this and asked the Police there to open the gate. They oponed it. I went inside. They asked me who I was I told them that I was the husband of the deceased. They said: 'All right. Sit down' I accordingly sat down."

Then questions followed obviously put on the supposition that the accused desired to make a confession, which he definitely negatived. Before us two main points have been argued. First that these women were in fact murdered at 9 o'clock on the Monday night. We have already dealt with this. We think there is no basis whatever for it. We entirely accept the prosecution story that these women were murdered at 1 o'clock. It is then argued, although it is a little difficult to follow, that because of the variance in the times with regard to the discovery of the knife and the closing of inquest, no statement at all was made by the accused and therefore no discovery was made. We wholly decline to accept this position. We find no room in this case for supporting any suggestion of what is commonly known as a foisted case. Several witnesses were well disposed towards the accused. We wholly decline to believe that the Police have been a party to an elaborate conspiracy to victimize an obscure worker on the railway. Our view is that this inquest started and ended at the time indicated in the inquest report and that thereafter no one was paying any great attention to actual

(2) 11 L W 8; 54 Ind. Cas. 479; A I R 1920 Mad. 109; 21 Cr. L J 79.

(3) 58 M 642; 158 Ind. Cas. 764; A I R 1935 Mad. 528; 36 Cr. L J 1442; 68 M L J Sup. 73; (1934) M W N 1479; (1935) Cr. Cas. 728; 8 R M 331; 42 L W 124 (F B).

times. We think that the Sub-Inspector's version is substantially true and that he signed Ex. G two days after carelessly. It is not the time of the end of this inquest so much as the beginning of it that is important. Obviously after it had started there was a long interval in which the statement was written down. The parties repaired to the spot where the knife was found and it seems possible that no particular record of actual times was made. The safest guide is the inquest report written at the time with the times recorded. Any argument based on the accused's statement in Ex. 4 that he was not arrested until 11 A. M., and that therefore he was not under arrest at the time of his statement to the Police, can be summarily rejected for the reasons we have already indicated namely, that he must have been arrested immediately the Police saw him.

In the Magistrate's Court the accused contented himself by saying that he was not guilty and would call witnesses at the Sessions. No application was made, says the learned trial Judge, for the summoning of any defence witnesses until the case was taken up for trial. Then D. Ws. Nos. 2, 3 and 4 were called for proving uniform *alibis* at Vizagapatam late on the evening of Monday and his presence there early on Tuesday morning. We observe that everybody at the original trial being conversant with such local conditions as the times of trains no formal proof of the relevant time table has been made. We have directed that a time table shall be attached to this record and received in evidence. The following times are however accepted by both prosecution and defence before us. The evening train leaves Waltair at 9 50 P. M., and reaches Vizianagaram at 11-21 P. M. and the morning train leaves Waltair at 6-5 A. M. reaching Vizianagaram at 7-55 A. M. It was therefore possible for the accused to have caught the morning train provided that he did in fact go back to Vizagapatam on Sunday, in which case he could have been on the spot in time at the time of the murder. If however he was in Vizagapatam at 5 A. M. catching the early morning train and reaching Vizianagaram at 7-55 he could not have been at the inquest much before 8-30, the station being about one and half miles from the hospital. Therefore, he could not have been at the inquest at 7-15 A. M. as alleged by the prosecution. His *alibi* therefore at Vizagapatam is of importance. We do not propose to discuss, although we have examined, the *alibi* in full. It is enough for us to say that we have considered and wholly agree with the estimate of its value given by the learned Sessions Judge. We agree with him in rejecting it and do not consider that it is necessary to repeat the criticisms which he has directed towards it. There is however one striking feature regarding this *alibi* and that is that the detailed story told by the witnesses is not so much as mentioned by the accused in any of his statements. It is true that he states at the Sessions and in Ex. 4 that he was at Vizagapatam, but there is no reference at all to any of the defence witnesses or any of the events spoken to by them.

The learned Sessions Judge has reviewed the evidence at great length. This is one of those cases where the evidence as a whole must be considered and weighed. There is ample material on the record to show that the accused might well have desired the death of his mother-in-law and wife. We have the fact that on this night Annapurna stated not once but many times that it was the accused who stabbed them. She is supported by P. Ws. Nos. 13 and 15, although standing alone we have indicated we should hesitate to accept their evidence as to the identity of the accused. We have the fact also that this man so far from being at Vizagapatam was at Vizianagaram (they are 34 miles apart) soon after 7 o'clock on the morning of the 18th. In the course of a statement to the Police he told them that the knife with which he had murdered these women was at a certain spot and he took the Police there. At that very spot immediately after the murder the night before, a man had been seen running and throwing away a knife. That knife was picked up from that spot by P. W. No. 13. Immediately these facts are known, we consider that by the accused's own conduct and words the statements of Annapurna and his own retracted statement are amply corroborated and the statements of P. Ws. Nos. 13 and 15 receive added strength; and it must be remembered with regard to P. W. No. 15 that he had repeatedly said to all the persons that had assembled the night before that he had seen his brother-in-law running. All these matters have received from the learned Judge the fullest consideration. Agreeing with him we are satisfied that the facts lead to one conclusion only, namely that it was the accused that committed this act. We therefore confirm his

conviction. It was a deliberate murder of two defenceless women and the learned Judge did his duty in passing the sentence of death. We accordingly also confirm the sentence and dismiss the appeal.

N. D. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 2456 of 1939

July 28, 1939

PANDRANG ROW AND ABDUR RAHMAN, JJ.

Haji MUHAMMAD SHADAK KOYI SAHIB—PETITIONER

versus

BURRA VENKATA KOMARAJU AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 109, 110 —Leave to appeal for raising for first time question before Privy Council, not raised in any Courts in India cannot be granted.

Where leave to appeal to the Privy Council is asked for, for the purpose of raising for the first time before the Privy Council a question which was not raised at any time while the litigation was pending in India, that is either in the trial Court or in the High Court, such leave cannot be granted.

C. Misc. P. under ss. 109 and 110 and O. XLV, rr. 2, 3 and 8 Civil P. C. praying that the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the judgment and decree of the High Court in A. S. No. 330 of 1936 preferred to the High Court against the decree of the District Court of Vizagapatam in O. S. No. 13 of 1936.

Messrs. *K. V. Krishnaswami Iyer* and *P. Panunni Rao*, for the Petitioner.

Mr. *Y. Suryanarayana*, for the Respondents.

Pandrang Row, J.—This is an application for leave to appeal to His Majesty in Council from the decree of this High Court made in appeal No. 330 of 1936 on February 14, 1939. That decree merely confirmed the decree of the trial Court, the finding of both the Courts being concurrent on the main question in the suit, namely, whether there was gross negligence on the part of the Court guardian appointed to defend the suit in which a decree had been passed against the minor, the present litigation being one to have that decree set aside as against the minor. The entire litigation proceeded in the trial Court as well as in this Court on the basis that gross negligence, if proved, would be sufficient to entitle the plaintiff to have the earlier decree set aside, and neither in the grounds of appeal in this Court nor during the arguments at the hearing of the appeal was it stated that gross negligence by itself would not be sufficient in the absence of fraud and collusion. But it is this point and this point alone that is sought to be raised in the present application for leave to appeal. The petitioner wants an opportunity of having this question settled by the highest Judicial tribunal and it would appear that they have been emboldened to do that by reason of a Full Bench decision of the Bombay High Court reported in *Krishna Das Padmanabh Rao* v. *Vithoba Annappa Shetti* (1), which appears to have been reported only after the High Court's judgment was pronounced. That, however, is a detail which need not affect our decision in this matter. Even in that case it is pointed out that there is a preponderance of authority among the High Court Judges in India in favour of the view that a minor can challenge a decree passed against him on the ground of the gross negligence of his guardian *ad litem*. This majority view appears to have been dissented from by the Full Bench of Bombay High Court on the ground that the majority view was based mainly on the consideration that such an action would lie under the English Law, and the Full Bench of the Bombay High Court was of opinion that under the English Law itself no such action would lie. We find, however, that apart from the dictum in *Gregory* v. *Molesworth* (2), of Lord Hardwicks which is quoted in some of the reported cases in India, at least since 1874 when *In re Hoghton* (3), was decided by Vice-Chancellor Malins, it has been understood to be well settled law in England that such an action would lie. It is sufficient to refer in this connection to the passages quoted from Macpherson on Infants and Simpson on the Law of Infants in *Brij Raj* v. *Ram Sarup* (4), and also to the passage from Halsbury's Laws of England Vol. 17, p. 138 on the same page. We find also in the latter edition *i. e.* Hailsham edition of the Laws of England, the same proposition of law laid down, that is to say, that an infant is as much bound as an adult by a judgment unless there has been fraud or

(1) A I R 1939 Bom. 65; 180 Ind Cas. 51; 41 Bom L R 59; 11 R B 230, I L R (1939) Bom. 340 (F B.)

(2) (1747) 26 E R 1160; 3 Atk. 626.

(3) (1874) 18 Eq. 573; 43 L J Ch. 758; 22 W R 854.

(4) 48 A 44 (53); 90 Ind. Cas. 749; L R 6 A 488 Civ.; 23 A L J 901; A I R 1926 All. 36.

gross negligence on the part of his next friend. We feel, therefore, some hesitation in expressing the view that under the English Law an action would not lie in the case of gross negligence only of the guardian. We are unable to accept the position as being one in which any real doubt remains about the maintainability of a suit of this kind. We, however, do not base our final decision which is to dismiss the petition on this ground. It is enough for our purpose to say that leave to appeal could not be given in a matter like this for the simple reason that leave is asked for, for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending in this country; that is to say either in the trial Court or in this Court. The resort to the provisions which permit a party to apply for leave to appeal for a purpose like this, namely, for raising a point for the first time after the whole case has been disposed of, would be in our opinion, an abuse which should not be encouraged. It might also be mentioned that if this new point had been raised earlier, the plaintiffs would have had an opportunity of meeting this point by alleging as an additional ground of claim actual fraud and collusion.

In the circumstances, we feel, that there is no other alternative than to refuse leave to appeal. The petition is, therefore, dismissed with costs.

N.S. *Petition dismissed.*

OUDH CHIEF COURT

First Civil Appeal No. 121 of 1940
January 28, 1941
GHULAM HASAN AND AGARWAL, JJ.
ABDUL AZIZ *alias* DULLU AND OTHERS—APPELLANTS
versus
NAWAB KHAN AND OTHERS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 1—Appeal against amended decree of Special Judge passed under s. 14, U. P. Encumbered Estates Act (XXV of 1934)—Court-fee payable—Ad valorem.

Where an appeal directed against an order of amendment, is to all intents and purposes against the amended decree passed by the Special Judge under s. 14, U. P. Encum. Estates Act, the court-fee payable on the memorandum of appeal is *ad valorem* under Art. 1, Sch. I, Court Fees Act. 171 Ind. Cas. 78 (1), 172 Ind. Cas. 941 (2) and 173 Ind. Cas. 353 (3), relied on. 147 Ind. Cas. 633 (4) and 145 Ind. Cas. 823 (5), distinguished.

F. C. A. against the order of the Special Judge, First Grade of Unao, dated July 17, 1940.

Mr. *Nasir Ullah Beg*, for the Appellants.

Judgment.—This is an office report in First Civil Appeal No. 121 of 1940 to the effect that the appellants must pay *ad valorem* court-fee on Rs. 6,035, which is the amount of the amended decree after deducting Rs. 1,365 the amount of the original decree passed by the learned Special Judge under s. 14 of the Encum. Estates Act against the appellants. The office reports that the order appealed against is a decree and not an order incapable of execution and not having the force of a decree. The memorandum of appeal is directed against an order dated July 17, 1940, amending the decree in Encum. Estates Act suit No. 46 of 1936 passed by the Special Judge, First Class, Unao. The valuation of the appeal is stated to be Rs. 6,035 and the court-fee of only Rs. 3 has been paid. *Ad valorem* court-fee on Rs. 6,035 is Rs. 477-8. Consequently, there is a deficiency of Rs. 474-8 in court-fee.

The facts are that originally the learned Special Judge passed a decree for Rs. 1,365 with future interest and proportionate costs against the appellants on December 14, 1939. The creditors thereafter applied to the Court for the amendment of the decree in view of the explanation, which has been added to subs. (5) of s. 14 of the U. P. Encum. Estates Act. The learned Special Judge ordered as follows:—

"In the result the decree in case No. 3 relating to Ex. D-5 (mortgage) is amended and in place of the decree for Rs. 1,365 I decree the claim on basis of Ex. D-5 for Rs. 7,400 with pro: costs and future interest at 4½ per cent. per annum from date of application."

A decree was prepared in pursuance of the above judgment. The appellants' Counsel has filed the copy of the judgment as well as the copy of the amended decree along with the memorandum of appeal. In appeal the amended decree for Rs. 7,400 minus Rs. 1,365, the amount of the original decree, has been challenged. Upon these facts it appears to us that the appeal in substance is really directed against the amended decree passed by the learned Special Judge though the memorandum of appeal merely purports to appeal against the order amending the decree. We have no doubt whatever that the object of the appeal is to get rid of the amended decree which involves the setting aside of the decree for Rs. 6,035 passed by the learned Special Judge. The case, therefore, in our opinion clearly

falls under Art. 1 of Sch. I of the Court Fees Act. It has been held in *Lal Baijnath Singh* v. *Tulsi Ram*, (1937 O. W. N. 890) (1), that where in an appeal against a simple money decree passed by a Special Judge under s. 14 (7), U. P. Encum. Estates Act, the appellants want a reduction in the amount of interest decreed by the lower Court, the appeal is governed by Art. 1 of Sch. I of the Court Fees Act and court-fee must be paid *ad valorem* on the amount of interest disputed by the appellants.

A similar view has been taken in *Jagat Jit Singh* v. *Munnoo Bibi*, (1938 O. W. N. 135) (2), where it was held that having regard to the definition of 'decree' contained in Civil P. C. and to the provisions of s. 14 (7), U. P. Encum. Estates Act the decision of the Special Judge is a decree though the amount that may be due to the opposite party yet remains to be fixed and hence *ad valorem* court-fee is payable in an appeal against such order.

A similar view has been taken in a Full Bench decision of the Allahabad High Court in *Jagdish Pratap Bahadur Singh* v. *Raj Kumar Udai Pratap Bahadur Singh*, (1938 O. W. N. 88) (3), where it was held that in an appeal against a decree passed by the Special Judge under s. 14 of the U. P. Encum. Estates Act, the memorandum of appeal cannot come under the descriptions in Arts. 11 or 17, Sch. II of the Court Fees Act, 1870, and, therefore, it must come under the description in Art. 1 of Sch. I of the Act, the court-fee payable, consequently, being *ad valorem*.

Learned Counsel for the appellants concedes that the object of the appeal is no doubt to obtain a cancellation of the amended decree for Rs. 6,035 in an indirect way, but argues that his appeal is only directed against the order passed by the learned Special Judge and not against the decree and as such the court-fee paid is sufficient. In support of his contention he relies on, 1, *Shujaatmand Khan* v. *Govind-Behari*, (A. I. R. 1934 Allahabad 100) (4) and 2, *W. H. Lawrence* v. *Dewan Singh*, (A. I. R. 1933 Rangoon 264) (5). Neither of these two cases has any bearing upon the present case. In the former case an order had been passed by the lower Court under s. 152 of the Civil P. C. amending the plaint and the preliminary decree and correcting the misdescription of the property, which had crept in the plaint and in the decree. A revision was filed against the said order. A preliminary objection was raised on behalf of the respondents that an appeal lay against the amended decree no revision was entertainable. It was held that the revision was not directed against the amended decree but against the order. No question whatever about court-fee was involved in the case.

In the latter case it was held that a decision given under s. 152 of the Civil P. C. granting an application for amendment of a decree is an order and not a decree and hence an application to set aside such an order is governed by Art. 181 and not Art. 164 of the Indian Lim. Act. The question in that case arose in connection with the point of limitation and had no reference whatever to the question of court-fee. Apart from this, both the above cases are distinguishable from the facts of the present case. In the present case an amended decree has actually been passed and the result of allowing the appeal would be to set aside the amended decree. There is no doubt that the decree passed by the Special Judge is under the provisions of s. 14 of the U. P. Encum. Estates Act, wherein it is specifically stated that such a decree shall be deemed to be a decree of a Civil Court of competent jurisdiction.

Reference has also been made on behalf of the appellants to a decision of this Court in *Rameshwar Bakhsh Singh* v. *Govind Prasad*, (1940 O. W. N. 862) (6). That case in our opinion is inapplicable. That was a case of miscellaneous appeal under s. 45 of the U. P. Encum. Estates Act against the decision of two issues framed in the creditor's claim under s. 14 of the Act. Under s. 45 as it then stood an appeal could be brought against "any decision, decree or order" of a Special Judge. The word "decision" was, however, deleted

(1) 1937 O W N 890; 171 Ind. Cas. 78; 1937 O L R 503; 10 R O 76; 1937 R D 403; A I R 1937 Oudh 501.

(2) 1938 O W N 135; 172 Ind. Cas. 941; 1938 O L R 68 (1); 10 R O 210 (1); 1938 R D 212; A I R 1938 Oudh 86.

(3) 1938 O W N 88; 173 Ind. Cas 353; A I R 1938 All. 97; (1937) A L J 1373; 1938 R D 142; 1938 A L R 123; 10 R A 418; I L R (1938) All. 230 (F B).

(4) A I R 1934 All. 100 (2); 147 Ind. Cas. 633; 1934 A L R 228; 6 R A 529.

(5) A I R 1933 Rang. 264; 145 Ind. Cas. 823; 6 R Rang. 59 (1).

(6) 1940 O W N 862; 190 Ind. Cas. 814; 13 R O 173; 1940 O L R 623; 1940 R D 416; A I R 1941 Oudh 60.

and after the words "or order" the words "finally disposing of the case" were inserted by the U. P. Encum. Estates (Amendment) Act XI of 1939 in both sub-ss. (1) and (2) to s 45 of the Act. There was no decree in that case passed by the Special Judge and it was held that the appeal, being an appeal against a decision under s. 14, U. P. Encum. Estates Act, fell within the scope of Art. 11 of Sch. II of the Court Fees Act and a court-fee of Rs. 3 was sufficient.

In the present case we hold that the appeal is to all intents and purposes against the amended decree passed by the Special Judge and consequently an *ad valorem* court-fee is payable. We accept the office report and direct that the appellant shall pay the deficiency of Rs. 474-8 within six weeks from to-day.

S. *Order accordingly.*

MADRAS HIGH COURT

Second Appeals Nos. 602 and 603 of 1936

December 8, 1939

PATANJALI SASTRI, J.

YARLAGADDA VENKATASUBBAYYA—
—APPELLANT

versus

GAJJALA SATYANARYANAMURTHY
AND OTHERS—RESPONDENTS

Conversion—Principal and agent—Relief on ground of conversion, when can be had—Agent advancing purchase money for goods purchased on account of principal—Principal has neither title to nor right to present possession of goods until he pays price—No question of conversion arises.

To entitle a person to claim relief on the ground of conversion or trover, he must show not only title to the property concerned but also a right to the present possession thereof.

Where the agent himself advanced the purchase money in respect of the goods purchased by him on account of the principal, the property in the goods cannot be said to have passed to the principal until the amount advanced by the agent for the purchase of the goods is paid to him. No question, therefore, can arise, of conversion by the agent in respect of property title to which remains vested in him. Moreover, the agent by reason of his having purchased the goods on his own responsibility, though on account of the principal is *vis-a-vis* the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The principal is not, therefore, entitled to possession of the goods even if the agent notwithstanding the non-payment of the balance of the purchase money, had intended that the property in the goods should pass to the principal. *Lord* v. *Price* (1), relied on.

S. A. against the decrees of the Sub-Judge, Masulipatem, in A. S. Nos. 56 and 57 of 1935, respectively.

Mr. *A. Lakshmayya*, for the Appellant.

Messrs. *P. Somasundaram* and *P. Suryanarayana*, for the Respondents.

Judgment.—These two connected second appeals arise out of a suit and a cross suit brought in the District Munsif's Court, Masulipatam. O. S. No. 17 of 1934 was a suit by the appellant for an account of dealings in groundnuts with the respondents, a firm of Commission Agents and O. S. No. 81 of 1934 was by the Commission Agents against the appellant for recovery of Rs. 856-7-0 said to be due to them on those dealings. The question for determination in both the suits being the same, they were heard and disposed of together by a common judgment in both the Courts below. Both the suits having been decided against the appellant in the lower Appellate Court, he has preferred these appeals. As respondent No. 1 has been the principal contesting party throughout, he is hereinafter referred to as the respondent. The facts of the case may be briefly stated. The appellant who is a groundnut merchant entered into an agreement in October 1932 with the respondent whereby he was to purchase groundnuts and sell the same as per instructions of the appellant, stocking them in the meanwhile in godowns which he rented for the purpose. The appellant advanced Rs. 1,000 as cover against any possible loss that might result from the transaction. The respondent was to purchase the groundnuts in the market advancing the purchase money himself or making himself personally responsible for the purchase money to the vendors. When the goods were sold, the respondent was to deduct the purchase money paid by him less the advance received with interest as well as godown rents and commission at the agreed rate and pay the balance of the proceeds, if any, to the appellant. Purchases were made in pursuance of this agreement in November and December 1932 and the goods were stocked in a godown. On March 1, 1933, however, owing to financial embarrassment, the respondent pledged these goods as well as other goods with the Andhra Bank Ltd., at Masulipatam and obtained a loan. This loan was repaid and the pledge redeemed some time in May 1933.

It is in evidence—and it was not disputed—that the market began to decline from January 1933. The appellant did not send any instructions to the respondent to sell the goods till September 1933 when the respondent wrote Ex. III to the appel-

lant calling upon him to pay the accounts due to him and take the goods. As there was no reply, he wrote another letter (Ex. III-a) to the same effect on October 19, 1933. To this letter, the appellant sent a reply (Ex. X) dated October 20, 1933 in which he stated that on coming to know of the pledge of the goods by the respondent, he had raised objection and that the respondent, had then agreed to take the groundnuts himself and settle the account by paying the appellant Rs. 3-2-0 a bag. The appellant thus repudiated the claim made by the respondent in Ex. III and III-*a* and a turn, called upon him to pay the amount due to the appellant at Rs. 3-2-0 a bag in accordance with the settlement referred to above. The respondent treated this letter as a breach of the contract by the appellant and sold the goods and after giving credit to the sale proceeds and the original advance received claimed a sum of Rs. 856-7-0 as due to him in O. S. No. 81 of 1934 while the appellant claimed in his suit O. S. No. 17 of 1934 an account of the dealings on the basis of the agreement which he put forward in his letter (Ex. X). The lower Appellate Court found that the agreement put forward by the appellant was not true and as stated above, rejected his claim and decreed that of the respondent.

The appellant's learned Counsel did not contest—as indeed he could not in second appeal—the finding of the lower Appellate Court that there was no settlement between the parties in March 1933 as alleged by the appellant. But the learned Counsel argued as a matter of law that the respondent's pledge of the goods purchased by him on account of the appellant without the latter's authority amounted to a conversion of the goods and that the respondent was therefore liable to pay damages for coversion according to the rates prevailing in the market at the time of the pledge. This contention cannot be accepted for two reasons: first the respondent having himself advanced the purchase money in respect of the goods purchased by him on account of the appellant the property in the goods cannot be said to have passed to the appellant until the amount advanced by the respondent for the purchase of the goods is paid to him. The law is thus stated in Bowstead on Agency ;

"Where an agent, by contracting personally renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass, and the agent has the same rights with regard to the disposal of the goods, and with regard to stopping them *in transitu* as he would have had if the relation between him and his principal had been that of seller and buyer (Art. 76)".

In this view, the correctness of which has not been disputed, the very foundation of the appellant's contention fails, as obviously, there could be no question of conversion by the respondent in respect of property, title to which still remained vested in him. Secondly, it is well-established that to entitle a person to claim relief on the ground of conversion or trover, he must show not only title to the property concerned but also a right to the present possession thereof. But one who has not paid the purchase money in respect of goods purchased by him has no right to claim possession of the goods before paying the whole of the purchase money due as the seller has a lien on the goods for the unpaid purchase money. It has thus been held in *Lord* v. *Price* (1) that a purchaser of goods which continued in the possession of the vendor subject to his lien for unpaid purchase money cannot sue a third person for a conversion of the goods. The plaintiff there purchased two lots of cotton at an auction sale but paid only the deposit required and so had to leave the cotton in the field where the auction had been held. One of the lots was removed by mistake by the defendant who had also brought some lots at the sale and the plaintiff brought the action for damages for conversion. The Court of Exchequer held that the plaintiff not having paid the residue of the purchase money had no right of present possession in respect of the goods purchased by him, such right being still in the vendor by virtue of his lien and that therefore the plaintiff was not entitled to maintain an action for the tortuous removal of the goods. Now according to the authority cited above, the respondent by reason of his having purchased the goods on his own responsibility, though on account of the appellant was *vis-a-vis* the latter, in the position of an unpaid vend r with a right to retain the goods until payment of the balance of the purchase money. The appellant was not therefore entitled to possession of the goods even if the respondent, notwithstanding the non-payment of the balance of the purchase money, had inten-

(1) (1874) 9 Ex. 54; 43 L J Ex. 49; 30 L T 271; 22 W R 318.

ded that the property in the goods should pass to the appellant of which however there is absolutely no evidence in the case.

The learned Counsel for the respondent also contended that the respondent must be deemed to be a tacit pledgee, having paid the purchase money for the goods out of his own pocket, and was therefore entitled to repledge the goods and relied upon *Bar Dukan* v. *Gopal Singh* (2), while the learned Counsel for the appellant challenged that position on the authority in *Tejpal Jamna Das* v. *E. V. David* (3). It is unnecessary however to consider this point as the appeals fail on the other grounds indicated above. Both the appeals are therefore dismissed. The appellant will pay the costs of respondent No. 1 in S. A. No. 602 of 1936. No order as to costs in S. A. No. 603 of 1936.

Leave refused.

N.•D. *Appeals dismissed.*

(2) A I R 1928 Lah. 747; 112 Ind. Cas, 642.
(3) 28 L W 204; 111 Ind. Cas. 240; A I R 1928 P C 219; 28 L W 204; 32 C W N 1146; 48 C L J 415 (P C).

SIND CHIEF COURT

Criminal Revision Applications Nos. 152 and 153 of 1940
July 19, 1940
DAVIS, C. J. AND LOBO, J.

S. E. NAYLOR AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 197—Port trust estate, whether falls under "village, town or district" within the meaning of s. 21 (10), Penal Code (Act XLV of 1860)—Prosecution of chief store-keeper and assistant superintendent of machinery employed for port trust estate—Sanction of Central Government, if necessary.

The port trust estate does not fall within the term, "village, town or district" within the meaning of cl. (10) of s. 21, I P. C. The chief store-keeper and assistant superintendent of machinery for the port trust estate entrusted with the keeping and the expending of property by the port trustees of the port on their behalf upon their estate are not public servants. No sanction of the Central Govt. therefore, is necessary for their prosecution.

Cr. R. Apps. to revise the order of the Additional City Magistrate, Karachi, dated March 30, 1940.

Messrs. *Dingomal Narainsingh* and *P. S. Shahani*, for the Applicants (Naylor and Donde, respectively.)

Mr. *Partabrai D. Punwani*, Advocate-General, for the Crown.

Davis, C. J.—We have before us two revision applications one by R. A. Donde, chief store-keeper, now under suspension, of the Karachi Port Trust, and the other, by S. E. Naylor, assistant superintendent of machinery at Keamari, now under suspension, and they are both being prosecuted for offences under s. 120-B read with s. 420 I. P. C. for offences alleged to have been committed by them in the discharge or purported discharge of their duties. The prosecution started many months ago and the plea that the sanction of the Central Govt. was necessary for the prosecution of the applicants under s. 197, Criminal P. C. has been raised at a very late stage in the proceedings. To bring themselves within the ambit of s. 197, Criminal P. C., the applicants must show that they are "public servants" within the meaning of s. 21 (10), I. P. C.

The Additional City Magistrate, against whose order these applications are made, held that the applicants were merely employees of the Karachi Port Trust employed by them to carry out the necessary repairs, maintenance and sanitation of the numerous properties which are vested in the port trust under the provisions of the Karachi Port Trust Act, Bom. Act, VI of 1886, and that they were not "public servants" within the meaning of s. 21 (10), I. P. C. There is in cl. (10) of s. 21, I. P. C. reference to "any village, town or district," but there is no reference to "port," and Mr. Dingomal and Mr. Shahani for the applicants have both argued that a "port" is a town or that, at least, there is included in the port trust properties a village called Keamari Indian village shown as such on all the maps; and that as Donde under the order of the chief engineer, supplied from stock or by purchase stores necessary for the repairs or maintenance of the houses and roads in this village, and Naylor as assistant superintendent of machinery was in charge of the fresh water supply and lighting and fire service of this village, so it was their duty to keep and expend property for the secular common purposes of the village within the meaning of cl. (10) of s. 21, I. P. C. Naylor also says that he received timber jointly with Donde for the purposes of the village. Clause (10) of s. 21, I. P. C., reads as follows:

"Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any

document for the ascertaining of the rights of the people of any village, town or district."

But we think cl. (10) has to be read with cl. (9), and while cl. (9) is intended to relate to Govt. servants, cl. (10) is intended to relate to local authorities responsible for the local administration of villages, towns or districts. It is not difficult to relate these terms to statutes relating to Municipalities and local boards, but there is no mention in cl. (10) of a "port," and were it the intention of the Legislature to include a "port" within cl. (10), we think there would be reference to a "port" such as there is reference to a "body of port commissioners" in s. 3 (28), General Clause Act, X of 1897. We have had cited to us definitions from the Oxford Dictionary and Murray's Dictionary to prove to us that a "port," while meaning many things, also means a town with a harbour, and it may be, of course, that a town with a harbour is a "port," but we think regarding s. 3, Karachi Port Trust Act, the definition in "Wharton's Law Lexicon," (Edn. 14), is more appropriate, that is "a place for the lading and unlading of ships," and this is borne out by the words of s. 3 themselves. Section 3, Karachi Port Trust Act, is as follows:

"Government may, by notification in the *Bombay Govt. Gazette* (*a*) define the limits of the port for the purpose of this Act, and (*b*) from time to time alter such limits.

Such limits may extend to any part of the navigable approaches to the port, and may include any wharves, tramways, warehouses, sheds and other works made on behalf of the public for convenience of traffic, for safety of vessel, or for the improvement, maintenance and good government of the port, whether within or without high water mark, and, subject to any rights of private property therein, any portion of the shore within fifty yards of high water mark."

From the evidence of the present chief store-keeper Rozario, it appears, the principal immovable properties owned by the port trust are wharves and cargo sheds; all else is incidental. It appears to us, therefore, that any property the port trust possesses is merely incidental for the fulfilment of its purpose as a port. The mere fact that groups of houses built on the port trust estate primarily for the accommodation of its employees is called a village is not enough to bring those who have charge of and supply stores for the maintenance and repairs and sanitation of these houses and the necessary roads, and who supervise and carry out repairs to the water supply and lighting of these houses and these roads, within that class of public servants who keep or expend property for the common secular purpose of a village within the meaning of cl. (10) of s. 21, I. P. C. As the Magistrate says, the port trustees are, so far as the houses and shops on their estate are concerned, in the position of landlords and the applicants are their employees for the purpose of the upkeep of their properties. It is difficult then to see how the terms "village, town or district" within the meaning of cl. (10) of s. 21, I. P. C., can be applied in the circumstances of this case.

The applicants were the chief store-keeper and assistant superintendent of machinery for the port trust estate as a whole; they were entrusted with the keeping, and it may be said, the expending of property by the port trustees of the port on their behalf upon their estate, and we do not think we can read into cl. (10) of s. 21, I. P. C., the word "port". After all the applicants claim that the ordinary Criminal Law shall be modified in their favour, and we think that they must prove this strictly. It is true that both the applicants come within the provisions of s. 24, Port Trust Act so that orders made by the Board, which affect them within the meaning of s. 23, require now the sanction of the Central Govt., but s. 23 does not relate to the prosecution of these special officers, and s. 71, Karachi Port Trust Act, makes provision for the punishment of officers who are not public servants within the meaning of s. 21, I. P. C., but this does not mean that cl. (10) of s. 21, I. P. C., has any necessary application to the applicants. Clauses (1) or (2) might apply, for instance, to the chairman, so that it cannot be said that if cl. (10) does not apply to the applicants s. 71, Port Trust Act, is meaningless. Our view then is that the port trust estate does not fall within the term, "village, town or district" within the meaning of cl. (10) of s. 21, I. P. C. and, therefore, no sanction of the Central Govt. is necessary for the prosecution of the offences alleged to have been committed by the applicants. These revision applications must be dismissed accordingly.

D. *Applications dismissed.*

PATNA HIGH COURT

Civil Revision No. 189 of 1939
April 12, 1940
DHAVLE, J.

BHAGWAN DASS RAMPROSAD—
PETITIONER
versus
SECRETARY OF STATE—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 60 (1) (i), (k) as amended in 1937, O. XXI, r. 48 — Exemption of deposits in Provident Funds is separate from exemption in respect of salaries — Disposing power under s. 60 (1), limits of — 'Salary', meaning of— Attachment of salary of employees of Post and Telegraph—Procedure.

The exemption of deposits in provident funds under cl. *(k)*, s. 60 (1), Civil P. C., is separate from the exemption in respect of salaries given by cl. *(i)*, and the result would be that the recurring contributions of the judgment-debtor to the provident fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by cl. *(i)*. [p. 361, col. 2.]

The reference to disposing power under s. 60, (1), Civil P. C., must be limited to the context, which is indicated by the words that follow :—"whether the sum be held in the name of the judgment-debtor or by another person in trust for him or on his behalf" [p. 362, col. 1.]

There is nothing in cl. (i) of s. 60 (1), Civil P. C., to indicate that the salary mentioned there is the net salary. [*ibid.*]

In cases of attachment of salaries of employees of Post and Telegraph department, it would be better for the Court in the interests of all concerned, to obtain on the application of the decree-holder the relevant materials from the Postmaster-General in order to work out the figures itself and then issue an attachment for a definite, specified amount, so that the parties and the Postmaster-General may be under no misapprehension. [p. 362, col. 2.]

C. R. against an order of the Munsif, First Court Patna, dated March 21, 1939.

Messrs. *B. N. Mitter* and *Ajit Kumar Mitter*, for the Petitioner.

The Assistant Govt. Advocate, for the Opposite Party.

Order.—This is an application in revision against an order of the Munsif, First Court, Patna, disallowing an application made by the petitioner under O. XXI, r. 48 (3) for recovery of three monthly instalments of Rs. 45 each. In March 1938, the petitioner obtained a Small Cause Court decree at Howrah against A. W. Lawie, an employee in the telegraph department, and put it into execution in Patna, as the judgment-debtor was posted here. The execution case at first numbered 848 of 1938 of the Second Court of the Munsif, but by transfer became No. 1086 of 1938 of the First Court of the Munsif. In this latter Court there was another decree under execution—execution case No. 157 of the Second Court which in the First Court became No. 825 of 1938—and in this execution an attachment order had issued against the salary of the same judgment debtor. Under this attachment the Postmaster-General was deducting Rs. 40 a month, beginning on March 1, 1938, from the salary of the judgment-debtor and sending it to the Court after deducting the money-order commission of eight annas. Two such instalments had been sent to the Court, when the petitioner's execution case was received in this Court. He applied for rateable distribution, and his prayer was allowed.

There were only four instalments due under the attachment. The instalment that should have come in the beginning of May did not arrive, but, on May 28, the Postmaster-General made an enquiry about the date of the decree under execution on account of the amendment of s. 60 (1) (i), Civil P. C., by Act IX of 1937 which had recently been brought to his notice by the Director-General of Posts and Telegraphs. It was only on July 12, that the Munsif applied to this enquiry of the Postmaster-General. Meanwhile, the petitioner realised that the whole amount leviable under the attachment of the decree-holder would be realised by the attachments in May and June, and that after that there would be nothing for his application for rateable distribution to operate on. He, therefore, asked that the order for rateable distribution passed in his favour should be recalled and an attachment issued in his execution case to the extent of Rs. 50 a month from the salary of Lawie. This was allowed, and a writ of attachment sent to the Postmaster-General on June 12. On June 18, the Postmaster-General returned the writ on the ground that Lawie's salary was still under attachment in the other case: it appears that he had actually made the necessary deductions from Lawie's salary but had not yet heard from the Munsif and had therefore not sent on the sums withheld from the judgment debtor. The petitioner then complained that the Postmaster-General was not right to return this attachment or to withhold the sums of money that he had deducted from the salary payable to Lawie in May and June but had not sent to Court. Ultimately he made a claim against the Postmaster-General under O. XXI, r. 48, sub-r. (3) for the recovery of three instalments at Rs. 45 a month

for the months of July, August and September.

There was before this a contempt proceeding against the Postmaster-General, which was discharged on the ground that this officer was not deliberately in contempt. The learned Munsif, from whose order of dismissal the present application arises, proceeded on the footing that though the decree of the other decree-holder would have been satisfied and the attachment at his instance come to an end at the time the petitioner took out his attachment, if the Postmaster-General had remitted to the Court the instalments due in the beginning of May and June, the result of the moneys being withheld by him, rightly or otherwise, was that that execution was not satisfied and the attachment was still subsisting at the time the petitioner's writ of attachment was issued by the Court or returned by the Postmaster-General on the ground of the other attachment. It is implied that as the previous attachment did in fact subsist and had not been withdrawn, the return of the petitioner's writ of attachment was in order.

Another point argued in the lower Court was that at any rate Rs. 5 per months was available for attachment at the instance of the petitioner as the judgment-debtor's pay was Rs. 190. The learned Munsif rejected this and accepted the Postmaster General's contention that only Rs. 35-10-6 was attachable, while Rs. 40 was being attached in the earlier execution case. It has been urged before me that the Postmaster-General is liable under O. XXI. r. 48, sub-r. (3), because the attachable proportion of Lawie's salary was not already being withheld and remitted to the Court in pursuance of a previous and unsatisfied order of attachment. This contention and the other contention that Rs. 5 at any rate was attachable under the writ of attachment unsuccessfully taken out by the petitioner make it necessary to look into the figures. The earlier decree was obtained in 1935; but the petitioner's decree was obtained in 1938, and as para. 1 of his petition to this Court shows, was based on three handnotes executed after June 1, 1937. Act IX of 1937 enlarges the exemption from attachment of judgment-debtor's salaries provided the proceedings relate to suits instituted on or after June 1, 1937. There is no dispute that the petitioner is hit by this amendment. His judgment-debtor's salary at the relevant time is taken by both the parties at Rs. 190.

The new cl. (*i*) of s. 60 (1), Civil P. C., exempts from attachment in execution of a decree the salary of any public officer to the extent of the first hundred rupees and one-half of the remainder of such salary. This provision by itself would operate to exempt Rs. 145 out of Lawie's salary of Rs. 190 from attachment. The petitioner claims to be entitled to attach the rest. But this claim overlooks cl. (*k*) of s. 60 (1), which also exempts all compulsory deposits in any fund to which the Provident Funds Act, 1925, applies in so far as they are declared by that Act not to be liable to attachment. It appears that the judgment-debtor belongs to a recognized Provident Fund and that Rs. 12 a month is deducted from his salary on this account. The exemption of deposits in provident funds is separate from the exemption in respect of salaries given by cl. (*i*), and the result would appear to be that the recurring contributions of the judgment-debtor to the provident fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by cl. (*i*). In other words, a decree-holder such as the petitioner would only be entitled to look to the balance after deducting this provident fund contribution of Rs. 12 from the Rs. 45 that is left over after giving effect to the exemption granted by cl. (*i*). There is also a monthly income-tax deduction of Rs. 6-11-0 from the salary of Lawie. The note to r. 64 at p 19 of Vol. II of the Post and Telegraphs Manual says that subscriptions to funds recognized by Govt...and recoveries of income-tax, deductions for which appear in the pay bills, should be excluded from the aggregate pay for the purpose of attachment by a Civil Court. The meaning of this was apparently taken in the lower Court to be that these deductions are first to be made from the gross salary and that then the balance is to be dealt with under cl. (*i*). This method is distinctly favourable to the decree-holder if the deduction on account of contributions to the provident fund should exceed the income-tax payable, but it seems to assume that 'salary' means net salary.

Clause (*i*) does not say anything about the income-tax, but the learned Assistant Govt. Advocate, who appears for the Postmaster-General, has contended that the exemption created by cl. (*i*) must be read in the light of what s. 60 (1) says about property over which the judgment-debtor

has a disposing power which he may exercise for his own benefit. It seems to me however that the reference to disposing power must be limited to the context, which is indicated by the words that follow :— "whether the sum be held in the name of the judgment-debtor or by another person in trust for him or on his behalf." Disbursing officers are now-a-days required by the Income Tax Act to deduct income-tax at the source, and therefore this portion of the salary may be said to be beyond the disposal of the salary holder. But there is nothing in cl. (*i*) to indicate that the salary mentioned there is the net salary. It may be that the duty cast by statute upon the disbursing officer to deduct the income-tax due operates, in relation to cl. (*i*) like a summary attachment and realization out of the attachable proportion of the salary. But it may also be that the Legislature did not intend to throw the income tax on the attachable proportion of the salary and leave the salary-holder a clear Rs. 100 a month plus one moiety of the excess. It is however not necessary to pronounce definitely on that point in the present case, for, as I have already shown, out, of a salary of Rs. 190 a decree-holder like the petitioner could not look to more than Rs. 33 per month for his writ of attachment to operate on, and as it happens, the amounts due under the previous attachment were both of them in excess of this figure. Clearly, therefore, there was nothing to attach under the writ taken out by the petitioner, provided the previous attachment was subsisting at the time it was to be given effect to.

This brings me to the other point raised. As the Postmaster-General had the moneys deducted in May and June in his own hands when he returned the writ of attachment issued at the instance of the petitioner, it is urged for the petitioner that he had no right to keep the moneys and prolong the attachment. But the Postmaster-General was making from the Munsif himself, enquires which cannot be characterised as improper; the same Munsif issued a writ of attachment for the petitioner without giving a reply, and the postmaster-General could not then assume that the previous attachment was at an end. He might perhaps have done well to inquire how he was to treate the former attachment. As things turned out, the earlier decree-holder afterwards asked the Court to return to the judgment-debtor the moneys withheld by the Postmaster-General in May and June. The prayer was allowed, the moneys returned to the judgment debtor in August and the attachment prolonged to July and August in consequence. The petitioner obtained his share out of the moneys realised by the prolonged attachment, which implies a definite recognition by him that the attachment was subsisting even in July and August. There could be no attachment through the Postmaster-General in September because Lawie applied in insolvency in August. Nothing could therefore have been attached for the petitioner in the turn that the matter actually took at the instance of the other decree-holder. As to the instalments of May and June, the attachment had not in fact been withdrawn by June 18, and the monies withheld by the Postmaster-General were disposed of in accordance with orders obtained from the Court not by the Postmaster-General but by the other decree holder in the interest of the judgment-debtor. There was undoubtedly much confusion in the case. The petitioner was not the only decree-holder that was making all sorts of applications to the Munsif, nor was the Court apparently looking in detail into the working of the section. I doubt if it is right for the Court to leave to the Postmaster General the interpretation of a section which may give rise to many controversies, or for the Postmaster-General to undertake this task. He has his Manual, but the Court must follow the Code. Sub-rule (2) of r. 48 of O. XXI, speaks of the attachable portion of the salary.

The Postmaster-General, not unnaturally, referred the Court in his correspondence to r. 63 of Vol. II, Post and Telegraphs Manual which, however, only speaks of a previous order of attachment, without saying anything about the attachable portion. It would, I venture to think, be better in such cases, for the Court, in the interests of all concerned, to obtain on the application of the decree-holder the relevant materials from the Postmaster-General in order to work out the figures itself and then issue an attachment for a definite, specified amount, so that the parties and the Postmaster-General may be under no misapprehension. Failing this, there are apt to be charges of collusion made unnecessarily, as happened in this case without any attempt whatsoever to establish it. Decree-holders, whom it is the duty of the Court to help in securing the fruits of their decrees, are liable to ask for what they are not entitled to if their rights are not made sufficiently clear ; and this means

waste of time and money for all concerned. The Postmaster-General is also torn between his Manual and the Civil P. C., with which he cannot be very familiar, and between the demands of the decree-holder through the Court and those of the judgment-debtor. Instance of all this are to be found in the record of this case, which is none too well arranged and which I have scrutinized with such help as the bar was able to render. Some of the confusion below seems to have been due to the fact that two or three execution cases were pending in this Court after a transfer from the other Court, with the result that orders that one would expect to find in one case are only to be found in another. The petitioner is, of course, not particularly interested in the confusion or the misunderstanding of the Postmaster-General. The Court must without any hesitation allow his claim, if it is made out, as against the Postmaster-General under O. XXI, r. 48, sub-r. (3). But the position is that the attachable proportion of the salary of Lawie was withheld by him in May and June, and that if it was not remitted to the Court, this was because the matter was under correspondence between the Postmaster-General and the Court, and the Postmaster-General was in no way responsible for the order passed by the Court later on at the instance of the other decree-holder that the attachment for these two months should in effect be withdrawn and the moneys withheld from Lawie in these months returned to the judgment-debtor. What weakens the petitioner's position still further is the fact (already referred to) that when the attachment at the instance of the other decree-holder was, so to say, extended or renewed for the months of July and August, the petitioner took his share of the money. He can therefore hardly be heard to say that there was no attachment subsisting in these months. It must accordingly be held that any attachment at his instance was actually inadmissible in these months. This is, therefore, not a case where the Postmaster-General could (as we now know the facts) be said wrongfully to have returned the writ of attachment taken out by the petitioner. There was no reason why the Court should not have replied to his enquiry of May 28, before June 12, when the petitioner's writ of attachment was issued to him. In returning the writ he showed the previous attachment; and he carried out the orders of the Court in paying the judgment-debtor and making deductions from his pay in July and August. Taking all the circumstances into account, I am not satisfied that this is a case for interference in revision. The application is accordingly dismissed.

S. *Application dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 278 of 1940
February 13, 1941
BENNETT, J.
SWAMI DAYAL—PLAINTIFF—APPELLANT
versus
RAM BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Court-fee—Suit for declaration that sale-deed was fictitious and did not affect plaintiff in realising his decree—No prayer for cancellation of deed—Suit is mere declaratory and involves no consequential relief.

A suit was brought by the plaintiff for a declaration that a sale deed was fraudulent and fictitious and does not stand in his way in realising the amount due in respect of a decreee obtained by him, without any request for the cancellation of the deed, is merely of a declaratory character and involves no consequential relief. No *ad valorem* court-fee is therefore, payable on the amount for which the deed was executed.

[Case-law referred to.]

S. C. A. against the order of the Civil Judge, Rae Bareli, dated April 17, 1940.

Mr. *Mohd. Ayub*, for the Appellant.

Judgment.—In this case it has been reported by the office that there is a deficiency of Rs. 4-8 on the appeal in this Court, and a deficiency of Rs. 57-8 in the trial Court, and of the same amount in the lower Appellate Court.

A suit was brought by the appellant for a declaration that a sale-deed was fraudulent and fictitious. It is suggested that this involves cancellation of the sale-deed and that the case accordingly falls under s. 7 (*iv-A*) of the Court Fees Act as amended in 1938. Consequently, court-fee is payable in this Court on one fifth of the amount for which the instrument was executed. the plaintiff not being a party to it. On this calculation there is a deficiency in this Court of Rs. 4-8. As regards the Court below, the Amendment Act of 1938 does not apply as the suit was instituted and the first appeal preferred before that Act came into force. But it is suggested that the suit was under s. 39 of the Specific Relief Act, and therefore *ad valorem* court-fee should have been paid.

The office report is contested, and learned Counsel for the appellant has referred to certain cases of this Court as showing that such a suit is merely of a declaratory character and involves no consequential relief.

In *Ram Dayal* v. *Baldeo Prasad* (8 O. W. N. 124) (1) it was held by a Single Judge of this Court that a suit to declare a deed of gift and a sale-deed fictitious and void, and that the property covered by these deeds was capable of being attached and sold in execution, was purely a declaratory suit inasmuch as the prayer that the property covered by the deeds was to be declared to be capable of being attached and sold was implicit in the prayer that the deeds conveying the property should be held to be void. The facts in the present case are somewhat similar as the appellant also asked for a declaration that the sale deed does not stand in his way in realising the amount due in respect of a decree obtained by him.

In a more recent case of this Court, *Ori Lal* v. *Rahim Zadi* (1940 O. W. N. 389) (2) it was held that where the plaintiff filed a suit for the cancellation of a sale deed before the Amendment Act of 1938, came into force, on the ground that it was obtained from her by fraud and undue influence and that she herself was in possession, she could not be required to pay *ad valorem* court-fee on the market value of the property.

In a case which came before a Bench of this Court recently, *Mashriqunnissa* v. *Parmeshwar Dayal Upadhya* (F. C. A. No. 8 of 1937) a suit had been brought for a declaration that a certain deed of gift was fictitious and void, and court-fee was paid for declaration only and not for consequential relief. The adequacy of such court-fee was not challenged.

The office have referred to a case of the Allahabad High Court, *Kalu Ram* v. *Babu Lal* (1932 A. L. J. R. 684) (3) but the ruling in this case is merely to the effect that a suit for the cancellation of an instrument under s. 39 of the Specific Relief Act is not a declaratory suit, and that it involves a consequential relief.

This ruling would not be applicable in the present case if it is considered that the suit is not a suit under s. 39 of the Specific Relief Act but rather a suit under s. 42 of that Act. No request was made by the appellant for the cancellation of the instrument, and his Counsel argues that if the deed of sale be found to be fictitious as alleged, it is void *ab initio* and cancellation is not necessary.

Some support for this view is to be found in a Bench case of this Court, *Baij Nath Singh* v. *Sri Nath Kuar* (1939 O. W. N. 184) (4). In that case a suit was brought for a declaration *inter alia* that a will was void. It was contended that as the will was challenged on the ground of its not being genuine and not being registered under the law, it was not necessary for the plaintiff to ask for its cancellation. It was said with reference to this argument:

"This argument would perhaps have held good if the plaintiff had attacked the will as void only; but he also challenges it, in the alternative, as being voidable on account of having been brought about by undue influence, and the fact that the plaintiff was not content to challenge it on the ground of its being void, itself shows that he is not sure of the will being void as he alleges."

There appears to be no such complication in the present case. There is an express allegation that the will is fraudulent and fictitious which would imply that it was void *ab initio*. I think therefore that there is ground for holding that the suit involves no consequential relief. It is true that s. 39 of the Specific Relief Act provides for suits to have a written instrument adjudged void or voidable and also provides that the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled. But the suit was not in the present case brought expressly under this section, and the section leaves it to the discretion of the Court to cancel the instrument. I do not consider in these circumstances, that I should be justified in finding that the present suit necessarily involves a consequential relief.

I accordingly reject the office report and hold that the proper court-fee has been paid.

s *Office report rejected.*

(1) 8 O W N 124; 130 Ind. Cas. 344; A I R 1931 Oudh 72; Ind. Rul. (1931) Oudh 152.

(2) 1940 O W N 389; 187 Ind. Cas 454; 12 R O 381; 1940 O L R 218; A I R 1940 Oudh 248; 15 Luck. 531.

(3) (1932) A L J 684; 139 Ind. Cas. 32; A I R 1932 All. 485; Ind. Rul. (1932) All 518; 54 A 813 (F. B.)

(4) 1939 O W N 184; 180 Ind. Cas. 61; 1939 O L R 109; 11 R O 225; A I R 1939 Oudh 125; 14 Luck. 536.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Revision No. 250 of 1940

September 18, 1940

ALMOND, J. C.

DOST MUHAMMAD QUTAB DIN—

PETITIONER

versus

MUNICIPAL COMMITTEE, HARIPUR HAZARA—RESPONDENT

Punjab Municipal Act (III of 1911), ss. 228, 172—Municipal Committee giving sanction in general terms for prosecution of petitioner for offence set out in sanction—Offence not mentioned by section but by facts constituting offence under s. 172—S. 228 held sufficiently complied with—Criminal Procedure Code (Act V of 1898), ss. 242, 537—Object of s 242—Complaint fully giving details of offence—Accused specifically asked to explain case—Non-compliance with s. 242 held mere irregularity curable under s. 537.

The sanction of the Municipal Committee for a prosecution was given in general terms without mentioning any section but after reciting the facts which the committee considered to constitute an offence and which were found to constitute an offence under s. 172, Punjab Municipal Act. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts:

Held, that in these circumstances the committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them. Therefore, there was no defect of non-compliance with the provisions of s. 228 of the Act which were sufficiently complied with.

The primary object of the proceeding prescribed by s. 242, Criminal P. C., is to determine whether the accused pleads guilty to the charge or demands to be tried.

The facts on which the complaint was made were clearly stated in the written complaint. Detailed evidence of the facts alleged by the complainants was given by the prosecution witnesses. The accused himself after the close of the case for the prosecution was specifically asked to explain the case:

Held, that in these circumstances failure to comply with the provisions of s. 242, amounted merely to an irregularity which could be cured under s. 537. 140 Ind. Cas. 113 (4), relied on, 99 Ind. Cas. 411 (2), not approved, *Subramaniya Iyer* v. *Emperor* (3) and 100 Ind. Cas. 227 (5), referred to.

Cr. R. against an order of the Additional Sessions Judge, Peshawar at Camp Abbottabad, dated May 25, 1940.

Sheikh *Abdulla*, for the Petitioner.

Lala *Asa Nand*, for the Respondent.

The Advocate-General, for the Crown.

Order.—The petitioner in this case, Dost Muhammad had been convicted of an offence under s. 172, Municipal Act, for building a verandah in front of his shop which encroaches on a public street. He petitioned for revision of his conviction to the Sessions Judge who dismissed his application and he now petitions this Court for revision of his conviction and sentence. It has been suggested by learned Counsel for the petitioner that the verandah in question has been built on the petitioner's own land, but there can in my opinion be no doubt whatsoever that the decision of the trial Court on this point is correct. There was formerly litigation between the Municipal Committee of Haripur and this petitioner respecting the land between his shop and the drain running along the street which was eventually decided by this Court in review application No. 4 of 1926. In that case it was definitely held that the petitioner's property did not extend up to the street drain. It is proved from the evidence of the municipal overseer that the present encroachment has been built up to the drain.

The principal arguments of the learned Counsel for the petitioner have been directed to legal points which are two in number. He contends that there was no sanction of the Municipal Committee to the prosecution of the offender under s. 172 of the Act as required by s. 223, and that the Municipal Committee by its resolution really intended to prosecute the petitioner for refusal to comply with a notice issued to him to demolish the building within a period of two days. In connexion with this part of his arguments learned Counsel has referred to some cases but only one of them appears to me to have any bearing on the question and that is a case reported in *Gobind Ram* v *Emperor* (1). The facts of that case are, however, distinguishable from the facts of the present case. In that case sanction for a prosecution specifically under s. 172 had been given and the accused was convicted of an offence under s. 219 of the Act. In the present case the sanction was given in general terms without mentioning any section but after reciting the facts which the Committee considered to constitute an offence. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts. It appears to me in these circumstances that the Committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them. I am, therefore, of opinion that there is no defect of non-compliance with

(1) A I R 1931 Lah. 98; 31 P L R 967.

the provisions of s. 228 of the Act. It has also been suggested in connexion with this part of the arguments that the conviction under s. 172 could not be maintained as only two days' notice to demolish the building was given whereas under s. 195 of the Act 30 days' notice was required. It is apparent, however, as pointed out by the trial Court that no notice to demolish is required at all where a building has been erected on a public street and a prosecution can be instituted forthwith without giving any notice to demolish at all.

The second legal point which is taken is that the provisions of s. 242, Criminal P. C., were not complied with. It is admitted that there was no compliance with this section of the Criminal P. C. In a case reported in *Gopal Krishna Saha* v. *Motilal Singh* (2) which was decided by a Bench of the Calcutta High Court it was held that failure to comply with the provisions of that section vitiated the trial on the principles laid down in the Privy Council ruling reported in *Subramaniya Iyer* v. *Emperor* (3). In a later case before the Judicial Commissioner's Court of Nagpur reported in *Lahani* v. *Khushal* (4), a contrary view was taken by the Judicial Commissioner who considered both, the Privy Council ruling reported in *Subramaniya Iyer* v. *Emperor* (3), and the *Calcutta case* (2), as well as subsequent pronouncement of the Privy Council reported in *Abdul Rahman* v. *Emperor* (5). In the case reported in *Subramaniya Iyer* v. *Emperor* (3), it was held that the trial of an accused person on a multiplicity of charges expressly prohibited by the Criminal P. C. vitiated the trial. In the later Privy Council case, it was held that failure to read over the depositions of witnesses under s. 360, Criminal P. C, was merely an irregularity. In my opinion the view which was taken by the Judicial Commissioner of Nagpur is the correct one. The primary object of the proceeding prescribed by s. 242, Criminal P. C., is to determine whether the accused pleads guilty to the charge or demands to be tried. In the present case, the facts on which the complaint was made were clearly stated in the written complaint. Detailed evidence of the facts alleged by the complainants was given by the prosecution witnesses. The accused himself after the close of the case for the prosecution was specifically asked whether he had encroached upon Govt. land and constructed a verandah without permission. He was further questioned as to whether he had failed to comply with the notice given to him. When all the evidence had been completed, it appears that the Court began to see the difficulty in recording a conviction under s. 219 of the Act in view of the fact that no legal notice had been given to the petitioner, and he called upon the Counsel for the complainants to justify the issuing of a notice for demolition within a period of less than 30 days and it was clearly because the complainants' Counsel was unable to justify the legality of the notice that there was no conviction under s. 219. The facts on which the case under s. 172 was based, however, were fully set out by the prosecution and the accused was specifically asked to explain that part of the case. I am of opinion that in these circumstances, failure to comply with the provisions of s. 242, Criminal P. C. amounts merely to an irregularity which can be cured under s. 537, Criminal P. C., and that there has as a matter of fact been no miscarriage of justice from this irregularity. For these reasons, I am of opinion, that there is no case made out for interference and accordingly dismiss this application.

D. *Application dismissed.*

(2) A I R 1927 Cal. 196; 99 Ind. Cas. 411; 28 Cr. L J 155; 54 C 359; 44 C L J 575; 31 C W N 167.
(3) 25 M 61; 28 I A 257; 11 M L J 273; 8 Sar. 160; 3 Bom. L R 540; 5 C W N 866; 2 Weir 271 (P C).
(4) A I R 1932 Nag. 127; 140 Ind Cas. 113; 28 N L R 163; (1932) Cr. Cas. 678; Ind. Rul. (1932) Nag. 134; 33 Cr. L J 938.
(5) A I R 1927 P C 44; 100 Ind. Cas. 227; 31 C W N 271; 25 A L J 117; (1927) M W N 103; 38 M L T 64; 8 P L T 155; 4 O W N 283; 28 Cr. L J 259; 6 Bur. L J 65; 5 R 53; 52 M L J 525; 29 Bom. L R 813; 45 C L J 441 (P C).

MADRAS HIGH COURT

Second Appeal No. 900 of 1936
November 24, 1939
HORWILL, J.

PANDELA PUNDARIKAKSHUDU—APPELLANT
versus
SONTINENI KONDAYYA AND OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 65-A—Mortgage before s. 65-A but lease after it—Section has no application—Lease by mortgagor for unusual term to defeat creditors, is void—Lessee has no right to redeem.

Where the mortgage took place before s. 65-A was introduced in T. P. Act, that section would not apply, even if the lease was actually after s. 65-A was introduced.

A lease is void, unless it is one granted in the ordinary course of management. A lease by the mortgagor for an unusual term to defeat the creditors is void and would not be binding on the mortgagee. The lessee in such a case will have no right to redeem. 164 Ind, Cas. 241 (6), dissented

from, *Tarn* v. *Turner* (7), explained, 148 Ind. Cas. 1115 (5), explained.

Mr. *B. V. Ramanarasu*, for the Appellant.
Mr. *Ch. Raghava Rao*, for the Respondents.

Judgment.—The appellant was a simple money creditor of defendants Nos. 2 and 3, who executed a mortgage deed in favour of defendant No. 1 on June 20, 1923 which contained a covenant against leasing the property. Defendant No. 1 was also an unsecured creditor of defendants Nos. 2 and 3 and obtained a simple money decree against them. Defendant No. 1 attempted to execute his decree in 1932; but by that time defendants Nos. 2 and 3 had filed an insolvency petition, and so the execution petition was struck off. The insolvency petition was subseqently dismissed; and before defendant No. 1 filed another execution petition against defendants No. 2 and 3, the plaintiff, in order to satisfy his own decree, had persuaded defendants Nos. 2 and 3 to execute a lease of the property for ten years. He then filed E. A. No. 2847 of 1933 in the execution petition of defendant No. 1, claiming that the equity of redemption could be sold only subject to his lease. That petition was dismissed; and the plaintiff thereupon filed the present suit for a declaration to that effect. The lower Appellate Court dismissed his suit on the ground that under s. 65-A, T. P. Act, such a lease would be void in view of the covenant against leasing the property. It is argued here that s. 65-A would not apply because the mortgage took place before s. 65-A was introduced into the T. P. Act. It is however contended on the other side that although that is true, the lease was actually after s. 65-A was introduced and that s. 65-A therefore applied. On this point I agree with the learned Advocate for the appellant. It is not contended that s. 65-A has any retrospective effect. Its effect was that whereas leases in contravention of a covenant was not void before the amendment, they became void afterwards. In effect, therefore, it added an implied term to the contract, which it could not do to a contract already executed on the date of the amendment.

Before s. 65-A was enacted, some Courts were inclined to apply the strict Law of England to mortgages in India also but the view that finally prevailed was that the mortgagor did have a right to lease and that although it was usual to introduce terms into the mortgage prohibiting the mortgagor from leasing lands, yet that condition was honoured as often in the breach as in the observance. It was accordingly held that a mortgage in breach of a covenant was not void, *Radha Pershad* v. *Manohur Das* (1) *Ali Hassan* v. *Dhirja* (2) and *Niader Singh* v. *Ram Chandar* (3) are authorities for that position; and it is not seriously disputed here that within certain limits leases can be granted. The above cases proceeded largely on the interpretation of s. 66, T. P. Act, which, by implication, gives the mortgagor a great deal of freedom in the management of his lands and even allows him to commit waste provided that the security is not thereby rendered insufficient. It is argued for the appellant that the only test of the validity of a lease is whether it renders the security insufficient and that before a lease can be declared to be invalid, it is necessary for the person seeking to avoid the lease to strictly prove that the security has been rendered insufficient.

In *Niader Singh* v. *Ram Chandra* (3) the amount of property leased was very small and it made no appreciable difference to the mortgage security. In the present case, however, the lease, as already observed, was for a period of ten years; which means that even if the property is sold, the purchaser, whether he be the mortgagee or a third party, can have no hope of getting possession for many years to come. Moreover, although the lease was *bona fide* in the sense that it was for consideration and that the appellant was working only to obtain satisfaction of his own decree, there can be no doubt that he had in view the position of his rival creditors and that this lease was brought about for the purpose of defeating the attempt of defendant No. 1 to proceed against the lands for the satisfaction of his own decree. The learned Judges who decided *M. P. M. S. Firm* v. *Ko Pyu* (4), were of opinion that a lease could not operate unless it was made in the ordinary course of management and that if it was one on exceptional terms, it ought not to operate. Pandalai, J., in *Moidunni Haji* v. *Madhavan Nair* (5) reviewed all the cases

(1) 6 C 317; 7 C L R 293.
(2) 4 A 518; A W N 1882, 118.
(3) A I R 1935 All. 511; 154 Ind. Cas. 1009; 1935 A L J 360; 7 R A 844.
(4) A I R 1932 Rang. 113; 138 Ind. Cas. 213; 10 R 310; Ind Rul. (1932) Rang. 171.
(5) 65 M L J 826. 148 Ind. Cas. 1115; A I R 1933 Mad. 876; (1933) M W N 347; 38 L W 921; 6 R M 575.

on this question and came to the conclusion that a lease is void, unless it is one granted in the ordinary course of management. Page, C. J. in *M. P. M. S. Firm* v. *Ko Pyu* (4) thought that s. 65-A was a statement of the then existing law. Following Pandalai, J. in the above case I hold that the present lease cannot be held to be valid either against the mortgagee or against the other creditors affected by it. The case in *Moidunni Haji* v. *Madhavan Nair* (5) is sought to be distinguished on the ground that there it was an action on the mortgage, whereas it is a mere accident in the present case that the preson who is seeking to execute his money decree against the equity of redemption should be the mortgagee. It is no doubt true that we must regard defendant No. I not as a mortgagee but as a simple money creditor executing his decree; but if the lease is a vaid one, he cannot be bound by it.

The remaining question is whether the appellant is entitled to redeem. It was held in *Basanta Kumar* v. *Adarmani* (6) that even where a lease was void, the lessee would be entitled to redeem. With all due respect to the learned Judge who decided that case, it is difficult to see how if a lease is void, (as it was in that case, because it related to a mortgage after the passing of s. 65-A, T. P. Act), it could confer any right at all; but that case was decided largely on the authority of *Tarn* v. *Turner* (7). I do not however consider this last case an authority for that position. That case was naturally one of an English mortgage, in which the ownership of the property passed by law to the mortgagee, leaving the mortgagor no legal title. The mortgagor therefore had no right left in law to deal with the property and a lease would therefore be technically void. It was however pointed out that although in law such was the position, yet equity recognized what was 'vulgarly known as an equity of redemption' which was regarded in equity as an estate. If it was an estate, then the mortgagor could transfer a part of it or the whole of it, and the transferee would therefore have some right in the property which would entitle him to redeem. Such a lease, if it had taken place in India, would not have been void at all. If a lease is declared to be void by a statue then the lessee can acquire no right at all.

The learned Advocate for respondent No. 1 argues that there was a merger of his mortgage with the equity of redemption which would prevent the lessee from redeeming. He points out that under s. 101, T. P. Act, only a subsequent encumbrancer can redeem. At the relevant time, however there could not have any such merger; for the suit relates to a time when the mortgagee was seeking to execute his simple money decree by sale of the equity of redemption. It is pointed out by respondent No. 1 that the plaint does not contain a prayer for redemption; and that therefore this Court should not allow the plaintiff to redeem. Both for that reason and on the ground that the lease by the mortgagor for an unusual term to defeat the creditors would not be binding on defendant No 1, the appeal is dismissed with costs. Leave to appeal is refused.

N.D. *Appeal dismissed.*

(6) 40 C W N 57; 164 Ind. Cas. 241; 9 R C 179.
(7) (1888) 39 Ch. D 456; 57 L J Ch. 1085; 59 L T 742; 37 W R 276.

LAHORE HIGH COURT
Special Bench
Civil Ref. No. 13 of 1939
April 29, 1940
DALIP SINGH, BHIDE AND BLACKER, JJ.
NAND LAL—PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Stamp Act (II of 1899), ss. 40 (1) (a) 33, 42—Collector's certificate under s. 40 (1) (a), if can be reviewed either by himself or by any other authority — Collector's endorsement that document is properly stamped—Court, if can refuse to admit it on the ground that it is not properly stamped — Civil Court admitting document under proviso (a) to s. 35 and granting certificate under s. 42 (1) — Collector, if can impound that document again under s. 33 (1) or proceed to assess further deficiency and penalty under s. 40.

Where the Collector is of opinion that the instrument is duly stamped or is not chargeable with duty and gives a certificate to that effect, that certificate is final and the decision cannot be reviewed either by the Collector himself or by any other authority or by another Collector before whom the document appears. *Reference under Stamp Act, Section 57 (1),* relied on. [p. 370, col. 1.]

It is clear from the terms of s. 42 (2), Stamp Act, that the Court at any rate cannot refuse to admit a document in evidence on the ground that such document is not properly stamped where the Collector's endorsement appears that it is properly stamped or that the duty has been levied on it. [p. 370, col. 2.]

When a Civil Court has collected the deficiency and penalty which appears to the said Court to be due on any document and has admitted the document in evi-

dence under proviso (*a*) to s. 35 of the Act, and has granted a certificate under sub-s. (1) of s. 42 of the Act that the proper duty and penalty have been levied in respect of the said document, it is not open to the Collector, on the document being subsequently produced before him in the performance of his official functions, to impound the same under sub-s. (1) of s. 33, Stamp Act, and to proceed thereafter to assess further deficiency and penalty under s. 40, Stamp Act. 47 Ind. Cas. 299 (2), referred to.

C. Ref. by the Financial Commissioner, Punjab, Lahore.

Mr. *V. N Sethi*, for the Petitioner.

Mr. *M. Sleem*, (Advocate-General), for the Crown.

Mr. *A. N. Chona*, for *pro forma* Respondent (Rajkumari).

Dalip Singh, J.—This case arises from a reference made by the learned Financial Commissioners under s. 57 Stamp Act. The facts of the case are that one Ganga Ram was the owner of certain shares, namely 30 shares in the Punjab Sugar Mills Co. Ltd.; their paid-up value was Rs. 1,500 the face value was Rs. 3,000 and the market value has been assessed at Rs. 8,445; 10 shares in the Nawab Ganj Sugar Mills, their paid up value was Rs. 750, the face value was Rs. 1,000 and the market value has been assessed at Rs. 1,270; one share in the Basti Sugar Mills; its paid up value was Rs. 100, its face value was also Rs. 100 and it market value has been assessed at Rs. 206. Thus the total paid up value was Rs. 2,350 the total face value was Rs. 4,100 and the total market value assessed was Rs. 9,921. On the death of Ganga Ram succession certificate proceedings were taken by his widow *Mst.* Har Devi in 1933. To these proceedings his mother *Mst.* Malawi Bai and his daughter *Mst.* Rajwanti were parties. While these proceedings were pending *Mst.* Malawai Bai applied for grant of letters of administration in 1934. On February 1, 1935, a compromise was entered into between the parties by which the shares were given to Har Devi. On May 15, 1935, *Mst.* Har Devi transferred the shares by deed to Nand Lal. The stamp on this document of transfer was Rs. 12-12-0, parties evidently considering that the stamp was to be paid on the paid up value, namely, Rs. 2,350. Nand Lal brought a suit on the basis of the transfer deed and the compromise deed was put in also. Both instruments were impounded but this reference is not concerned with the compromise deed at all. The transfer deed was impounded on October 16, 1935.

On November 5, 1935, the learned Senior Subordinate Judge held that the stamp should have been on the face value namely, Rs. 4,100. He accordingly demanded Rs. 18-12-0 as stamp deficiency and Rs. 187-8-0 as penalty, a total demand of Rs. 206-4-0. This was paid and a certificate, not exactly in the terms required under s. 42 was endorsed by the Court on the back of the document. An application was made under s. 39 to the Collector for refund of the penalty levied by the learned Senior Subordinate Judge. The learned Collector appears to have called for the original instrument from the Court, and, as far as can be made out from the record, the Court sent him the original instrument. The Collector then appears to have considered an enquiry necessary whether the stamp should have been on the face value of the shares or on their market value. It was held, after a report had been called from the Revenue Assistant, that the market value was Rs. 9921 and on May 15, 1937 the Collector accepted this report and agreed as to the market value of the shares. A revision was taken to then Commissioner who forwarded it to the Financial Commissioners on July 15 1938, and the Financial Commissioners have referred a certain question, which will be stated later, under s. 57 of the Act. It appears that while the proceedings were still pending before the learned Collector an application was made to the Commissioner under s. 45 for refund of the penalty on June 20, 1936. This applicatian however, was rejected on October 8, 1936. The question that has now been referred by the learned Financial Commissioners is stated by them as follows:

"Whether when a Civil Court has collected the deficiency and penalty which appears to the said Court to be due on any document and has admitted the document in evidence under proviso (*a*) to s 35 of the Act, and has granted a certificate under sub-s. (1) of s. 42 of the Act that the proper duty and penalty have been levied in respect of the said document, it is open to the Collector on the document being subsequently produced before him in the performance of his official functions, to impound the same under sub-s. (1) of s. 33 Stamp Act, and to proceed thereafter to assess further deficiency and penalty under s. 40, Stamp Act, notwithstanding the fact that when a copy of the document with the certificate of the Court was forwarded to him under sub-s (1) of s. 38 of the Act the Collector took no action under s 61 of the Act to apply to the appellate Court concerned for a declaration that some higher rate of duty is chargeable on the document than was at first assessed by the Civil Court under proviso (*a*) to s. 35 of the Act?".

The question referred assumes that a proper certificate was given under sub-s. (1) of s. 42 of the Act and I do not think it is open to this Court to go into the question whether the terms of the certificate actually

granted did or did not comply with the provisions of sub-s. (1) of s. 42. Assuming therefore, that the proper certificate was given by the Court under the provisions of s. 42 (1) the question arises whether this certificate is final for all purposes or whether the Collector can re-assess the document on the ground that the Court had made a mistake in the assessment and the instrument was really chargeable with a larger stamp duty. This question assumes again that the document came before the Collector in the performance of his functions within the terms of s. 33. As has been pointed out above, the Collector appears to have sent for the original document from the Court and it might be open to argument as to whether the Collector in so acting caused the instrument to come before him in the performance of his functions. But as this point has also not been referred to us, I do not think it is open to this Court to go into this question or pronounce any decision on it. I, therefore, proceed to consider the real question arising in the case namely, whether the certificate given by the Court under s. 42 (1) is final or not.

Now, there is no doubt that if one looks purely at the language of s. 33 (1) it would seem as if the Collector was bound to impound the document whenever it was produced or came before him if, in his opinion it was not a properly stamped document. No exception is made in the language with regard to an instrument which has already been the subject of assessment of stamp duty either by a Court or by a Collector before whom the document was previously produced or before whom it had come in the performance of his functions. Under s. 40 (1) the Collector is then to take one of two courses: If he is of opinion that such instrument is duly stamped or is not chargeable with duty, he should certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be. If he does so then under s. 40 (2) this certificate is conclusive evidence of the matter stated therein. It seems, therefore, clear that where the Collector is of opinion that the instrument is duly stamped or is not chargeable with duty and gives a certificate to that effect, that certificate is final and the decision cannot be reviewed either by the Collector himself or by any other authority or by another Collector before whom the document appears. This has been so held on high authority of *Reference under Stamp Act, Section* 57 (1).

(1) 25 M 752.

The next procedure provided by s. 40 (1) (b) is, if the Collector is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty together with a penalty. In s. 42 (1) it is provided that where the duty and penalty (if any) leviable in respect of any instrument have been paid the Collector shall certify by endorsement thereon that the proper duty or, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and under s. 42 (2) every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and must be delivered to the person from whose possession it came into the hands of the officer impounding it if he so applies or to any person whom such person may direct it to be delivered. There is a provision that where the instrument has been admitted under s. 35 that is by a Court on payment of duty and penalty it shall not be delivered to the person from whose possession it came for one month or if the Collector requires it to be detained further until the Collector who has certified that it shall be further detained, has cancelled such certificate. It is sought to be contended by the learned Advocate-General that the absence of any clause, as appears under s. 40 (2), as to the conclusive nature of the document in s. 42, means that the decision of the Court or of the Collector can be varied or need not be considered final with reference to s. 33 when the instrument again comes before any Court or any Collector. So far as a Court is concerned, however, the terms of s. 42 (2) make it perfectly clear that the Court could not refuse to receive any such document in evidence. This is quite apart from the provisions embodied in s. 35 which do not refer to the admission of a document after payment of duty or penalty as the case may be. It seems clear from the terms of s. 42 (2) that the Court at any rate cannot refuse to admit a document in evidence on the ground that such document is not properly stamped where the Collector's endorsement appears that it is properly stamped or that the duty has been levied on it. The contention, therefore, of the learned Advocate-General on this point cannot be sustained. His main argument rests indeed on the language used in s. 33 and in s. 40. This argument no doubt has force, but it seems to me considering the general scheme of the Act that the arguments against giving this interpretation are even stronger.

The first argument which appears to me to be of weight is that if a Court has levied what in its opinion is the proper duty and penalty to be paid on the document provision is made in s. 61 whereby the Collector, to whom a copy of the document has been sent, can require the appellate Court to take the order of the Court into consideration and the appellate Court may give the Collector a declaration that a higher duty and penaly than those paid were due on the instrument, yet s. 61 does not provide that this higher duty can be levied from the person concerned in the matter at all. On the contrary, s. 61 (4) provides only that a prosecution may be launched by the Collector upon the instrument and it is provided that the prosecution shall not be launched if the penalty and duty is paid as declared by the higher Court unless the Collector thinks that an offence was committed with an intention of evading payment of the proper duty. Secondly, s. 61 (4) (*b*) provides expressly that the declaration made by the appellate Court shall not affect the validity of any certificate granted under s. 42. The learned Advocate-General contended that this merely meant that for the purposes of s. 42 (2) the instrument will still be good but that it did not affect the question where a further duty would not be levied under s. 40. But s. 40 does not say that the Collector while impounding an instrument under s. 33 or receiving an instrument under s. 38 (2) can also deal with an instrument sent to him after impounding under s. 61 (3). It therefore follows that there is no process by which the higher duty and penalty declared by the appellate Court to be chargeable on the instrument can be recovered from the person concerned. He may pay it voluntarily in order to avoid prosecution but that is a different question and the validity of the certificate appears to me to mean that the terms of the certificate still hold good, namely that the proper duty and penalty have been recovered from the person in terms of the endorsement required under s. 42 (1). In other words that for all purposes the document must be held to be properly stamped.

Another argument which appears to me to have force is that the Legislature could hardly have contemplated that the Collector should be able to differ from the finding of a Court and from the finding of a previous Collector. If the contention that the terms of s. 33 merely refer to the opinion of the Collector and do not exclude documents which have been the subject of previous decision by a Court or a Collector were correct it would follow that a number of Collectors might come to different conclusions about a document and the duty and penalty leviable thereon. It could hardly have been contemplated by the Legislature that every time a document reached a Collector he should be able to review (for that is what it practially amounts to) the decision of his predecessor. Further, if each Collector when deciding would have to endorse on the document that proper duty and penalty had been levied the document would then have a series of differing endorsements that the proper duty and penalty had been levied thereon. This could hardly have been contemplated by the Legislature. Thirdly, there does not appear to me any good reason why if the Collector is of opinion that the document is properly stamped the opinion should be final under the terms of s. 40 (2) but that the opinion of the Collector or the Court that the document has been properly stamped after payment of any deficit duty and penalty levied should not be final. There is a Full Bench ruling on this point reported in *Khubchand, In the matter of* (2), but as the ruling appears, with great respect, to confuse the provisions of s. 42 (1) with the provisions of s. 40 (1) (*a*), I do not propose to lay any great stress on it. Nevertheless the conclusion reached is the same as the conclusion to which I have come. I am therefore of opinion on the point referred that the answer of the Court should be that the Collector cannot impound the document again under the provisions of s. 33 (1) or proceed to assess further deficiency and penalty under the provisions of s. 40, Stamp Act, where the Court has granted a certificate under s. 42 (1) of the Act having admitted the document into evidence under the provisions of proviso (*a*) of s. 35.

Bhide, J.— I agree.

Blacker, J.—I agree.

D. *Answered accordingly.*

(2) 40 A 128; 47 Ind. Cas. 299; A I R 1918 All. 181; 16 A L J 49 (F B).

PATNA HIGH COURT

Criminal Revision No. 392 of 1940

August 12, 1940

DHAVLE, J.

NIRSU RAUT—PETITIONER

versus

SOMAR NONIA AND OTHERS—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 139-A

—*S. 139-A not complied with by Magistrate—Effect.*

Where a Magistrate has not complied with the provisions of s. 139-A, Criminal P. C., his order should be set aside. 190 Ind. Cas. 879 (2), followed.

Cr. R. from an order of the Sessions Judge of Darbhanga, dated May 14, 1940.

Mr. *K. Dayal*, for the Petitioner.

Messrs. *Hareshwar Prasad Sinha* and *R. Choudhari*, for the Opposite Party.

Order,—This rule must be made absolute. It arises out of proceeding under Chap. X. of the Criminal P. C. The Magistrate made an order under s. 133 in respect of a well which has been found to be public. Section 139-A of the Criminal P. C. required the Magistrate who was dealing with the case, on the appearance before him of the person against whom the order was made, to question him as to whether he denied the existence of any public right in respect of the place in question, and if he did so, to enquire into the matter before proceeding under ss. 137 or 138. Why s. 139-A is so repeatedly overlooked it is not easy to imagine, for the section has been in the statute for over 16 years. In the present case, however, the matter seems to have been handled by more than one Magistrate, none of whom seems to have any idea of the procedure at all. One of them went on fixing dates for the evidence of party II and of party I on successive dates, but actually examined what he calls P. Ws. No. 1. It was after this that the second party, the petitioner before me, made an application asking to be allowed to adduce evidence in support of his denial of the public right alleged by the other side, and the Magistrate adjourned the case for the evidence of the parties after "I have decided the point raised." Now as it happens, he never decided that point at all, and then another Magistrate dealt with the case under s. 137.

Mr. Hareshwar Prasad Sinha who appears for the opposite party before me has cited a case from *Manohar Singh* v. *Emperor* (1), in which Mr. Justice Boys considered the question of what to do in a case in which s. 139-A had not been complied with, and instead of setting aside the order of the lower Court, allowed to the party who was found not to be supported by evidence six months to obtain an order in his favour from the Civil Court. The learned Advocate has urged that the same course may be followed in the present case, as the finding is that the well is a public well. It appears, however, that the current of decisions in this Court runs in a different direction and quite recently in Criminal Reference No. 30 of 1940 (*Muni Lal Agarwala* v. *The Public of Bhagalpur*) (2). Mr. Justice Agarwala overruled the contention that an order should not be set aside merely because the Magistrate did not comply with the provisions of s. 139-A. "That however", said the learned Judge,

"is to overlook the whole object of the provisions of that section. Those provisions are clearly designed to ensure that where there is reliable evidence in support of the denial of the existence of the public right, the Magistrate shall have no jurisdiction to pronounce on the cogency of that evidence but must refer the matter to a Civil Court. When the Magistrate does not direct his mind at all to ascertaining whether there is any evidence in support of the denial of the existence of the public right, and takes upon himself to decide the question whether a public right exists or not, he usurps the function of a Civil Court and deprives the party concerned of the right to have the matter decided by that Court."

This, if I may respectfully say so, is the proper way of approaching the matter; and when that is done, there cannot be any question that the order of the lower Court must be set aside. The Magistrate is directed to re-hear the proceeding as from the state where the second party should have been asked under s. 139-A (1) whether he denied the existence of the public right.

S. *Rule made absolute.*

(1) 27 A L J 385; 116 Ind. Cas. 786; A I R 1929 All 220; Ind. Rul. (1929) All. 610.

(2) 190 Ind. Cas. 879; A I R 1941 Pat. 38; 21 P L T 843; 7 B R 36; 42 Cr. L J 34; 13 R P 266.

RANGOON HIGH COURT
Full Bench
Second Appeal No. 365 of 1939
August 19, 1940

ROBERTS, C. J., MOSELY AND DUNKLEY, JJ.

AH TWE AND ANOTHER—APPELLANTS

versus

MA MAI SEIN AND OTHERS—RESPONDENTS

Rangoon City Municipal Act (VI of 1922), s. 194—Applicability—There must be tax claimable—Jurisdiction of Civil Court to decide whether person is in arrears of municipal tax—Lower Burma Land and Revenue Act (II of 1876), ss. 55, 56—Question as to arrears of land revenue or defaulter or both—Jurisdiction of Civil Court to decide—Suit to set aside sale by Township Officer for arrear of land revenue—Civil Court, if can entertain—Government purchasing land at revenue sale and setting holder as licensee—Suit to set aside sale—Government, if necessary party—Pleadings—Amendment—Suit to set aside revenue sale—Amendment of plaint at stage of second appeal to the effect that ss 55 and 56, Lower Burma Land and Revenue Act (II of 1876), are ultra vires, cannot be allowed.

Before s. 194, Rang. City Municipal Act comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court may enquire whether a person is in arrear with payment of a municipal tax, for, if he is not, the Land Revenue Acts have no application.

With regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act, 1876, specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the Revenue Officer, and accordingly this question is one for him to determine. The Civil Court has no jurisdiction in view of ss. 55 and 56, Lower Burma Land and Revenue Act, to decide the question as to arrears of land revenue or defaulter or both and, therefore, it cannot entertain suit to set aside a sale held by Township Officer for land revenue arrears. 181 Ind. Cas. 590 (2), relied on, 180 Ind. Cas. 234 (1) and 139 Ind. Cas. 566 (3), distinguished.

Per *Dunkley, J.*—Government is a necessary and proper party to a suit to set aside a revenue sale, where the purchaser is the Govt. who settles the holder of the land as a licensee. To such a case s. 56, would apply. 30 Ind. Cas. 772 (4), referred to.

In a suit to set aside a sale held by Township Officer in Lower Burma, the plaintiff cannot be allowed to amend his plaint at the stage of second appeal, to the effect that parts of ss. 55 and 56, Lower Burma Land and Revenue Act are *ultra vires*.

S. A. from the decree of the District Court, Insein, dated September 27, 1939.

Mr. *U Sein Tun Aung*, for the Appellants.

Mr. *S. T. Leong*, for Respondents Nos. 1. to 11.

Roberts, C. J.—The plaintiffs brought this suit to set aside a sale held by a Township Officer in Lower Burma for arrears of land revenue. The Sub-Divisional Court thought that it had jurisdiction to entertain such a suit and it is contended, upon the authority in *Maung Thaung* v. *Shaik Abdul Gani* (1), that such a conclusion was right. Section 194., Rang. Municipal Act, provides that any arrears of tax or any fee or other money claimable by the Corporation thereunder may be recovered as if they were arrears of land revenue. Before this section comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court may enquire whether a person is in arrear with payment of a municipal tax, for if he is not, the Land Revenue Acts have no application. But with regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act, 1876, specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the Revenue Officer, and accordingly this question is one for him to determine. Section 56 provides (*inter alia*) that no Civil Court shall exercise jurisdiction as to any matters, claims and questions mentioned in proviso 1 to s. 55. When these are examined it will be seen that the jurisdiction of the Civil Courts is ousted as to any questions of liability of any person under ss. 37 and 38; questions as to whether any revenue, tax or rate is in arrear; questions as to the legality of process in recovering sums in arrear: and questions as to the validity of any sale under s. 45 or proclamation under s. 47 of the Act.

In other words in land revenue cases Revenue Courts deal with such matters to the exclusion of Civil Courts; in cases to which land revenue proceedings are made applicable for the recovery of arrears of moneys due, it must first be ascertained that arrears exist. Baguley, J., pointed out in *Ko Cheik* v *Secretary of State* (2), that s. 53 (2) (*xii*) of the Upper Burma Land and Revenue Regulation bars the jurisdiction of the Civil Courts with regard to all claims in connection with collection of revenue. The Act in Lower Burma is no less explicit. The appellant's Counsel desires to show that the land Revenue Officer did not comply with various provisions of the Act in reaching his decisions he says that there was no "defaulter" within the meaning of s. 44 and that there was no sum "in arrear" but these are matters which we are expressly precluded by the terms of the Act from considering. Two lines of argument were pursued on behalf of the appellants. First it was urged that a suit to set aside a sale by a Township Officer for arrears of land revenue was maintainable in Bengal; the reason for this is that the Bengal Land Revenue Sales Act, 1859 is quite different from the law in this country If a plaintiff can show that he has suffered substantial injury when such a sale has taken place contrary to the provisions of

(1) (1938) Rang. 603; 180 Ind. Cas. 234; A I R 1939 Rang. 30; 11 R Rang. 395.

(2) (1939) Rang. 275; 181 Ind. Cas. 590; A I R 1939 Rang. 160; 11 R Rang. 473.

that Act s. 33 of the Act expressly permits to Civil Courts to intervene; but there is no such provision in the law in Burma. It follows that the long line of authorities sought to be invoked under the Ben. Act can be of no assistance in this country.

Secondly it was contended that we should assume that ss. 55 and 56, Lower Burma Land and Revenue Act, which has been in operation for over sixty years deprives a party aggrieved of his rights to property. It is enough to say that it does not follow that because a person aggrieved cannot file a suit in the Civil Courts to set aside a sale under the Act he has no other remedy; not only does he have the rights of appeal given him by the Act itself but he may be advised in certain cases of other remedies as well. It is suggested that we ought to permit an amendment of the pleadings at this stage in order to change the cause of action and to substitute for it a suit for a declaration that parts of ss. 55 and 56 of the Act are *ultra vires*. That is not a proposition to which we can assent. Some attempt was made to employ arguments which were used in a recent case which came before this High Court by way of an application for a writ of *certiorari*. But the present proceedings stand on an entirely different footing. As I have pointed out they were brought in a Sub-Divisional Court to set aside the acts of a Revenue Officer, and to determine questions which the Act says are not to be determined by the Civil Courts. Accordingly this appeal must be dismissed with costs.

Mosely, J.—I agree.

Dunkley, J.—I agree with my Lord, the Chief Justice, that this second appeal must be dismissed with costs, as the jurisdiction of the Civil Courts in regard to the subject-matter of the suit is ousted by the provisions of s. 56, Lower Burma Land and Revenue Act. The two Burma cases which have been cited by learned Counsel for the appellants are clearly distinguishable. In *Trustees for the Development of the City of Rangoon* v. *G. S. Behara & Sons* (3), the question was the recovery of an arrear of a tax imposed under the Rangoon Development Trust Act, 1920. The relevant provision of this Act is s. 86 (1), which enacts that:

"Any sum of money, or any tax, or fee due to or claimable by the Board (*i. e.* the Board of Trustees) may be recovered by the Board as if it was an arrear of land revenue."

(3) 10 R 412; 139 Ind. Cas. 566; A I R 1932 Rang 123; Ind. Rul. (1932) Rang. 195.

In *Maung Thaung* v. *Shaik Abdul Gani* (1), the question was the recovery of an arrear of municipal taxes and the City of Rangoon Municipal Act, 1922, the relevant section of which is s. 194 (1), which enacts that:

"Any arrears of tax or any fee or other money claimable by the Corporation under this Act may be recovered as if they were arrears of land revenue."

Consequently, in both these cases the provisions of the Land and Revenue Act for the recovery of arrears of revenue do not come into play until there is an arrear of tax claimable from the person from whom the trustees of the Corporation of Rangoon as the case may be, are claiming it. As Page, C. J., said in the former case (3), (at p. 433*), it is in such cases a condition-precedent to the right of the authorities concerned to have recourse to the special procedure prescribed in the Land and Revenue Act that a sum has fallen due, and that it is due from the person from whom it is being claimed. These are, therefore, questions which can be decided by the Civil Courts, and with respect to which the jurisdiction of the Civil Courts has not been ousted. But in the case of an arrear of land revenue, the provisions of the Land and Revenue Act alone have to be considered, and the arrears fall to be recovered by the procedure laid down in that Act only; and under the Land and Revenue Act, the questions as to whether any revenue is in arrear, and by whom it is payable, are to be decided by the Revenue Courts, and the jurisdiction of the Civil Courts in such matters is ousted by the provisions of s. 56. I agree with my Lord that the law in regard to the jurisdiction of Civil Courts in such a matter has been correctly laid down by Baguley, J. in *Ko Cheik* v. *Secretary of State* (2).

Reference has also been made to the line of cases of which *Maung Naw* v. *Ma Shwe Hmat* (4), is the leading case, in which it was decided that the prohibition contained in s. 56, Land and Revenue Act, does not extend to disputes between private individuals regarding the right to occupy land. The answer to this point is that the Govt. of Burma was a necessary and proper party to this suit, and the suit could not succeed without joining Govt. as a party. The appellants seek to set aside a revenue sale at which Govt. was the purchaser, and the predecessor-in-interest of the respondents, Maung Po Ni, is a mere licensee of

(4) 8 L B R 227; 30 Ind. Cas. 772; A I R 1915 L B 75.

*Page of 10 R.—[*Ed.*]

Govt. Hence this suit, which was to set aside the revenue sale and to put the appellants into possession of the land, could not be decreed unless Govt. was made a party to the suit.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Criminal Appeal No. 265 of 1938
January 20, 1939
PANDRANG ROW, J.
In re BALAM PATEYYA AND OTHERS —APPELLANTS

Criminal trial—Joint trial—Large number of offences—Joint trial, when can be held—Proper procedure in such case, stated—Criminal Procedure Code (Act V of 1898), s. 297—Riot—Which party started riot, doubtful—Warning to jury against acting on uncorroborated evidence of interested witnesses and to treat such evidence with caution, is necessary—Failure to warn is misdirection—Vandalism or theft and dacoity are different—Failure to point out difference to jury amounts to misdirection.

Unless all the offences for which a joint trial is held are parts of the same transaction, there can be no joint trial held according to law in respect of all the offences. A joint trial in respect of very large number of counts is very much to be deprecated even though the law may not prohibit it. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. No doubt, joint trials would be legal in certain circumstances, but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a Judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him, to hold separate trials. The usual course to be adopted in cases of large number of counts is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. [p. 377, col. 2; p. 378, col. 1]

Where the parties were at bitter enmity and so far as the question of motive was concerned, either of the parties might have started the riot, it is obviously incumbent on the Judge to warn the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration, where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. The failure of the Judge to so warn the jury amounts to misdirection. [p. 378, col. 2; p. 379, col. 2]

Vandalism is one thing and dacoity and theft are quite different, and hence the failure of the Judge to point out the difference between vandalism and dacoity or theft to the jury when asking them to give their verdict on counts relating to dacoity and theft amounts to misdirection. [p. 377, col. 1.]

Cr. A. against an order of the Sessions Court, West Godavari Division, in C. C. No. 6 of 1938.

Messrs. *K. S. Jayarama Iyer* and *G. Gopalaswami*, for the Appellants.

Mr. *K. Venkataraghavachariar*, for the Public Prosecutor, for the Crown.

Judgment.—This is an appeal from the judgment of the Sessions Judge of West Godavari dated May 7, 1938, in S C. No, 6 of 1938, on his file. The case related to certain occurrences which took place in the village of Mukkumala on August 15, 1937. The trial in the Sessions Court began only on March 21, 1938, and went on for nearly a month and a half. There were 24 accused and the number of witnesses examined for the prosecution were 51 and a fairly large number of exhibits were filed on both sides. To add to the complexity and the difficulty which the case must have presented to the jury who in respect of some of the counts acted as assessors and also to the trial Judge, the charges against the accused were on no loss than 66 counts and the occurrences related to about fifteen different places, the first occurrence being at the hamlet of the Edigas in the village known as the Edigagudam, the next being the gingelly fields near it, the third occurrence being between the washerman's hut and Edigagudam and the remaining occurrences having taken place in various houses belonging to the Kammas in the village, the houses being twelve in number. The first count was in resect of rioting with deadly weapons against all the twenty-four accused; counts 2 to 7 related to offences of causing grevious hurt with dangerous weapows, *i. e.*, ofiences under s. 326, I. P. C, some of the counts being against a few of the accused and the others being against the rest constructively by the operation of s. 149, I. P. C. counts 8 to 29 related to hurt with a dangerous weapon, an offence under s. 324, I. P. C. some of the counts being under that section alone against some of the accused and the others being against the remaining accused constructively by the operation of s. 149, I. P. C., counts 30 to 44 were in respect of the offence of mischief punishable under s. 440, I. P. C., against all the accused in the various houses in which mischief is said to have been committed. So far as this offence is concerned, it must be mentioned that there was no charge under s. 149, I. P. C. Counts 45 to 56 were counts relating to the offence of house-

breaking punishable under s. 455, I. P. C., against all the accused in the respective houses referred to in the counts; counts 57 to 62 related to the offences of dacoity punishable under s. 398, I. P. C., against all the accused in respect of the various houses referred to in the counts; the remaining four counts 63 to 66 related to the offence of a theft in a building against all the accused in the respective houses referred to in the counts. Counts 45 to 66 were tried with the aid of a jury and the jurymen acted as assessors in respect of the other charges which were triable with the aid of assessors.

The entire trial was held jointly and there was no separate trial in respect of any counts. In the result thirteen out of the twenty four accused were convicted on various counts—six Edigas and seven Malas, and these are the appellants in this appeal. Most of the appellants have been convicted under a very large number of counts ranging from 13 to 24. The sentences have however been ordered to run concurrently in all cases and the longest sentence was only three years on the ground as stated in the judgment that though the offences were grave, the rioters had behaved with moderation and they had been on remand for several months and also because most of the offences were practically parts of one transaction. This observation of the learned Judge that most of the offences were practically parts of one transaction shows that the learned Judge himself was not quite sure that all the offences were actually parts of the same transaction. It is obvious that unless all the offences were parts of the same transaction, there could have been no joint trial held according to law in respect of all the offences. This point will have to be considered at greater length later on after giving a brief description of the facts of the case.

It is not disputed that there had been trouble between the Kamma community on the one hand and the Ediga and Mala communities on the other, in the village for some time before the occurrence. The trouble was mainly due to a dispute about wages, the Kammas being generally speaking, employers, and the Edigas and the Malas being generally labourers employed by the Kammas. A fairly accurate account of the state of affairs about a week or so before the occurrence is to be found in the special report sent by the Sub-Inspector to the Joint Magistrate (Ex. B) on August 8, 1937. As observed by him, the fight by the labourers against their employers had already begun and here were complaints made to the authorities by both parties. The Sub-Inspector warned both parties and asked for instructions. The Sub-Divisional Magistrate appears to have been of the opinion that the state of affairs did not warrant any action on his part. To this effect he made an endorsement on the report on August 13, 1937. On the same date the Inspector of Police appears to have sent a report to the joint Magistrate (Ex. E 1) praying for action to be taken under s. 107, Criminal P. C., against ten members each of the two parties on the following grounds :

"The strike is formed about one and a half months ago and is getting from bad to worse day by day. The Sub-Inspector, Tanuku, enquired into this and tried his best to arrange a compromise but invain. The Kammas are rich and obstinate. The Edigas are poor but desperate. Their feelings are highly strained and they are trying to avenge each other. Even in my enquiry both parties abused each other and the situation is serious. Unless both parties are bound over they are determined to commit a breach of the peace."

Unfortunately, for reasons which are not discoverable on the record the Joint Magistrate does not appear to have taken any action in the matter as requested by the Inspector of Police, and two days after the date of the report the trouble came to a head, and there was undoubtedly a serious breach of the peace in the village owing to the clash between the warring communites in the village. There can be no doubt that the beginning of the clash was provoked by the unwarranted action of some of the Kamma community in going to the hamlet of the Edigas and searching the house of one of the Edigas on the pretext that certain hay had been stolen and was secreted in the house. No attempt has been made before me on behalf of the Crown to justify this action on the part of the village Munsif and there is no doubt that it was this raid into the house of one of the Edigas by the village Munsif and some of the Kammas that was the immediate cause of the clash. The clash was thus sudden and was not the result of any previously concerted action on the part of the appellants and it is impossible to say that the events that took place at Edigagudam and even the events that took place in the gingelly fields immediately afterwards in which two or three people were beaten are parts of the same transaction as the events that followed after a large number of Edigas and Malas had collected subsequent to these events and made

a rush to the village in which the Kamma houses were situated.

There was in my opinion no justification for regarding all the events that took place on that day in the village as parts of the same transaction, and it was not right to try the cases in respect of all these occurrences in one trial. The danger of the joint trial in this case is indeed apparent on the most cursory examination of the judgment itself. The large number of the counts on which the trial was held led to a lengthy trial spread over nearly a month and a half and must have necessarily confused the minds of the jury the members of which also acted as assessors in respect of some of the counts. The result of such confusion is apparent, for it is clear from a mere perusal of the verdict of the jury on some counts and the opinions of the jurymen as assessors in respect of the connected counts arising out of the same occurrences, that they are absolutely inconsistent. To put it in other words, even where the occurrence is one and the same in the sense that it took place in the same house and the evidence regarding the occurrence was the same but different offences were committed, for instance, hurt, mischief and housebreaking and dacoity, the members of the jury gave a verdict which is inconsistent with their opinions as assessors in respect of the counts on which the trial was with the aid of assessor. This is absolutely inexplicable except on the supposition that their minds were so confused by reason of the length of the trial, the volume of the evidence and, if one may say so without meaning any disrespect to the learned Sessions Judge, the very lengthy and not very clear charge which he delivered to the jury. The summing up appears to have lasted from 11 in the forenoon till about 7 in the evening, an ordeal which most people would find it difficult to stand without some untoward reaction in their minds.

It is very difficult in a case where the trial has lasted for more than a month, and a number of witnesses were examined, for the members of the jury to carry in their minds any clear idea either of the demeanour of the witnesses or of the particular charges to which the evidence of a particular witness relates and this inability to remember is not removed by the long charge a charge so long that before one got to the end of it, one must necessarily have forgotten something of the beginning or the middle. The difficulty was increased by reason of the fact that the ordinary precaution of stating to the jury the evidence as against each of the accussed was not followed in this case. The evidence was undoubtedly marshalled and ably marshalled, by the learned Judge as regards each particular count or connected sets of counts, but unfortunately no attempt was made either at the beginning or at the end to indicate to the jury what was the evidence against each particular accused and in respect of each particular count. It is not known whether the members of the jury were furnished with a copy of the counts or whether a translation was furnished to them, and one can very well imagine the state in which their minds were at the end of the charge, and the clearest indication of that state is furnished by the inconsistency between the verdict of the jury and the opinions of the same gentlemen as assessors in respect of the same occurrence backed by the same evidence.

A joint trial in respect of very large number of counts is very much to be deprecated even though the law may not prohibit it. It is one thing to say that a joint trial was legal but quite another to say that it was proper in the circumstances. No doubt, joint trials would be legal in certain circumstances, but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a Judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him, and in a case like this it would have been expedient also to have held separate trials. The usual course adopted in such circumstances is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. This practice is in accordance with common sense and does justice to the accused and does not result in the confusion that we find in the present case as a result of the joint trial held in respect of so many as 66 counts.

After going through the charge to the jury, I am of opinion, that it has not been fair to the accused and that it contains several misdirections. There has also been an improper exclusion of relevant evidence which was attempted to be left in on behalf of the accused. The learned Judge did not lay sufficient stress on the fact that all the witnesses for the prosecution were interest-

ed, when he was charging the jury as to the evidence on particular counts. I wish to mention an instance or two as examples, as there are several such instances to be found in the charge. For instance, in dealing with counts 33, 47 and 60 in paras. 65 to 67 of the charge, the learned Judge first of all points out that the witnesses who speak to those counts are P. Ws. Nos. 18 and 47. Towards the end of para. 67 he points out that P. W. No. 47 does not speak with any personal knowledge as to what happened. It was thus clear that there was only the evidence of P. W. No. 18 in respect of these counts. He has pointed out at the same time that according to the evidence of P. W. No. 18 the events in the house were witnessed not only by himself but also by his wife, his daughter, his brother's wife and his brother's daughter who were in the house at the time of the occurrence. None of these have been examined. The witness also spoke to the commission of dacoity in his house, the dacoity consisting in the fact that a sum of Rs. 100 is said to have been demanded by the accused under threats and that actually he was beaten thereafter. Fortunately for the accused so far as the count of dacoity was concerned, the learned Public Prosecutor stated that the accused were entitled to the benefit of the doubt; otherwise I should not have been surprised if the jury had returned a verdict of guilty in respect of this count also.

The verdict of the jury was (by a majority of one) a verdict of guilty in respect of count 47 and in respect of count 33 they gave their opinions as assessors, as follows: four of them to the effect that none of the accused was guilty and one to the effect that accused Nos. 6 and 13 were guilty. This verdict and these opinions are, in my opinion, directly attributable to the failure on the part of the learned Judge to have warned the jury against acting on the uncorroborated testimony of an interested witness like P. W. No. 18, whose evidence about a part of the same occurrence namely the dacoity, was such that the Crown itself was prepared to advise that the accused were entitled to the benefit of the doubt. On the same evidence, it is impossible to justify the verdict of guilty by 3 to 2, while in respect of another part of the same occurrence backed by the same evidence the majority was 4 to 1 to the effect that none of the accused was guilty. It is impossible to my mind to account for these extraordinary aberrations, so to speak, of judicial opinion delivered by members of the jury in their dual capacity, except on the ground that they did not know what they were doing because of the length of the trial and the length of the charge and the complexity of the case occasioned by the joint trial on a large number of counts. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. On the other hand, instead of warning the jury in respect of the remaining counts namely 33 and 47—count 60 having been practically abandoned by the Crown—that it was not safe to convict in view of the interestedness of the witness and the absence of corroboration, the learned Judge thought it fit to dismiss the argument to this effect by the accused's Counsel in the following words in para 67 of his judgment:

"One of the arguments of accused's Counsel was that in every case in which there was no corroboration, it would be safer for you to reject the testimony. Such a condemnation of uncorroborated testimony is not correct. There is no principle which debars you as judges of fact from relying upon such testimony. No particular quantum of proof is required to prove any fact. In order to hold any fact proved you require only such evidence as would satisfy a reasonable man that the fact is true".

While these observations cannot be said to be erroneous in law, they were undoubtedly not calculated to lead to a correct or just decision in a case of this kind. This was not a case in which these observations should have been made to the jury, which appear to have encouraged instead of discouraging them to accept the uncorroborated testimony of an interested person while the prosecution had given no reason for not examining a number of other witnesses who were available at least for the purpose of corroboration though they were equally interested. Similar observations can be made in regard to a number of other counts dealt with in the charge of the learned Judge. It is not as if any particular observation was not in strict accordance with law or with the evidence in the case, but throughout it appears that wrong guidance was given to the jury by the learned Judge; where caution ought to have been imposed on the jury encouragement was given to them to accept evidence which was obviously to be treated with considerable caution. According to the learned Judge the parties were at bitter enmity and so far as the question of motive was concerned,

either of the parties might have started the riot. When such was the position, it was obviously incumbent on the learned Judge to have warned the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration, where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. In several places the learned Judge himself remarks that even as regards the material portions of the prosecution story the truth had not been placed before the Court by the prosecution. For instance in para. 95 of his judgment, he says that he has no hesitation in discrediting the story related by the prosecution as regards theft of hay. He did not accept the broad case for the prosecution that there was an unlawful assembly of the Malas and Edigas from the very beginning whose common object was not only to beat the members of the Kamma community but also to invade their houses, break the doors and windows, cause hurt to the inmates and to commit theft, dacoity, etc. So far as the first part of the occurrence is concerned, he appears to have come to the conclusion in para. 95 of his judgment that there must have been a free fight between the Malas and Edigas on the one hand and the Kammas on the other in Edigagudam in the course of which both parties sustained injuries, and that it was only thereafter that the Edigas and Malas gathered in large numbers and marched into the village and committed several acts of vandalism. Vandalism is one thing and dacoity and theft are quite different, and the learned Judge failed to point out the difference between vandalism and dacoity or theft to the jury when he asked them to give their verdict on counts relating to dacoity and theft.

In several places in his judgment, it is very clear that a good portion of the prosecution evidence was disbelieved by the learned Judge. He concedes in para. 101 of his judgment that all the material prosecution witnesses are Kammas and that it was possible for the prosecution to obtain the testimony of disinterested witnesses belonging to Brahmin and Vysia communities in the village. He says that while this is a ground for scrutinizing the evidence with care, it is not proper to condemn the evidence as a whole. The charge delivered by the learned Judge does not however show that the jury were asked to scrutinize the evidence with care, and if there was any scrutiny, the result of the scrutiny by the jury and by the Judge shows that the scrutiny must have been exceedingly slipshod. Otherwise there would not have been the numerous inconsistencies that are to be found between the opinions of the jury as jurymen and as assessors, and also between what the Judge stated in his judgment and the convictions recorded by him. As an instance of the latter, I might mention that while in para. 142 the learned Judge has recorded the opinion that there was no identification of any of the accused as regards count 43, he has actually convicted a number of accused under that count. He has moreover convicted various accused persons under ss. 440 and 149 I. P. C., while as a matter of fact there was no charge under s. 149 in respect of any of the counts relating to s. 440, I. P. C. It would also appear that the judgment and the finding are inconsistent so far as count 42 is concerned.

I shall go on to indicate briefly the various other defects which are to be found in the charge. The learned Judge omitted to tell the jury that there was no mention of the commission of any house breaking or dacoity in the first report of the occurrence Ex. F. He also omitted to mention to the jury that even in the charge sheet only one dacoity was mentioned whereas in the evidence no less than six dacoities were spoken to. The result of this is seen in the fact that in the case of two dacoities (counts 57 and 58) the jury returned a verdict of guilty by a majority. The inconsistencies between the verdict of the jury as a jury and the opinions of the members of the jury as assessors are to be seen in the following instance On counts 57 and 58 by a majority of 3 to 2 the jury returned a verdict of guilty against accused Nos. 1 to 4, 7, 13, 14, 17 and 18. On the count 34, that is to say, the count relating to the occurrence in the same place regarding which the evidence is the same, the opinion of the assessors was in the case of two not guilty and in the case of two other assessors, that accused Nos. 1 to 3 and 13 were guilty and in the case of the remaining assessor that accused Nos. 1 to 3 were guilty. These opinions and the verdict are not reconcilable. In respect of these very counts also, the leared Judge omitted to direct the jury that the accused implicated by the witnesses were only accused Nos. 1 to 3, 13, 14 and 17. If this had been pointed out, it is not likely

that the jury would have returned a verdict even by a majority against accused Nos. 4, 7 and 18 who were not implicated by the witness in the dacoity.

Then again in respect of count 45 which relates to house-breaking, the jury found by a majoriiy of 3 to 2 that all the appellants were guilty, while in respect of the same incident dealt with in count 31 which relates to mischief three out of the five assessor expressed the opinion that none of the accused was guilty, the evidence being the same. In respect of the same count 45 the only eye-witness who speaks to it namely P. W. No 41, mentioned only accused Nos. 1, 3 4, 14 to 16, but this was not specifically mentioned to jury in the charge. The result was that, accused Nos. 15 and 16 who were mentioned by the sole witness were acquitted, whereas, several others who were not mentioned, namely No. 2, 7, 13, 17 and 18, were found guilty by the jury. This again is an inconsistency which deprives, in my judgment, the verdict of the jury of any real value as a judicial verdict. It is impossible really to treat a verdict of this kind with any respect when the same gentlemen in their capacity as assessors on the same evidence have expressed absolutely different and inconsistent opinions. Verdicts of this kind were really not entitled to acceptance, and unless the learned Judge who tried the case was himself in the same boat so to speak, with the jury, it is impossible to account for his acceptance of such verdicts in the face of the opinions of the jurymen as assessors given at the same time. A mere comparison of the opinions with the verdicts would have indicated to him the necessity of expressing his disagreement with the verdict of the jury and making a reference to the High Court. The acceptance of the verdicts in these circumstances shows that there has been a disregard of the duty of the Judge to consider the verdicts carefully before he expresses his agreement with them or decides not to express his disagreement. Instances of this kind may be multiplied, and they are all found in the memorandum of appeal: *vide* particularly paras. 13, 14, 15 and 16 of the grounds of appeal. I may here mention that the learned Public Prosecutor has not attempted any explanation of these inconsistencies when the appeal was argued before me and indeed no explanation seems to be possible. The inconsistencies are so gross and so glaring that the only explanation would be though it would hardly be a satisfactory explanation that all those who were connected with the trial were so confused at the end of it that they did not know what they were doing. Such an explanation would certainly not be very useful from the point of view of the prosecution. I come next to the contention that relevant evidence was excluded by the learned Judge during the triel. In the case of P. Ws. Nos. 23 and 24 there is specific proof that certain evidence was excluded : *see* pp. 96 and 100 of the printed record. P. W. No. 23 who speaks to the commission of various offences in his house in respect of which covictions have been recorded, was asked in cross-examination

"when you went and reported to the Sub-Inspector at 1 o'clock you did not mention the names of any of the culprits ?"

This obviously relevant and important question was objected to and was actually disallowed by the learned Judge. It must be remembered in this connection that in his evidence in the case P. W. No. 23 had implicated a number of accused and the case for the defence was that as a matter of fact the witnees had not mentioned any of these accused to the Police when questioned immediately after the occurrence. It was certainly relevant and important to elicit the fact whether as a matter of fact the witness had mentioned the names of any of the culprits to the Sub-Inspector at 1 o'clock that is to say, almost immediately after the occurrence. There was in my opinion no justification for exclusion of evidence of this kind; the question was overruled and the the evidence was excluded by the learned Judge. A somewhat similar question was put to P. W. No. 24, namely "Did you tell the Sub-Inspector that your brother paid Rs. 50 and your wife paid Rs. 15 ?' This was in connection with the allegation made in the evidence of the witness that these sums of money had been extorted from these people under threat of instant hurt. It is difficult to understand the reason for the objections to a question like this. Section 162, Criminal P. C., does not certainly stand in the way of such evidence being given. Apparently, by reason of the objection being sustained in reference to this question by the learned Judge, similar questions were not asked of the other witnesses for the prosecution. I may mention, however, in this connecution that similar questions appear to have been asked of P. W. No. 27 and disallowed : *vide* p. 107 of the printed record. It is apparent, therefore, that there has been a serious exclusion of

evidence which was perfectly relevant and which might have materially helped the defence in throwing doubt on the veracity of important posecution witnesses.

I have said enough to show that the convictions of the appellants in this case cannot stand. There has been no proper trial ; the trial that was held was not according to law; there was a wrongful exclusion of material evidence by wrongful disallowance of relevant and material questions which must have prejudiced the appellants' defence and there was throughout in the charge a failure to put points which were favourable to the accused before the jury. The judgment itself apart from the record of the case, clearly establishes the fact that in this case there has been no attempt to consider the case as against each of the accused, and the jury must have been considerably confused and misled by the defects in the charge. I am therefore of opinion, that the appeal must to allowed. The convictions and the sentences on the appellants are hereby set aside and in view of the fact that the appellants have been in jail pending trial, some for six months or thereabouts and others for as long as ten months or so, it is in my opinion unnecessary to direct a retrial. Even otherwise I am of opinion after considering the evidence for myself that it is hopelessly lacking in quality and it is not likely that there would be a conviction if a retrial is held according to law. I therefore acquit the appellants and direct that the bail bonds executed by them be discharged.

N.-S. *Appeal allowed.*

PATNA HIGH COURT

Appeal No. 142 of 1938
September 5, 1940
HARRIES, C. J. AND MANOHAR LALL, J.
Ch. HANUMAN SINGH AND OTHERS—
APPELLANTS
versus
Ch. GAYA SINGH AND OTHERS—
RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), ss. 7, 9—S. 7 governs all provisions of Act—Court not exercising discretion under s. 8—S. 9, if comes into operation—Concluding sentence of s. 9, meaning explained.

The scheme of the Act is perfectly clear and shows that the provisions of s. 7 govern all the provisions of this Act, that is to say, in no case can a Court pass a decree for an amount of interest greater than the amount of the principal less any sum which has been paid or recovered on account of interest for the period preceding the institution of the suit.

Section 9 only comes into operation where the Court exercises the discretion vested in it by s. 8. When the Court does not choose to re-open the transaction the provisions of s. 9 will never come into operation.

The concluding sentence of s. 9 means that where the Court has exercised the discretion under s. 8 and reduced the rate of interest to 9 per cent. thereby relieving the debtor of all liability in respect of interest in excess of 9 per cent. per annum simple in the case of a secured loan or in excess of 12 per cent. per annum simple in the case of an unsecured loan, and if the limit provided by s 7 has not been reached and there is still an excess out of the amount left in deposit with the transferee of the equity of redemption then the mortgagee shall be entitled to recover that excess in addition to the amount which he may otherwise be entitled to recover, but always within the limit fixed by s. 7.

A. from the original decree of the Sub-Judge, Arrah, dated May 30, 1938.

Messrs. *Mahabir Prasad*, and *Tarkeshwar Nath*, for the Appellants.

Messrs. *Sarjoo Prasad*, *P. Misra*, *P. N. Gour* and *Ray Parasnath*, for the Respondents.

Manohar Lall, J.—This is an appeal by the dfendants third party, who have purchased the equity of redemption from the mortgagors after the mortgage bond in suit, against the decision of the learned subordinate Judge of Arrah by which he decreed the suit instituted by the respondents to enforce their dues on the mortgage bond executed on May 27, 1923. The sole question for determination in this appeal is the extent to which the appellants can obtain relief under the Bihar Money-lenders (Regulation of Transations) Act, 1939. It is sufficient to state that themortgage bond in suit was executed on May 27, 1923 to secure a sum of Rs. 3,000, which carried interest at 12 per cent. per annum to be compounded annually. On June 21, 1930 the appellants obtained a transfer of the equity of redemption from the mortgagors for a sum of Rs. 13,000. Out of the consideration a sum of Rs. 6,685 was left with the appellants to pay off the amount of principal and interest which then fell due on the mortgage claculated at the bond rate. The appellants paid a sum of Rs. 1,261-10-0 in August 1931 and a further sum of Rs. 1,350 in June 1938 to the mortgagee, that is to say, a total of Rs. 2,611-10-0. The present suit was filed on April 30, 1937. The learned Subordinate Judge has decreed the suit for a sum of Rs. 11,748-9-0 with interest *pendente lite* up to the expiry of the period of grace at 12 per cent. simple per annum besides costs. It is not denied by the respondents and indeed it is

obvious that the provisions of s. 7, Bihar Money-lenders (Regulation of Transactions) Act, forbid the Court from passing a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced upon the mortgage bond in suit. Applying the rule laid down by this section, the plaintiffs would be entitled to a decree for a sum of Rs. 3,000 being the principal together with a sum of Rs. 388-6-0 on account of interest, they having already realized Rs 2,611-10-0 from the hands of the appellants.

But it was suggested relying upon s. 9 of the Act that as a sum of Rs. 1 073-6-0 was still in deposit with the appellants in respect of interest for the period preceding the date of transfer for payment to the mortgagee, the portion of this amount so left in deposit which is in excess of the amount which would have been payable as interest at the rate of 9 per cent. per annum simple for such period is available to the plaintiffs-mortgagees in addition to any amount which may be awarded to them. In my opinion, this argument is fallacious. The scheme of the Act is perfectly clear and shows that the provisions of s. 7 govern all the provisions of this Act, that is to say, in no case can a Court pass a decree for an amount of interest greater than the amount of the principal less any sum which has been paid or recovered on account of interest for the period preceding the institution of the suit. Again if s. 9 is carefully read, it will be obvious that this only comes into operation where the Court exercises the discretion vested in it by s. 8. When the Court does not choose to re-open the transaction the provisions of s. 9 will never come into operation.

If the argument of the learned Advocate for the respondents were accepted it would lead to startling results; for instance, if the Court chose to re-open the transaction under s. 8 then notwithstanding that it relieved the debtor of all liability in respect of interest in excess of 9 per cent. per annum in the case of a secured loan as in the present case the amount due on account of interest may still be large (owing to the long time that elapsed between the date of the mortgage and the date of the institution of the suit) so that the debtor would still be liable to pay an amount of interest which would be greater than the principal so that instead of getting any relief the debtor is actually worse off by having to pay more than what would be recoverable by the mortgagee by the operation of s. 7. There is no difficulty in understanding the concluding sentence of s. 9 which was also relied upon on behalf of the respondents. These words, on a proper construction, mean that where the Court has exercised the discretion under s. 8 and reduced the rate of interest to 9 per cent. thereby relieving the debtor of all liability in respect of interest in excess of 9 per cent. per annum simple in the case of a secured loan or in excess of 12 per cent. per annum simple in the case of an unsecured loan, and if the limit provided by s. 7 has not been reached and there is still an excess out of the amount left in deposit with the transferee of the equity of redemption then the mortgagee shall be entitled to recover that excess in addition to the amount which he may otherwise be entitled to recover, but always within the limit fixed by s. 7.

The result is that the plaintiff will be entitled to a mortgage decree for the amount of Rs. 3,388-6-0. The plaintiff is also entitled to interest *pendente lite* on the sum of Rs. 3,000. In the circumstances I think it would be fair that the plaintiff should recover interest at the rate of 12 per cent. per annum simple as was decreed by the learned Subordinate Judge himself in the present case. The interest at the rate of 12 per cent. simple will run *pendente lite*, and during the period of grace which is fixed at two months from to day. The decretal amount will carry interest at 6 per cent., thereafter till the date of realization. As regards costs, the plaintiff will be entitled to the amount of court fee which he has paid upon his plaint but the other costs of the Court below will be calculated on the amount to which the plaintiff is now being held entitled. As regards the costs of the appeal, the appellant has succeeded in getting the decree reduced by about Rs. 7,000 In these circumstances the appellant will be entitled to costs in proportion to his success in this Court. Let a usual mortgage decree be prepared in the terms indicated above.

Harries, C. J.—I agree.

S. *Order accordingly.*

MADRAS HIGH COURT

Civil Revision Petition No. 2094 of 1939

December 15, 1939

PANDRANG ROW, J.

JOHN BATIST D'SOUZA—PETITIONER

versus

LIZZIE JANE LOBO—RESPONDENT

Divorce Act (IV of 1869), ss. 7, 18, 19—Juris-

diction—Parties belonging to Mangalore, married there and husband having house of his own at that place —Husband in service at Rangoon—Husband and wife last residing at Mangalore when husband was on leave—Husband having no house or flat in Rangoon during this period—On husband's departure to Rangoon wife staying behind and presenting petition under ss 7, 18, 19 in Mangalore—Mangalore Court held had jurisdiction to entertain it.

Where there is a residence, it is possible to regard a person as residing there though he is not actually present in the flesh at that place. But where there is no place of residence, this fiction is not available, and the person must be deemed to be residing in the place where he actually lives.

The parties were married at Mangalore to which place they belonged and the husband had a house of his own at that place. The husband was, however, in service in Rangoon and the parties resided there for some years. The wife presented an application under ss. 7, 18, 19 of the Divorce Act at Mangalore on the ground that the parties last resided there when the husband was on leave. The husband had no house of his own or a rented house or flat in Rangoon during this period and the evidence showed that he had wound up the establishment at Rangoon before he left that place. On the expiry of the leave the husband went to Rangoon and the wife remained behind at Mangalore:

Held, that during the period of leave when the husband was living with his wife in Mangalore in his own house, he had no place in Rangoon which he could call his residence. Merely because he had a lien, on his post during his leave, he could not be regarded as a resident of Rangoon even during the time when he was spending his leave at Mangalore with his wife in his own house. The Court at Mangalore had, therefore, jurisdiction to entertain the application.

C. R. P. under ss. 115 of Act V of 1908 and 224 of the Govt. of India Act praying the High Court to revise the order of the District Court of South Kanara dated July 6, 1939, and made in O. P. No. 55 of 1938.

Messrs. *E. Antony Lobo* and *A. Viswanathna*, for the Petitioner.

Mr. *G. A. Pais*, for the Respondent.

Order.—This petition raises a question of jurisdiction, namely whether the District Court of South Kanara had jurisdiction to entertain the application presented to it by the respondent in the present petition under ss. 7, 18 and 19 of the Indian Divorce Act for a declaration that the marriage of the petitioner with the respondent is null and void and for maintenance, etc. The petition was by the wife against her husband both of them are natives of South Kanara and as would appear from the entry in the marriage register relating to their marriage in 1932, both are parishioners of the same parish in Mangalore. It appears however from the evidence that the respondent, *i. e.*, the husband, has been employed for many years in the Telegraph department in Burma and has been residing most of the time at Rangoon. The petition was however put in, in 1938, in the District Court of South Kanara on the ground that both the parties had last resided together at Mangalore in South Kanara in the respondent's own house at Jeppu. This fact, namely, that the husband and the wife lived together from at least February 1938 to the beginning of April 1938, in the respondent's house at Jeppu is not denied, and it is further clear that this was the period during which the two last resided together, because, thereafter the husband went away to Rangoon and the wife remained behind at Mangalore till the petition was filed in July 1938. The learned District Judge after taking evidence was satisfied that the husband and the wife did last reside together in Mangalore till the respondent left Mangalore for Rangoon on April 5, 1938, and that therefore he had jurisdiction to entertain and deal with the application.

The only question that is argued in this petition is that the finding of the District Judge is wrong on the admitted facts of the case. As observed already the admitted facts of the case show that the parties not only belong to Mangalore but were married in Mangalore and were living in Mangalore on more than one occasion. They lived together on two occasions after the marriage in Mangalore, once in 1934, and a second time during the end of 1937 till April 1938, and on the latter occassion they lived together in the respondent's own house at Jeppu. A number of rulings have been quoted but it is not possible to say that the facts of the present case are clearly covered by any one of them. While it is obvious that a person who has no fixed residence elsewhere can be regarded as residing in any place in which he is actually found, nevertheless, where there is a fixed place of residence, a temporary sojourn in another place for a few days would not make him a resident of that place and give jurisdiction to the Court having jurisdiction over that place to entertain application under the Act. In the present case, however, it is not established that the present petitioner (*i. e.*, the husband) had a fixed residence in Rangoon at the time when he was actually living together with his wife in Mangalore from February 1938 to April 1938. It is not established that he had any house of his own or a rented house or flat in Rangoon during this period. In fact, the evidence

contained in his own letter to his wife would show that he had wound up the establishment and left his "Chokra" at the house of a friend and perhaps a few belongings also and it is clear that even for some time before he actually left Rangoon, he was getting his food from outside. It would seem therefore that during this period when he was living with his wife in Mangalore in his own house, he had no place in Rangoon which he could call his residence. In these circumstances, can it be said that merely because he had a lien, so to say, on his post in the Telegraph Office during his leave, he must be regarded as a resident of Rangoon even during the time when he was spending his leave at Mangalore with his wife in his own house. I am of opinion that the answer to this must be in the negative. It is possible to regard a person as residing in a place where he is physically not present when he has got a permanent place of residence, but where he has no permanent palce of residence or any place of residence which he can call his own available to him at all time, it is impossible to adopt the idea of fictional residence at a place where he is not. In other words, where there is a residence, it is possible to regard a person as residing there though he is not actually present in the flesh at that place. But where there is no place of residence, this fiction is not available, and the person must be deemed to be residing in the place where he actually lives. It is impossible to allow the contention that during this particular period the respondent did not reside anywhere at all. He actually lived in Mangalore during this period and this was the period during which the couple lived together for the last time. Unless it is shown that the respondent must be deemed to have resided in a different place in the eye of the law, the actual facts established in the case—and in fact admitted—are more than sufficient to show that the couple resided together in Mangalore for the last time during the period in question. As observed already, the petitioner has failed to show that during this period he could be reasonably regarded as having resided in Rangoon or in any place other than Mangalore. In the view I have taken, it is unnecessary to deal with the different states of facts which arose in the various cases that were quoted to me. The only principle that I can discover from the decisions is that a person cannot be said to reside at a place where he spent only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence, the place where he actually lives must be taken to be a place where he resides. This general principle which can be gathered from the case that were quoted to me is sufficient to cover the present case because it has not been shown that, during the period that the couple lived together at Mangalore in the petitioner's own house for the last time, the petitioner can be regarded as having resided elsewhere.

The petition therefore fails and it is dismissed with costs.

N. S. *Appeal dismissed.*

LAHORE HIGH COURT

Second Appeal No. 247 of 1940
October 11, 1940
BHIDE, J.

AMIR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NATIONAL BANK OF INDIA, DELHI—DEFENDANT—RESPONDENT

Master and servant—Employment of servant on basis of special contract—Pension rules subsequently framed by employer—Rules, when can be imported into contract—Pension, when cannot be claimed as of right.

Where a person has been employed on the basis of a special contract the provisions of the pension rules, framed by the employer subsequently cannot be imported into it unless there is any indication in the contract itself that the rules were to be considered as incorporated in the contract.

In the absence of a contract between the employer and the employee, the employee cannot as of right claim the pension for past services. Nor can the pension which is granted as a matter of grace be claimed as of right.

Mr. *Shamair Chand*, for the Appellants.

Messrs. *M. C. Mahajan*, *Shamsher Bahadur* and *Raj Narain*, for the Respondent.

Judgment.—The plaintiff Amir Singh was employed as treasurer by the defendant, National Bank of India After serving for about 25 years, he was granted a pension of Rs. 217 per mensem, but subsequently it appears that the Bank suffered a loss of about Rs. 77,500 as a result of the action of a firm of the joint Hindu family to which the plaintiff belonged. The defendant Bank thereupon stopped the pension. The plaintiff therefore instituted the present suit for recovery os Rs. 1,953 as arrears of pension for nine months. The main issue in the case was whether the plaintiff was entitled to pension as of right or the pension was

granted to him as a matter of grace. The Courts below have found the issue against the plaintiff and dismissed his suit. From this decision the plaintiff has preferred a second appeal.

It has been found by the learned District Judge that the contract on the basis of which the plaintiff was employed as a treasurer did not contain any provision for the grant of a pension to him on his retirement. Learned Counsel for the appellant has not shown that this finding of the learned District Judge is wrong. Not only the original contract between the parties of the year 1906 did not contain any provision for the grant of a pension to the plaintiff, but even the subsequent contracts between the parties right up to the year 1928 did not contain any such provision. It has not been shown that any rules for the grant of pension even existed in the year 1906 when the plaintiff was first employed as a treasurer. It is alleged that rules for the grant of pension were framed in the year 1920 and as these rules govern the Indian staff, the plaintiff should be held to be entitled to pension on the basis of these rules. The rules themselves however provide that they will not affect any agreement between the Bank and the employees, if any. In the present instance the plaintiff had been employed on the basis of a special contract and therefore the provisions of the rules cannot be imported into it unless there is any indication in the contract itself that the rules were to be considered as incorporated in the contract. In none of the contracts is there any indication that the rules as regards pension were to be considered as part of the contracts relating to the employment of the plaintiff. I therefore see no reason to differ from the finding of the learned District Judge that the grant of pension was not a part of the contract on the basis of which the plaintiff was employed.

The next contention of the learned Counsel was that the Bank having granted a pension to the plaintiff was not competent to withdraw it subsequently. It was contended that past services were a good consideration for the grant of pension under the Indian Law. There seems to me to be no force in this contention although past services may form a good consideration for a contract under the Conract Act. In the present instance, the past services had been remunerated by the grant of salary and commission to the plaintiff and there was therefore no question of compensating the plaintiff for past services. The pension appears to have been granted to the plaintiff as a matter of grace and the application made by the plaintiff for the grant of pension also shows that he was cognisant of the fact. The appeal fails and is dismissed with costs.

D. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 140/44 of 1940

October 15, 1940

ALMOND, J. C.

Sardar MOHD. ALI JAN

S. AZIMULLAH JAN—APPELLANT

versus

Mirza ABDUL HAKIM *Mirza* GHULAM MOHIUDDIN KHAN AND ANOTHER—RESPONDENTS

Pre-emption—Jurisdiction—Appeal—Pre-emption decree on payment of price and compensation for improvement—Appellate forum must be determined on basis of price.

The value of a pre-emption suit which is decreed on payment of price and compensation for improvement, does not include the amount of compensation for improvement for purposes of appeal. The appellate forum must be determined on the basis of price made payable. 68 Ind. Cas. 890 (4), followed, 111 Ind. Cas. 129 (1), 98 Ind. Cas. 890 (3) and 177 Ind. Cas. 686 (3), distinguished.

C. A. against an order of the Additional District Judge, dated June 4, 1940

Sh. *Allah Bakhsh*, for the Appellant.

Sh. *Mohd. Shafi*, for the Respondent (Vendee).

Judgment.—Sardar Mohd. Ali Jan brought a suit for pre-emption of a house situated in Peshawar City on payment of Rs. 2,800. The learned Senior Subordinate Judge who heard the suit dismissed it on the ground that the plaintiff was a minor and had sued without a next friend. He, however, came to the decision on all the issues amongst which are the following:

No. 4. Was the price Rs. 3,000 fixed or paid in good faith?

He found that it had been so paid.

No. 5. If, not what is the market value?

He found the market value to be, Rs. 3,000.

No. 7. Was the defendant entitled to make any improvements and is he therefore, entitled to compensation? If so what?

He found that the defendant was entitled to receive compensation of Rs. 3,100 on account of improvements.

The plaintiff appealed to the District Judge who returned the appeal for presentation in this Court on the ground that the value of the suit for purposes of jurisdiction was Rs. 6,100 *i. e.*, Rs. 3,000 market price of the house and Rs. 3,100 on account of improvements. Against that order the plaintiff has appealed to this Court. He has also put in subsidiary application praying that if the appeal is decided against him, the original appeal be heard in this Court and he be given an extension of time to bring it within the period of limitation.

Under the provisions of s. 30, N.-W. F. P. Courts Regulation, the appeal lies to the Court of the District Judge in a suit of value not exceeding Rs. 5,000. The question of the valuation of suits for possession of houses is not covered by the Suits Valuation Act, nor by any rules which have been made. In the tabular statement which is given in the "instructions on the subject of Suits Valuation Act, VII of 1887 and the rules made thereunder for determining the value of certain classes of suits for purposes of court-fees and jurisdiction" issued by the Chief Court, Punjab and published as an appendix to the Court Fees and Suits Valuation Act of Sabharwal, and Anand, it is stated that the valuation for purposes of jurisdiction in such cases is "the market value presumably but this must be left to judicial decision" and it is on the basis of judicial decisions of the Lahore High Court that the learned Additional Judge came to the conclusion that the suit was of the value of Rs. 6,100. The cases to which he referred were *Ilahi Jan* v. *Rahmat Ullah* (1), *Jaswant Ram* v. *Moti Ram* (2) and *Sis Ram* v. *Sohan Lal* (3). Those cases, learned Counsel for the appellant before me seeks to distinguish from the present case, and he, in his turn relies upon *Chiragh Din* v. *Seraj Din* (4) which cites with approval two earlier cases *Dharam Chand* v. *Girdhari Lal* (5) and *Lal Hussain* v. *Hassa Khan* (6). Of the cases which were relied upon by the learned Additional Judge *Ilahi Jan* v. *Rahmat Ullah* (1) did not contain any question of compensation for improvements. The plaintiff in that case had sued to pre-empt certain property for Rs. 2,000 although 7,000 had been stated in the sale deed. It was decreed by the original Court on payment of Rs. 7,000. An appeal was preferred to the District Judge who held that the market price was Rs. 2,000 and he therefore entertained the appeal. It was held by the High Court that the value for purposes of jurisdiction was that which was found by the trial Court and not that which the plaintiff had stated in his plaint. It also referred to *Chiragh Din* v. *Seraj Din* (4). *Jaswant Ram* v. *Moti Ram* (2) was a Full Bench ruling but it related to a suit for redemption and in this connection learned Counsel points out that the amount which is to be paid on a redemption of mortgage is not based on any equitable considerations, as is the amount to be paid as compensation for improvements in a pre-emption suit. *Sis Ram* v. *Sohan Lal* (3) also did not raise any question of compensation for improvements. It may further be noted at this stage that when the learned Additional Judge was dealing with the case reported in *Ilahi Jan* v. *Rahmat Ullah* (1) he quoted a passage which was itself quoted from the 1926 case [*Jaswant Ram* v. *Moti Ram* (2)] in which the words "pre-emption of a mortgage" occur. It is however obvious that the word "pre-emption" is a misprint for the word "redemption" and this may have influenced the learned Additional Judge in coming to his conclusion.

The case relied upon by learned Counsel for the appellant namely *Chiragh Din* v. *Seraj Din* (4) is a direct authority on the problem now before me. In that case the plaintiff had sought pre-emption on payment of Rs. 60 and he was granted a decree on payment of Rs. 60 as the pre-emption price and on payment of Rs. 71 as compensation for improvements. The appeal was heard by a Senior Subordinate Judge who would not have jurisdiction to hear it had the value of the suit been Rs. 131 but who had jurisdiction to hear it if the value of the suit was Rs. 60. It was held by the learned Judges who decided the question in the High Court that the value of the suit for purposes of jurisdiction should not include any amount awarded as compensation for improvements. It was pointed out that the claim of the plaintiff was not to take over the improvements but to be substituted for the vendee as owner of the property as it was when it was sold to the vendee, that the grant of compensation for improvements was discretionary, that the vendee might

(1) A I R 1928 Lah. 670; 111 Ind. Cas. 129; 10 L L J 277.
(2) A I R 1926 Lah. 376; 96 Ind. Cas. 890; 7 L 570; 27 P L R 605 (F B).
(3) A I R 1938 Lah. 311; 177 Ind. Cas. 686; 40 P L R 88; 11 R L 354.
(4) A I R 1923 Lah. 107; 68 Ind. Cas. 890; 3 L 386; 5 L L J 137.
(5) 38 P L R 1902.
(6) 96 P L R 1912; 13 Ind. Cas. 428; 68 P W R, 1912.

be allowed to remove his improvements or even be made to forego any compensation for them. I accept the reasoning given in this judgment and hold that this appeal lay to the District Court and not to this Court. The appeal is therefore accepted and the memorandum of appeal will be returned to the District Judge for disposal on its merits. The subsidiary application no longer arises and is accordingly dismissed. There will be no order for costs on that application and the costs of the main appeal in this Court will be costs in the District Judge's Court. Pleader's fees Rs. 32.

D. *Appeal accepted.*

ALLAHABAD HIGH COURT

Execution Second Appeal No. 1718 of 1938
September 24, 1940
BRAUND, J.
UJAGAR SINGH—APPELLANT
versus
LIKHA SINGH AND ANOTHER—RESPONDENTS

Limitation Act (IX of 1908), Art. 181—Applicability to proceedings under s. 144, Civil Procedure Code (Act V of 1908)—Decree for pre-emption by trial Court—Deposit made—Decree reversed in appeal by original vendee—Amount withdrawn before such decree—Application for restitution—Time, when runs—Second appeal by pre-emptor—Limitation, if suspended—Time, when runs in case of deposit withdrawn after first Appellate Court's decree—Civil Procedure Code (Act V of 1908), s. 144—Proceedings against person not party to suit.

The article of Lim. Act applicable to applications under s. 144, Civil P. C., is Art. 181. Where the pre-emption decree of the trial Court is reversed in appeal by the original vendee, the right to apply for restitution in respect of the amount withdrawn by the vendee before the appellate decree from out of the deposit made in Court by the pre-emptor decree-holder for payment to the vendee, accrues at the moment when the first Court's decree is drawn up and the limitation runs from that time. The right to apply for restitution is not suspended because a second appeal is preferred by the pre-emptor. In respect of the amount withdrawn by the vendee after the decree of the first Appellate Court, limitation for restitution in respect of that amount runs from the date on which the amount was withdrawn. 141 Ind. Cas. 121 (1) and 150 Ind. Cas. 1096 (2), relied on.

Proceedings under s. 144, Civil P. C., cannot be taken against a person who was not a party to the suit.

Ex. S. A. from the decision of the Civil Judge, Farrukhabad, dated September 3, 1938.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *Babu Ram Avasthi*, for the Respondents.

Judgment.—This is a second appeal. It arises in this way. One Dhyan Singh, the father of the present plaintiff-appellant, had occasion to bring a suit for pre-emption. On January 18, 1930 a decree was passed in favour of Dhyan Singh for pre-emption upon payment of a sum of Rs. 1,500. This sum was payable as to Rs. 469 to the vendor, Gaya Singh, and as to Rs. 1,031 to Likha Singh who was the original purchaser. The reason why those payments were to be made in that way was, apparently, that out of the original purchase price of Rs. 1,500 a sum of Rs. 469 still remained due to the original vendor. There then follows the sequence of events which have given rise to this appeal. This appeal turns entirely on a point of limitation and it is, therefore, necessary to observe the dates with some care. The original decree was passed, as I have said, on January 18, 1930. The payments into Court were made immediately afterwards. In due course Likha Singh filed a first appeal against the pre-emption decree and on January 9, 1931, that appeal was allowed and a decree was passed dismissing the original suit. Now, at that point the position was that there was no pre-emption and, accordingly, subject to anything that might have intervened, Dhyan Singh would have been entitled to get back the monies he paid into Court.

Several things, however, had happened in the meantime. On January 30, 1930 and again in December 1930, Likha Singh had withdrawn an aggregate sum of Rs. 384-3-0 out of Court. It will be noticed that both those dates are prior to the decision of the first appeal. The way in which Likha Singh withdrew those monies was this. It will be remembered that out of the total sum of Rs. 150 originally paid into Court Rs 469 stood in Court to the credit of Gaya Singh, while Rs. 1,031 stood in Court to the credit of Likha Singh. Likha Singh happened to have a money decree against Gaya Singh on another account altogether. In execution of that money decree, Likha Singh attached and ultimately obtained payment out of Court of this sum of Rs. 384-3-0 out of Rs. 469 standing to the credit of his judgment-debtor, Gaya Singh.

On February 24, 1931, which was after the decision of the first appeal, another person named Daya Mahesh, who is defendant-respondent No. 2 to the present appeal, withdrew Rs. 1,63-8-0 out of Rs. 1,031 standing in Court to the credit of Likha Singh. Daya Mahesh had a decree against Likha Singh and he executed it by attaching Likha Singh's money in Court to the extent of Rs. 163-8-0. Meanwhile Dhyan Singh had filed

a second appeal in the suit. This was dismissed by the High Court on November 23, 1933. On November 23, 1936, exactly three years after the date of the dismissal of the second appeal Dhyan Singh's son, the present plaintiff-appellant, made the present application under s. 144, Civil P. C., for the recovery from Likha Singh of the sum of Rs. 547-11-0 made up, as to Rs. 384-3-0 of the sum withdrawn in the year 1930 by Likha Singh and, as to Rs. 163-8-0, of the sum withdrawn by Daya Mahesh in February, 1931 which sum had gone to discharge a judgment debt for which Likha Singh was liable. To this application under s. 144, Civil P. C., both Likha Singh and Daya Mahesh were made respondents.

As regards Daya Mahesh, he can be disposed of in a very few words. He was never a party to the suit and, accordingly, it is conceded that as against him the proceedings under s. 144, Civil P. C., are misconceived. The suit as against him must be dismissed with costs. As regards Likha Singh, however, the matter is not so easy. The defence raised by Likha Singh was one of limitation. The point can be put very shortly. He says that the proper article of limitation is Art. 181 which allows a period of three years from the time "when the right to apply accrues." He says that the right to apply for restitution under s. 144, Civil P. C., first accrued, as regards Rs. 384-3-0 when the first appeal was allowed on January 9, 1931 and, as regards the sum of Rs. 163-8-0 on February 24, 1931 when it was withdrawn by Daya Mahesh. He says, accordingly, that this application was well out of time and must be dismissed. That view of the matter has commended itself to both the lower Courts and it is from their orders dismissing the application that this second appeal has come to me.

It has been very ably argued by Mr. Baleshwari Prasad who concedes that the proper article of limitation is Art. 181. Indeed, he is compelled to concede that because he cannot withstand the volume of authority which exists in this Court to that effect. It is true that among the High Courts in India there is an unfortunate conflict of opinion on this matter, the High Courts of Madras, Bombay and Lucknow taking one view and the High Courts of Calcutta, Patna and Allahabad taking the opposite view. It is sufficient for me to say that it is well-settled in this Court at any rate that the proper article of limitation is Art. 181 and I need not, I think, discuss that aspect of the matter any further. But Mr. Baleshwari Prasad goes on to say that that does not dispose of the matter. He says in the first place, that, even accepting Art. 181 as the correct article to apply, the period of limitation must be taken from the date of the decision of the second appeal in this Court and not from the date of the decision of the first appeal.

I regret that I do not agree with him as regards this. We have, after all, in this case simply to apply to the best of our ability the words of the article. No words could be simpler. They are "when the right to apply accrues." Now, it seems to me, at any rate as regards the sum of Rs. 384-3-0, that the right to apply to have that sum restored to him under s. 144 arose the moment the first appeal was decided, perhaps it would be more accurate to say at the moment the decree consequent upon the first appeal was drawn up. The practical result of the first appeal was that no pre-emption remained and no moneys need, or ought to have been paid into Court by Dhyan Singh. Had he chosen to do so, he could at once have claimed to get those moneys back. If he had tried to, he would have discoverd that a part of this money still remained in Court, whereas a part of it had been paid out to Likha Singh and Daya Mahesh. As Mr. Baleshwari Prasad rightly points out, no application under s. 144, Civil P. C., would have been necessary in respect of the money still remaning in Court. But as regards those moneys which had found their way into the hands of Likha Singh and Daya Mahesh respectively the right to apply under s. 144 immediately arose. The only distinction between the sum of Rs. 384-3-0 withdrawn by Likha Singh and the sum of Rs. 163-8-0 withdrawn by Daya Mahesh is that the latter sum was not drawn until February 1931, whereas the former sum had already been withdrawn when the first appeal was allowed. In the latter case therefore the *terminus a quo* for limitation would be the date when it was actually withdrawn, whereas in the former case the date would be the date of the decision in the first appeal.

Then Mr. Baleshwari Prasad goes on to say that this cannot be so because at all relevant times his client was in complete ignorance of the payment having been made out of Court to Likha Singh and Daya Mahesh respectively. He points out, as regards the payment out of Court to Daya Mahesh, that it was to put it at its lowest—most improperly made, because at that date

the first appeal had already been allowed and the money in Court was no longer the money of Likha Singh. It was either the money of the plaintiff or else was in suspense pending the hearing of the second appeal. Upon either view, it is extremely difficult to understand how any Court could have allowed it to be attached. In both cases the plaintiff says that these payments out of Court were made without notice to him and that he was in ignorance of them. But, allowing for all these circumstances in the appellant's favour, I still do not see how it affects the matter. What we have to consider is when his "right to apply accrued." Now, a man's "right" is one thing and his opportunity to take advantage of that right is another thing altogether. A person may possess a right although he is in complete igorance of it. A relative may have died a month ago, leaving a person a legacy by his or her will. Can it be said that the right of the legatee does not exist because he has remained in ignorance of the testator's death? Analogies are unsafe I know, but it seems to me that it must be conceded here that the appellant's right to get his money back existed notwithstanding that he did not know, or may not have known, that the money had ever been paid out of Court.

The next argument addressed to me is that it was impossible for the appellant to have made an application under s. 144 pending his own second appeal. It is pointed out with considerable force that to have applied to get his money back pending the appeal would have been inconsistent with the appeal itself. Whatever may be the truth of that, I think there are at least two answers to it. The first is that there was nothing in the world to compel Dhyan Singh to appeal at all. It must always be remebered that what we are considering is when the right accrued. If the right once existed it is, in my view, neither defeated nor postponed, by the exercise by Dhyan Singh quite voluntarily of an option to appeal. It would have been quite open to Dhyan Singh to say "I am now content with matters as they stand and I will try to get my money back." Instead of that he appealed. But that does not alter the fact that his right to get his money back had accrued. That is one answer. Another answer, equally satisfying to my mind, is that I do not believe there was any inconsistency at all. If Dhyan Singh had wanted to recover this Rs. 547-11-0 from the persons into whose hands it had got, he could surely have made an application for its restitution, not perhaps by payment to himself, but by payment of it back again into Court. The Court has ample power under s. 144 to make all such orders as the nature of the case may require and, if the Court had felt that there was any difficulty or inconsistency about ordering payment to the appellant himself, the Court could very well have ordered that the money should be paid back into Court where it came from pending the hearing of the second appeal. I do not believe that as a practical matter there was any real difficulty at all.

Apart altogether from aurhority, I should have felt litte or no difficulty in this case. But there is a substantial volume of authority in the Court, of which I only purpose to refer to two cases. The first is *Dhapo* v. *Baqridi* (1). That is a decision of Mukherji and Bennet, JJ., in which the exact point was decided. It was held, in precisely similar circumstances to these, that the proper article of limitation was Art. 181 and that the period of three years prescribed by the article was to be counted from the date of the lower Appellate Court's decree reversing the decree of the trial Court and not from the date of the High Court's decree confirming that of the lower Appellate Court. The learned Judges in this case say:

"To this application of Baqridi Art. 181 applies. This is the view taken in this Court. Then the limitation of three years begins to run from the date on which the right to apply accrues... .....The right to apply for restitution accrued as soon as Baqridi's appeal succeeded in the first Appellate Court. That right to apply for restitution was not in any way suspended by the fact that Ramji Lal filed a second appeal. It has been argued that Baqridi took the precaution of waiting to see how the second appeal fared.....We have the simple words of the third column of Art. 181 to interpret, and the only way in which we can interpret it is to say that the right to apply accrued as soon as the decree in favour of Ramji Lal was reversed."

The other case to which I desire to refer is the Full Bench case in *Parmeshar Singh* v. *Sitladin Dube* (2). This was a Full Bench case to which Sir Shah Sulaiman, C. J. and Mukerji and King, JJ. were parties. It is unfortunate perhaps that on two of the questions involved the decision is by a majority. But it is all the same a decision binding on me. It concludes that the proper article of limitation is Art. 181, Lim. Act, and it concludes, moreover, that in a simple case such as the one before me the *terminus a quo* from which limitation runs is the

(1) 54 A 770; 141 Ind. Cas 121; A I R 1932 All 609; (1932) A L J 724; Ind. Rul. (1933) All. 61.
(2) (1934) A L J 503; 150 Ind. Cas. 1096; A I R 1934 All. 626; 57 A 26; 7 R A 65 (F B).

date of the lower Appellate Court's decree by which the first Court's decree is reversed. An elaborate argument had been addressed to the Full Bench in that case to the effect, if I have understood it rightly, that where an appeal is brought either from an original decree or from a prior appellate decree, it is only the decree of the ultimate Appellate Court that conclusively and once and for all decides the rights of the parties. For that reason it was suggested that in a case such as the present one you have to look at the point of time when the right, the accrual of which is the starting point of limitation, was finally and conclusively established. That could only be done by the final and conclusive decree in the prceedings, that is to say, the decree of the second Appellate Court. So the argument ran and it found favour with the then learned Chief Justice. He says in a dissenting judgment :

"I am therefore of opinion that the expression 'where and in so far as a decree is varied or reversed' which occurs in s. 144, must mean where the decree is reversed either temporarily or finally. No doubt a succeesful party is entitled to apply for restitution immediately after there is a temporary or provisional reversal, but if he chooses to wait till the reversal is complete and absolute he would nevertheless be in time if he comes in within the prescribed time from the date when the decree is finally declared to be reversed without any further question or doubt."

The learned Chief Justice was prepared, therefore, to hold that limitation ran from the date of the decree in second appeal. The opposite view, which was the decree of the Court, is expressed in the following passage from the judgment of Mukerji, J. He says :

"The argument at the Bar however, was that it is the final decree that is the principal decree in the case and it is that decree alone which can be executed. There can be no doubt that the proposition is true, but only so far as it goes. We are not considering whether the final decree is not (*sic* "now") the decree which finally defines the rights of the parties ; but the fact remains that it was open to the defendants to apply for restitution on an earlier date and, unless the law postpones that right and gives a fresh right, the limitation must begin to run from the date when the right to apply first accrues."

If I am at liberty to express my own view, I should with great respect prefer the view which found favour with a majority of the Court in this case. For all these reasons, in my judgment, the view of the lower Courts is correct and this appeal must be dismissed with costs. I have been asked for leave to appeal under the Letters Patent, but it is not a case in which I feel justified in granting leave.

S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 1694 of 1938
August 19, 1940
LODGE, J.

Smt. ANNAPURNA DASI—DEFENDANT—APPELLANT

versus

BAZLEY KARIM FAZLEY MOULA, —PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 85—Default by purchaser to pay balance—Sale becomes a nullity—Practice—Case raised in plaint—No denial in written statement—Question not agitated in trial Court—Appellate Court, if can consider and decide it.

Whether the deposit made under r. 85, O. XXI, Civil P. C., be forfeited or not, the purchaser shall forfeit all claim to the property if he makes default of payment of the balance of the purchase money and the sale becomes a nullity.

Where the case was clearly made out in the plaint that defendant had failed to deposit the balance of the purchase money and there was no denial of the assertion in the written statement the facts necessary to be established must be taken to be admitted facts. Consequently the lower Appellate Court would be justified in considering the question and giving a decision thereon even though the question had not been agitated in the Court of first instance.

A. from the appellate decree of the Sub-Judge, Zillah Birbhum, dated August 11, 1938.

Mr. *Gopendra Nath Das*, for the Appellant.

Messrs. *Satindra Nath Mookerjee* and *Ramendra Ch. Roy* (for Deputy Registrar), for the Respondents.

Judgment.—This appeal arises out of a suit for declaration of title to certain lands and for recovery of possession of the same. The material facts briefly are as follows : The plaintiff in the suit and defendant No. 1 jointly obtained a decree for rent against one Khatun Bibi in the presence of other *pro forma* defendants in the year 1931. Defendant No. 1 was found entitled to Rs. 8 odd and the plaintiff to Rs. 15 in that decree. In the year 1933 defendant No. 1 took out execution of that decree, had the property of the judgment debtor put to sale and purchased it on November 27, 1933. At the time of the sale, defendant No. 1 applied to set off his decretal amount against the purchase money. This was allowed. Thereafter apparently through oversight, the balance of the purchase money was not deposited by defendant No. 1. But in spite of his failure, the sale was confirmed. The bid made by defendant No. 1 at which the sale was confirmed was for Rs. 35-8-6 and his claim under the

decree was only about Rs. 16. Defendant No. 1 appears to have taken possession after his purchase. In the following year, the plaintiff took out execution proceedings of the same decree, had the property put to sale and on July 10, 1934, purchased the property. Thereafter the plaintiff instituted the present suit for declaration of his title to the lands and for recovery of possession and for mesne profits asserting that he had been dispossessed by defendant No. 1 in the year 1935. Both the Courts below decreed the plaintiff's suit. In the original Court it was held that the decree was a rent decree and that the sale at which the plaintiff purchased had the effect of a rent sale, whereas the sale at which defendant No. 1 purchased had the effect only of a money sale. In the lower Appellate Court it was found that the decree itself had the effect only of a money decree and that both sales in execution had the effect of money sales. The lower Appellate Court held that defendant No. 1 having failed to deposit the balance of the purchase money, her purchase in 1933 was a nullity and therefore the plaintiff was entitled to succeed. Against that decision, defendant No. 1 has appealed.

On behalf of the appellant it has been pointed out that this question was not considered in the Court of first instance and it has been argued that the lower Appellate Court ought not to have decreed the plaintiff's suit on this ground. It is true that there is no discussion on this point in the judgment of the learned Munsif; but it appears in para. 4 of the plaint that the case was clearly made out therein that defendant No. 1 had failed to deposit the balance of the purchase money. There is no denial of the assertion in the written statement and the facts necessary to be established before this question can be decided must be therefore taken to be admitted facts. Such being the case, the lower Appellate Court was justified in considering this question and giving a decision thereon even though the question had not been agitated in the Court of first instance. It has been argued that under the amended r. 86 of O. XXI, the Court may, if it thinks fit, refrain from forfeiting the deposit made under r. 85 and that therefore the effect of the failure to deposit the balance of the purchase money is that the sale is not a nullity and that the property is a security for payment of the balance of the purchase money. The only case on this point to which my attention has been drawn is the case in *Mohamad Ali Mia* v. *Kibria Khatun* (1), where it was held under the Code of 1882 that where the balance of the purchase money is not paid, the sale is a nullity and not merely an irregular sale for which remedy may be had by an application under s. 244 or s. 311 of that Code.

The learned Advocate for the appellants has contended that under the old Code, the Court had no option and was bound to forfeit the deposit made under s. 306 of the Code and that consequently when default was made for payment of the balance, it must be taken that in law no payment whatever had been made for the property and that consequently the sale was a nullity. It is true that r. 86 has been amended and the words "the deposit.....shall be forfeited to Govt." have been replaced by the words "the deposit may, if the Court thinks fit...be forfeited to the Govt," But the concluding words of the rule have remained unaltered and that part lays down that the defaulting purchaser shall forfeit all claim to the property. It follows that whether the deposit made under r. 85 be forfeited or not, the purchaser shall forfeit all claim to the property if he makes default of payment of the balance of the purchase money. In my opinion, the amendment of the rule does not make any alteration in the law regarding the effect of the failure to deposit the balance of the purchase money and the decision in *Mohamad Ali Mia* v. *Kibria Khatun* (1), referred to above must be taken to be still good law. Following that decision I hold that the lower Appellate Court was right in holding that the sale at which defendant No. 1 purchased was a nullity and consequently he was right in decreeing the plaintiff's suit as he did. The appeal accordingly fails and must be dismissed with costs payable to plaintiff-respondent No. 1.

D. *Appeal dismissed.*

(1) 15 C W N 350; 9 Ind. Cas. 66.

BOMBAY HIGH COURT

Suit No. 1491 of 1939
February 5, 1940
BLACKWELL, J.

J. C. ENO, LTD.—PLAINTIFFS

versus

VISHNU CHEMICAL Co—DEFENDANTS

Trade mark—Infringement—Imitation of words—Tests—Copy of words used as trade-mark in any other language intended to deceive or likely to deceive, can be restrained — Words "Fruit salt" distinctive mark of plaintiff's saline—Defendant selling saline under name "Falaxar", meaning in Marathi "Fruit Salt"—Defendants held could be restrained from using that word—Defendant's goods colourable imitation of plaintiff's goods—Actual deception, if must be proved—Passing-off action—Plaintiff can make choice of either account and payment of profits gained by defendant or enquiry as to damage occasioned to plaintiff.

If traders in India have acquired in any language the exclusive right to the use of certain particular marks not merely as descriptive of but as distinctive of their goods, they have the right to restrain another trader from copying those words for use in connection with a similar class of goods in any other language in India. If traders attempt to deceive by mis-spelling or distorting any word in any shape or form, it being obvious what word they are in fact intending to indicate, they are in fact attempting to deceive. This is the real test which has got to be applied not only to the use of words in the same language, but to the use of words in any other language which may be a colourable imitation of words in the language from which the evidence may establish that they were in fact taken. If the Court comes to the conclusion that the use of the words in a foreign language was an intention to deceive and in fact was likely to deceive, then the Court ought to restrain the use of such words. [p 395, col. 1; p. 396, col. 1.]

The plaintiff's saline was well-known in India and was very commonly asked for as "Fruit Salt" the words "Fruit Salt" were well-known in the trade to belong exclusively to the plaintiff's saline, and those words were not merely descriptive of, but were a distinctive mark of, the plaintiff's saline. The defendants had been selling and offering for sale in Bombay and other places in India saline not of the plaintiffs' manufacture under the name "Falaxar", and that word was the Marathi equivalent of the plaintiffs' mark "Fruit Salt":

Held, that the word "Falaxar" was the Marathi equivalent of the mark "Fruit Salt", and the defendants could therefore be restrained from using such name. Though any one may use the word "Fruit" and the word "Salt" in any language in India as he pleases, yet he is not permitted to use those words as indicative of a class of goods similar to the plaintiffs' goods, the reason being that those words in the English language had become distinctive of their goods, and if those words were used in any other language in India in connection with a similar class of goods, the use of the words might be liable to cause deception: [p. 396, col. 2.]

Held, further that it could not be said that any one could possibly have sought to register in England in connection with goods similar to the plaintiffs' goods the words "Fruit Salt" in any foreign language, *In re Trade Mark of John Dewhurst & Sons, Ltd.* (1), *Eastman Photographic Moterials Co.* v. *Comtroller General of Patents Designs and Trade mark* (3), *Eno* v. *Dunn* (4) and *Singer Manufacturing Co.* v. *Loog* (5), relied on. [*ibid.*]

Where defendants' goods are colourable imitation of the plaintiff's goods, it is not necessary for the plaintiff to prove actual deception especially when the defendants sold their goods not openly in shops but in a hole and corner manner by canvassers and by a lorry upcountry.

In a passing off action the plaintiff is entitled to make his choice of either an account and payment to him of the profits which the defendant has gained by his wrongful conduct, or an enquiry as to, and payment of, the damages occasioned to the plaintiff by reason of it. 181 Ind. Cas. 17 (6) and 114 Ind. Cas. 30 (7), distinguished. *Weingarten Bros.* v. *Charles Bayer & Co.* (8), relied on. [p. 399, col. 1.]

Messrs. *F. J. Coltman* and *N. P. Engineer*, for the Plaintiffs.

Messrs. *K. T. Desai* and *A. A. Peerbhoy*, for the Defendants.

Judgment.—This is a passing-off action. The plaintiffs have over a long period of time manufactured and sold in the Indian markets and elsewhere in large quantities a saline under the names "Eno" and 'Fruit Salt.' That saline is sold in octagonal shaped bottles packed in cardboard cartons enclosed in wrappers. Exhibit (C) is a specimen of the plaintiffs' goods, and I will discuss the get-up thereon later. The plaintiffs' case is that their saline so manufactured and sold, and bearing the marks "Eno" and "Fruit Salt," has acquired a very wide reputation throughout India, and that the marks "Eno" and "Fruit Salt" are well known to the trade and the public as denoting saline of the plaintiffs' manufacture, and that such saline is commonly asked for by purchasers by the name "Fruit Salt" or "Eno's Fruit Salt." The plaintiffs complain that the defendants have been selling and offering for sale in Bombay and other places in India saline not of the plaintiffs' manufacture under the name "Falaxar," and that that word is the Marathi equivalent of the plaintiffs' mark "Fruit Salt" and that the defendants are and have been selling and offering for sale "Falaxar" packed in bottles of the same size and shape as those of the plaintiffs and packed in cartons wrapped in wrappers so contrived as to be a colourable imitation of the plaintiffs' wrappers. Exhibit (E) is a specimen of the defendants' goods, and I will discuss the get-up thereon later. The plaintiffs allege that they have acquired a right to the exclusive user of the marks "Eno" and "Fruit Salt" as applied to their saline, and that the defendants' mark "Falaxar" is a colourable imitation of the plaintiffs' mark "Fruit Salt," and is calculated to deceive purchasers into the belief that the defendants' saline bearing the mark "Falaxar" is saline of the plaintiffs' manu-

facture. The plaintiffs further allege that the get-up of the defendants' saline is a colourable imitation of the get-up of the plaintiff's saline and is calculated to mislead purchasers into the belief that the defendants' saline so got-up is saline of the plaintiffs' manufacture.

By their written statement the defendants admit that the saline manufactured and sold by the plaintiffs in bottles bearing both the marks 'Eno" and "Fruit Salt" has acquired a wide reputation and commands a large sale in the market in the principal cities of India. They admit that the mark "Eno" is well-known to the trade and the public as denoting the saline of the plaintiffs, but deny that the words "Fruit Salt" by themselves are known to the trade or the public as denoting the saline of the plaintiffs' manufacture. They allege that the saline manufactured by the plaintiffs is commonly called and asked for by purchasers by the name of "Eno" or "Eno's Fruit Salt" and not by the name "Fruit Salt." They admit that they have been selling and offering for sale in Bombay and other places in India since the year 1931 a saline manufactured by them under the name 'Falaxar." They deny that "Falaxar" is the Marathi equivalent of the mark "Fruit Salt." They deny the alleged colourable imitation and say that the floral design and pictorial representation of fruits on their wrappers is common to the trade. They deny that the plaintiffs have acquired a right to the exclusive use in India of the mark "Fruit Salt," and say that these words have acquired merely a descriptive meaning in the Indian market. They say further that the plaintiffs' claim is barred by the law of limitation. [His Lordship then set out the issues and proceeded.] The plaintiffs had used the words 'Eno" and "Fruit Salt" in England in connexion with their saline for many years. They registered "Fruit Salt" as their trade-mark in England on April 2, 1906, Ex. (G). They have to prove in this case that they have used those words in India and have acquired an exclusive right to use them in connexion with their saline, and that those words have become distinctive marks in connexion with their saline.

The reputation of the plaintiffs' saline in India and the wide extent of their sales is admitted in para. 3 of the written statement, and is established by the evidence. Mr. E. L. C. Gwilt, who is now the Managing Director of F. J. Foster & Co. Ltd., came out to India in November 1922, as an employee of Messrs. Joseph Nathan & Co. Ltd., and as the representative both of the Company and of Mr. Foster, he attended to the interests of the plaintiffs in regard to the sale of their Fruit Salt in India until June 1924, and during that period visited the principal cities in India, where the plaintiffs' fruit salt was being sold. He said that the sales increased in volume from £30,000 in value in 1922, to £50,000 in value by June 1924. The get-up of the wrapper upon Ex. (C) had, he said, the same appearance to the best of his recollection as it had in 1924. His recollection was not challenged in cross-examination. He said further that no product in India was called "Fruit Salt" except the plaintiffs', and no product was asked for, or accepted, by anybody in the trade, or connected with the trade, as "Fruit Salt" except the plaintiffs' fruit salt during the period in which he represented the plaintiffs in India.

Mr. R. N. Katrak is now and has been for the last nine years the sole sale representative of the plaintiffs in the Bombay Presidency. From 1912 to 1917 he attended in Bombay to the sales of the plaintiffs' fruit salt. He said that the get-up, as it now appears on Ex. (C), was the same between 1912 and 1917, and since 1931 as it is now as far as he could recollect. His recollection also was not challenged in cross-examination. Mr. W. V. Pendharkar, one of the defendants' witnesses, stated that he used to sell the plaintiffs' fruit salt some eighteen years ago at Bhandara in the Central Provinces, where his father carried on business, and where the witness assisted him. He said further that he had known the plaintiffs' bottles for many years with the same carton and wrapper upon them which are upon them now. One G. V. Tole, another of the defendants' witnesses, stated that he had read about Eno's Fruit Salt before he began to sell Ex. (E), and that he had never heard or read of any Fruit Salt except Eno's Fruit Salt. The admission of the defendants in their written statement and this evidence clearly establish the reputation in India and the extent of the plaintiffs' sale.

Next arises the question whether the plaintiffs' saline was well-known and commonly asked for as "Fruit Salt." The oral evidence and the written orders which have been produced establish that the plaintiffs' saline was asked for both as "Eno's" and as "Eno's Fruit Salt," and very frequently simply as "Fruit Salt."

In addition to the evidence of Messrs. Gwilt and Katrak upon this point, there is the evidence of Mr. Marshall, a qualified chemist and representative in India of Messrs. Burroughs Welcome & Co. He has sold thousands of bottles, and said that it is perfectly understood in the trade that by "Fruit Salt" is meant the plaintiffs' "Fruit Salt," and that those words are well-known in the trade to belong exclusively to the plaintiffs' products. Evidence was also given on the point by three persons in the trade who had sold the plaintiffs' saline over a long period of years, and by two members of the public who had purchased it. I find on the evidence that the plaintiffs' saline was well-known in India and was very commonly asked for as "Fruit Salt," that the words "Fruit Salt" are well-known in the trade to belong exclusively to the plaintiffs' saline, and that those words are not merely descriptive of, but are a distinctive mark of, the plaintiffs' saline. [His Lordship then considered the evidence relating to the meaning of the word "Falaxar" and proceeded.] I find that the words Fala and Kshar are of common use in Marathi, and would be well-understood as meaning 'Fruit' and 'Salt' and in combination "Fruit Salt." [His Lordship next went through the defendants' oral evidence and proceeded.]

I turn now to the question whether the defendants had the right to use the word Falaxar. It was argued for the defendants that the plaintiffs have offered no evidence that they themselves have ever used that word, or that they have acquired by user a right to the exclusive use of that word, and that the plaintiffs could only seek to restrain the use of words in a foreign language which they had themselves used and by the user thereof had acquired an exclusive right to that user.

The question whether it was permissible to seek registration of words in a foreign language which might be deceptive having regard to the fact that there was already registered a symbolic trade-mark conveying a similar meaning to that which would be conveyed by the words in the foreign language sought to be registered, was discussed in *In re Trade-mark of John Dewhurst & Sons, Ltd.* (1). In that case the applicants sought to register as part of the trade-mark on one of three panels on a label certain Burmese characters the meaning of which was "The Golden Fan Brand." There were already on the register several trade-marks containing fans and one of them, which was applied to the same class of goods as the trade-mark sought to be registered, had a golden fan. The owners of those trade-marks all consented to the application. The Court of Appeal, however held, reversing the decision of the Vice-Chancellor of the County Palatine, that the Comptroller of Patents, Designs and Trade Marks, was justified in refusing to register a trade-mark containing as an essential part of it, words amounting to a verbal description of a mark already on the register, on the ground that their use would be calculated to deceive, though the words were in the Burmese language and character, which are little known out of Burma. In the course of the argument Lindley, L. J. said (p. 144*):

"The difficulty in your way is this—you could not register 'Golden Fan Brand' in English, nor, I suppose, in any ordinary European language. Can you then do it because the language in which you propose to register it is an out of the way language which few people here know?"

Pausing here for a moment, Counsel for the defendants actually went to the length of contending that it would be open to the defendants to procure registration in England of the Marathi word Falaxar, although the plaintiffs there have got on the register the words Fruit Salt as their registered trade-mark. In my opinion, the suggestion that the defendants would be entitled to register in England the word Falaxar is completely met by the observations of their Lordships in the case to which I am referring. I am clearly of opinion that they would not be entitled or permitted to register the word Falaxar in England. They would be asked what it meant, and if they were honest they would have to concede that in fact it was intended to convey the words Fruit Salt. In the course of his judgment Lindley, L. J. said (page 146*):

"Now the way in which it strikes me has been already pointed out in the course of the argument. Could Messrs. Dewhurst require the Comptroller to register their mark if these hieroglyphics were expressed in language intelligible to Englishmen? In other words, if instead of the hieroglyphics you had their equivalent, 'The Golden Fan Brand,' ought the Court to compel the Comptroller to put such a mark on the register? I say that unquestionably the Court ought not to do so. The objection to it would be that the words must be calculated to deceive because they only express in words what the golden fan of Mr. Boyd expresses to the eye. That is the principle upon which the Star Case, *In re Trade-mark of La Societe Anonyme des Verreries de l'Etoile* (2), proceeded, and I do not think that any evidence which could be adduced

(1) (1896) 2 Ch. 137; 65 L J Ch. 618; 74 L T 388; 44 W R 672.

(2) (1894) 2 Ch. 26; 63 L J Ch. 381; 7 R 183; 70 L T 295; 42 W R 420.

*Pages of (1896) 2 Ch.—[*Ed.*]

would get over that objection, because we know perfectly well that if you once put upon the register a golden fan in the shape of a picture like Mr. Boyd's and you also put upon the register a mark called "The Golden Fan," although without a golden fan, the two must mislead the public, and Mr. Boyd's consent is no answer to that."

Counsel for the defendants pointed out, as was the fact, that in that case there was a symbol upon the register and what was sought to be registered were certain words. He sought to distinguish that case from a case in which words might be upon the register and an application might then be put forward to put on the register words having an equivalent meaning. In my opinion, no such distinction as is sought to be drawn can in fact be drawn. Indeed the case would have been, in my opinion, still stronger if instead of a golden fan being already upon the register the words "Golden Fan Brand" had been registered. I am clearly of opinion as was indicated by their Lordships in that case that no one would have been allowed to register in England words conveying a meaning similar to "Golden Fan Brand." Lopes, L J. in the course of his judgment said (p. 151*):

"But it is said here that these words, being in Burmese, would not be calculated to mislead or to deceive. Now, if we were to hold that the mere fact that the words in question were in the Burmese language was sufficient to rebut the probablity of deception, I ask, where are we to stop? What would be said with regard to French? What would be said with regard to German? What would be said with regard to Welsh? In point of fact, if we pushed that matter to its logical conclusion we should have to go the length of holding that the fact of the words being in any foreign language would be sufficient to rebut the probability of deception. In my opinion that cannot be done."

It is true that their Lordships in that case were dealing with a registered trade-mark. In my opinion, however, the principle there laid down is equally applicable in a country where there is in fact no register of trade-marks, and where traders have to rely on long user of certain marks and on having acquired by long user the exclusive right to the use of particular marks. In my judgment, if traders in India have acquired in any language the exclusive right to the use of certain particular marks not merely as descriptive of but as distinctive of their goods, they have the right to restrain another trader from copying those words for use in connection with a similar class of goods in any other language in India and the reason for my opinion is that there are in India, as is well-known, a very large number of languages, and that a very large number of persons in India know several languages. Many persons who know Marathi know English, many persons who know Urdu know English, many persons who know Gujarati know English, and so on. Accordingly, a person knowing a number of languages would very likely be deceived if a trader translated into one of the languages which that person knew the trade-mark acquired by long user by a trader in another language with which that person was familiar, and affixed that trade-mark so translated to a similar class of goods.

In *Eastman Photographic Materials Co.* v. *Comptroller General of Patents Designs, and Trade-mark* (3), Lord Halsbury in the course of his judgment quoted with approval the report of the Commission appointed to enquire into trade-marks and designs. In the course of their report as appears at p. 576* of the judgment the Commissioners say:

"We would add upon this point that we think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning, should be registered The quetion in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected."

Lord Halsbury said in reference to that report (p. 575*):

"My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that Commission."

There is one other passage in Lord Halsbury's judgment to which I will refer, and that is the passage at the bottom of p. 577* where his Lordship said:

"Of course also words which are merely misspelt, but which are nevertheless, in sound, ordinary English words, and the use of which may tend to deceive, ought not to be permitted."

Although those observations were made in a trade-mark case, they appear to me to be equally pertinent in a country where there is no registration of trade-marks and where a trader's only remedy may be a passing off action. If traders attempt to deceive by mis-spelling or distorting any word in any shape or form, it being obvious what word they are in fact intending to indicate, they appear to me to fall within the principle to which Lord Halsbury was drawing attention, and they are in fact

* Page of (1896) 2 Ch.—[*Ed.*]

(3) (1898) A C 571; 67 L J Ch. 628; 79 L T 195; 47 W R 152; 14 T L R 527; 15 Rep. Pat. Cas. 476.

*Pages of (1898) A. C.—[*Ed.*]

attempting to deceive. This is, in my judgment the real test which has got to be applied not only to the use of words in the same language, but to the use of words in any other language which may be a colourable imitation of words in the language from which the evidence may establish that they were in fact taken. If the Court comes to the conclusion that the use of the words in a foreign language was an intention to deceive and in fact was likely to deceive, then, in my opinion, the Court ought to restrain the use of such words.

Both the plaintiffs and the defendants relied upon *Eno* v. *Dunn* (4). The respondent had applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. The appellant, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescing drink, opposed the application. It was held by Lords Watson, Herschell, Macnaghten (Lord Halsbury, L. C. and Lords Morris, dissenting) that upon the evidence the proposed words as a matter of fact were calculated to deceive the public, that the case therefore fell within s. 73, Patents Designs and Trade Marks Act, 1883, and that the trade-mark ought not to be registered. It may here be pointed out that although the appellant had in fact the words (Fruit Salt) registered as his trade-marks, being unable upon the hearing of the summons to prove that Fruit Salt had been used as a trade-mark before the passing of the Act, 1875, he submitted to an order to remove his trade mark from the register, and confined his opposition to his second ground, *viz.*, that the use of the term 'Fruit Salt' as proposed by the respondent was calculated to deceive. That case therefore proceeded upon the footing that the words 'Fruit Salt' had not been registered as a trade-mark, just as the case before me proceeds on the basis that there is no registration in India. Some of the judgments contain useful observations as to the right to use particular words, such as, 'Fruit Salt.' At p. 257* Lord Waston said:

"I do not think it necessary to refer to the evidence in detail. It appears to me to establish conclusively that although the words "fruit" and "salt" are in common use wherever the English tongue is spoken, they have in combination no technical or scientific meaning, and before the respondent entered the field, were never applied, in popular language, to any known substance other than the article manufactured and sold by the appellant under the name of Eno's 'Fruit Salt.' That circumstance does not give the appellant a right of property in the words "Fruit Salt," or entitle him to use them, by themselves in a registered trade-mark; but it is nevertheless a material circumstance in considering whether the use which the respondent proposes to make of them in his trade-mark would be calculated to mislead.

I have come to the conclusion that the proposed use of the term "Fruit Salt" by the respondent might and in many instances probably would, have the effect of deceiving the public."

Lord Macnaghten at p. 263* said as follows:

"In the present case the evidence shows that the expression 'Fruit Salt' has come to mean Mr. Eno's preparation, that at present it means nothing else, and that Mr. Eno's preparation is well-known and very popular. Mr. Dunn adopts the expression 'Fruit Salt', and gives it a prominent position among the words he seeks to register. I have no doubt that those words are calculated to deceive. They are claculated, and I think designed, to create a confusion in the minds of those persons to whom Mr. Dunn's advertisements are addressed, and to lead the ordinary run of such persons to suppose that his baking powder is in some way or other connected with Mr. Eno's preparation. The object I think was—and if Mr. Dunn's application were successful the result, I am convinced, would be in, some cases at any rate—to induce people to buy under an impression 'not founded in truth,' and not perhaps the less misleading because it is vague and indefinite, and incapable, it may be, of bearing the very slightest examination. Mr. Eno has not and cannot have any exclusive property in the expression 'Fruit Salt' The words of which it is composed are common English words; anybody may use them in any manner and in any connection he pleases, provided the use to which they are applied is not calculated to deceive"

Applying the principle laid down by their Lordships in this case to the case before me any one may use the word "Fruit" and the word "Salt" in any language in India as he pleases. But what, in my opinion, he is not permitted to do is to use those words as indicative of a class of goods similar to the plaintiffs' goods, the reason being that those words in the English language have become distinctive of their goods and if those words are used in any other language in India in connexion with a similar class of goods, the use of the words may be liable to cause deception. After the observations of their Lordships in *In re Trade-mark of John Dewhurst & Sons Ltd.* (1) to which I have referred it cannot, in my opinion, be suggested that any one could possibly have sought to register in England in connexion with goods similar to the plaintiff's goods the words "Fruit Salt" in any foreign language. As was said by James, L. J., in *Singer Manufacturing Co.* v. *Loog* (5) at p. 412 the observations being quoted at p.

(4) (1890) 15 A C 252; 63 L T 6; 39 W R 161.

(5) (1880) 18 Ch. D 395 (412).

* Pages of (1890) 15 A. C.—[*Ed.*]

1 of 6th Edn. of Kerly on Trade Mark:

".....no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark sign or symbol device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer."

I have already pointed out that very many peoples in India know English as well as different vernacular languages. But even if an Indian does not know English but knows only some vernacular language, if a trader is permitted to use in that language words which have become associated with the goods of another trader in another language and are distinctive of the goods of that other trader, he is thereby putting it into the power of unscrupulous dealers to mislead and practise a deception upon the individual knowing only the one language, in that he may thereby be enabled to pass off upon that unsuspecting person goods as and for the goods of the other trader to which those particular words in another language have by long user become attributed.

It was argued for the defendants that an educated person knowing both Marathi and English would read the whole label on Ex. (E) and could never be deceived. He would, it was said, see the words at the bottom "Manufactured by 'Vicco'—Vishnu Chemical Company, Bombay." But unfortunately the world is full not of careful but of careless persons, and of people who frequently are not careful to read the whole of everything they ought to read, and in my opinion looking at the general get-up of Ex. (E), and seeing the word (Falaxar) there on, even an educated person might be misled into thinking that he was getting the plaintiff's fruit salt. It is in evidence before me that illiterate persons frequently bring chits to Chemists' shops and to the shops of persons who sell such preparations as Exs. (C) and (E), and that on such chits the word "fruit salt" is written. Such chits may be given to them either by their doctor, or by their master. Suppose, an illiterate person knowing no English were to bring such a chit to an unscrupulous dealer who was desirous of selling Ex. (E), the dealer might give a bottle of Ex. (E) to the illiterate person, who might very easily say, "Is this fruit salt?" having been told by his master or doctor that what he was to get was fruit salt. He might easily use those words even if he knew no English and did not understand them. It would then be open to the dealer if his would-be purchaser knew Marathi to point to Ex. (E) and say, "Cannot you read the word Falaxar? That means fruit salt." That is the sort of thing which, in my opinion, might happen over and over again if traders were permitted to do what the defendants have done in this case, *viz.*, use a coined Marathi word which does not in fact exist in Marathi, but which would convey the meaning "fruit salt" I hold on the evidence before me that the plaintiffs have acquired a right to the exclusive use of the words "fruit salt" in connection with their saline, that those words are a distinctive mark, and that no one has a right to use those words in any language in connection with similar goods as being likely to deceive.

I turn now briefly to discuss the get-up of the defendants' goods as contrasted with the get-up of the plaintiffs' goods. One Dayalji Girdhar was called by the defendants, and he produced a number of preparations of salines put up in wrappers by various manufacturers with a view to showing that the use of fruit and leaves on such wrappers were common to the trade. None of the wrappers on the bottles produced in my opinion bore any resemblance to Ex. (C), except a fruit laxative manufactured by the Alembic Chemical Works, Ltd., Ex. (N). The witness said that the Alembic Fruit Laxative which he had been selling was Ex. (13), which does not resemble Ex. (C). He admitted that he might have been selling Ex. (N) before 1934, but he did not know whether the plaintiffs objected to the get-up of Ex. (N), and whether it was changed in 1935 to Ex (13). As regards a product, Cipla Sanasalt, Ex. (14), he knew that it had formerly been sold as Cipla Frutsal and that it was no longer sold as such. The use of fruit and leaves is no doubt common to the trade upon wrappers for various laxative productions, but none of those produced by the witness which are in actual use of the material times bear any resemblance to Ex (C). There are no doubt minor differences between Exs. (E) and (C), but there is a striking resemblance between them, and the defendants' witness, Tolaji, was himself deceived in the witness box as I have already mentioned. I have already pointed out in the course of the judgment the fact that the words on Ex. (E) "Health giving, pleasant, cooling and invigorating" are also to be found on Ex. (C). The back-ground of the same is black and is very similar. The red lines at the top and bottom of both are also very similar.

The leaves and fruits proceeding from the top on the right hand side and going right round the left hand side, although different in colour, are extremely similar in general characteristics. Diamonds are to be found on both Exs. (E) and (C), and words written within those diamonds. I have already expressed the opinion that Pendharkar in preparing the design Ex. (E) had in fact before him the design on Ex. (C). I hold that the get-up of Ex. (E) is a colourable imitation of Ex. (C), and is calculated to deceive.

It was argued by defendants' Counsel that there was no evidence of actual deception. But the evidence establishes that the plaintiffs only came to know in March or April 1939, that the defendants were putting Ex. (E) upon the market. The evidence establishes that the defendants sold their goods not openly in shops but in a hole and corner manner by canvassers and by a lorry upcountry. In my opinion, therefore, it would have been very difficult for the plaintiffs to prove actual deception, and no inference ought to be drawn from the fact that they have not been able to prove deception that Ex. (E) is not in fact calculated to deceive.

Then it was argued that the plaintiffs were disentitled to relief because of their delay in taking proceedings, the evidence being that the defendants' goods had been sold since 1931 without a carton and a wrapper and under a different label, but in its present form since 1933. The plaintiffs came to know that the defendants were selling Ex. (E) for the first time in 1939, March or April, and they at once put the matter in the hands of their Solicitors, Messrs. Payne & Co. As a result of enquiries by Messrs, Payne & Co., the plaintiffs came to know two months later through Messrs. Payne & Co., that the defendants were the manufacturers. Then there was an interview, and certain letters were written by Messrs. Payne & Co, Ex. (F) the last of which was written in September 1939, and the suit was filed on October 18, 1939. On this evidence I hold that there has been no unreasonable delay. The defendants raised an issue as to whether the plaintiffs' claim for accounts and/or damages is barred by the Law of Limitation. Mr. Engineer expressed on behalf of the plaintiff their willingness to confine their claim for an account of profits to three years before the institution of the suit. On that Mr. K. T. Desai for the defendants gave up the issue of limitation.

The next question is whether the plaintiffs have a right to ask for an account of profits. On the authority of *Gujarat Ginning and Manufacturing Co. Ltd.* v. *Swadeshi Mills Co. Ltd.* (6), Counsel for the defendants submitted that substantial damages could only be awarded on proof of actual damage, that no special damage had been pleaded and no evidence of actual damage sustained had been offered, and that the plaintiffs were not entitled to ask for an account of profits without proving that their sales had fallen off by reason of the defendants' piracy. In my opinion, the case relied on is not an authority for the principle for which Mr. Desai contends. It would seem from the judgment that in that case the plaintiffs were not asking for an account of profits, but were asking only for damages, and the observations of the Court must be, in my opinion, restricted to a case where a claim for damages only is put forward. Although in the plaint in that case the plaintiffs had asked for full and detailed accounts of the purchase and sale by the defendants of the imitation *dhoties*, issues Nos. (3) and (4) which were raised were directed only to damages, namely (3) "Do the plaintiffs prove that they have suffered any loss on account of the said infringement?" and (4) "Are the plaintiffs entitled to any damages? If yes, what amount?". The trial Judge ordered an account to be taken by Commissioners to ascertain the loss sustained by the plaintiffs in the manner suggested in *Juggi Lal Kamlapat* v. *Swadesh Mills Co. Ltd* (7). In the latter case the plaintiffs gave up their claim to an account of profits and claimed only damages. The case in *Gujarat Ginning and Manufacturing Co. Ltd.* v. *Swadeshi Mills Co, Ltd.* (6), appears to have proceeded upon the same footing Indeed in his judgment at p. 190* Broomfield, J. said:

"It has been conceded in this case however that in view of the decision of the Privy Council in *Juggi Lal Kamlapat* v. *Swadesh Mills Co., Ltd.* (7), the criterion is whether there has been any falling off in the plaintiffs' own sales of these *dhoties* by reason of the defendants having pirated their number."

Neither the case in the Privy Council nor the case in *Gujarat Ginning and Manu-*

(6) 41 Bom. L R 182; 181 Ind. Cas 17; A I R 1939 Bom. 118; 11 R B 325.

(7) 51 A 182; 114 Ind. Cas. 30; A I R 1929 P C 11; 56 I A 1; 29 L W 243; 33 C W N 242; 31 Bom. L R 285; (1929) A L J 1; 56 M L J 282; Ind. Rul. (1929) P C 70 (P C).

*Page of 41 Bom. L R—[Ed].

facturing Co. Ltd. v. *Swadeshi Mills Co. Ltd.* (6), lay down that a plaintiff is not entitled to an account of profits if he gives up his claim for damages. In Edn. 6 of Kerly on Trade Mark, at p. 517, it is said that the plaintiff may, in general, make his choice of either an account and payment to him of the profits which the defendant has gained by his wrongful conduct, or an enquiry as to, and payment of, the damages occasioned to the plaintiff by reason of it, and *Weingarten Bros.* v. *Charles Bayer & Co.* (8), is relied upon in support of that proposition. Towards the end of his judgment at p. 351*, Lord Macnaghten said :

"Ever since the case in *Edelsten* v. *Edelsten* (9), it has been the established rule that a plaintiff succeeding in a case of this sort may at his option take an inquiry as to damages or an inquiry as to profits. I do not see any ground for departing from that practice in the present case."

In the case before me the plaintiffs have elected, as they have a right to do, to claim an account of profits and not to ask for damages. On the assumption that they were entitled to do so the parties have agreed the amount of profits made by the defendants at the sum of Rs. 2,000. (After recording findings on issues, his Lordship concluded.) I pass a decree for an injunction in terms of prayer (*a*) of the plaint. The defendants to be at liberty to use bottles of the size and shape which they are now using without the labels now appearing thereon. Decree for Rs. 2,000 the sum agreed upon between the parties as the profits derived by the defendants, and order for delivery up in terms of prayer (*e*) of the plaint except as to the bottles. The defendants to deliver up all labels of the type now appearing on their bottle Ex. (8). The plaintiffs will have the costs of the suit and interest on judgment at six per cent. per annum. Though the plaintiffs do not concede that the subject-matter of this suit is below Rs. 10,001, in order to avoid any dispute upon the question, by virtue of the power conferred upon the Court by High Court r. 548 (*ii*) (*h*), I sanction the employment of two Counsels in this case having regard to the importance of the case.

S. *Suit decreed.*

(8) (1905) 22 R P C 341; 92 L T 511; 21 T L R 418.

(9) (1863) 1 De. G J & S 185; 9 Jur. (N S) 479; 7 L T (N S) 768; 11 W R 328; 137 R R 202.

*Page of (1905) 21 R P C—[*Ed.*]

MADRAS HIGH COURT

Civil Revision Petition No. 269 of 1937

February 2, 1940

ABDUR RAHMAN, J.

PULIYATH GOVINDA NAIR—PLAINTIFF—PETITIONER

versus

PAREKALATHIL ACHUTHAN NAIR—DEFENDANT—RESPONDENT

Contract Act (IX of 1872), s. 25 (3)—Agreement by A to release B's brother from liability which is enforceable at time of agreement is good consideration for new agreement between A and B—Words "by the person to be charged therewith", scope of — Whether limited to person who was indebted from beginning—Promise referred to in s 25 (3) must be express — Promise to pay portion of barred debt—If can be sued for whole debt.

An agreement by the plaintiff to release the defendant's brother from liability if it was legally enforceable at the time when the agreement was reached is quite a good consideration for the new agreement between the parties to the suit. But if the plaintiff's claim against the defendant's brother was barred by limitation on the date on which this agreement was arrived at and the contract was not reduced to writing as required by s. 25 (3), Contract Act, it would remain unenforceable.

The words 'by the person to be charged therewith" in s. 25, Contract Act, are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning.

The promise referred to in s. 25, sub-cl. (3) of the Contract Act must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a distinct promise to pay before the document can be said to fall within the provisions of this section.

[Case-law referred to.]

If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt.

C. R. P. under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Ottapalam in S. C. S. No. 322 of 1936.

Mr. *P. Govinda Menon*, for the Petitioner.

Mr. *N. R. Sesha Ayyar*, for the Respondent.

Judgment.—A suit was instituted by the petitioner for the recovery of Rs. 288 and odd being the price of paddy alleged to have been due by the respondent's brother and verbally agreed to be paid by the respondent. The lower Court found in favour of the agreement but refused to give effect to it as it was held to be without consideration. The plaintiff has consequently come up in revision.

It may not be quite correct to say that the agreement between the parties to the

suit was without any consideration. The agreement by the plaintiff to release the defendant's brother from liability if it was legally enforceable at the time when the agreement was said to have been reached was quite a good consideration for the new agreement between the parties to the suit. But if the plaintiff's claim against the defendant's brother was barred by limitation on the date on which this agreement was arrived at and the contract was not reduced to writing as required by s. 25 (3) of the Indian Contract Act, it would remain unenforceable. Mr. Govinda Menon contends however, that this section has no application to an agreement which was entered into between the parties to the present suit but must be confined in its operation to the agreement arrived at between the original parties thereto, if attempted to be enforced by the original creditor against the original debtor. Section 25 of the Indian Contract Act, so far as it is relevant to the present case, reads as follows :—

"An agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised on that behalf, to pay, wholly or in part, the debt of which the creditor might have enforced payment but for the law for the limitation of suits".

The words "by the person to be charged therewith" are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. This difficulty seems to have been recognised on behalf of the plaintiff and a letter Ex. (c) was produced by him at the trial. This was written by the defendant on May 20, 1933 to the plaintiff asking him to come and receive 50 *paras* of paddy "towards what was due to be given to" him. A perusal of this letter shows that although it contains a definite request to receive 50 *paras* of paddy, yet there was nothing in it which could be said to disclose an express promise to deliver the remaining paddy; and in the absence of an express promise, this letter cannot be held to comply with the requirements of the section. The promise referred to in s. 25, sub-cl. 3 of the Indian Contract Act must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a dinstinct promise to pay before the document can be said to fall within the provisions of this section. See *Ramaswami Pillai* v. *Kuppuswami Pillai* (1), *Govind Das* v. *Sarju Das* (2), *Maniram Seth* v. *Seth Rup Chand* (3) and *Mukhi Lal Chand* v. *Gul Muhammad* (4). Reliance was placed by the learned Counsel for the petitioner on *Appa Rao* v. *Suryaprakasa Rao* (5) and *Maidens Hotel, Delhi* v. *Willnot* (6). But they do not bear out his contention. It was held in the first case that a document sufficiently complies with s. 25 of the Contract Act, if an intention to pay a debt wholly or in part has been expressed therein in such a way as to constitute a promise and the debt is sufficiently identifiable although the amount promised to have been paid remain unstated. This is not the same thing as saying that the promise to pay the debt need not have been expressed or that an implied promise was enough for the purpose of this section. The Lahore case lays down nothing more than that a letter containing a promise to pay a debt which was barred by the law of limitation is itself an agreement enforceable in law. This follows directly from the language of the section but renders no assistance to the petitioner's case.

It was then urged by Mr. Govinda Menon that the express promise to pay a portion of the debt due was quite enough to bring the case within the s. 25 (3) and that after such a promise not only could the portion of the debt so promised to be sued for, but that had provided a good cause of action even in regard to the portion for which there was no express promise in the document. The contention that if a person promised to pay a part of the debt, he should be taken to have promised to pay the whole of the debt had, in my opinion, no substance. If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt. If on the other hand, he promises to pay the whole of the barred debt in writing he could be sued for the whole of the debt. Illustration (e) given in the section would show what the legisla-

(1) (1910) M W N 547; 7 Ind. Cas. 901; 20 M L J 656; 8 M L T 282.

(2) 30 A 268; 5 A L J 274; A W N 1908, 129.

(3) 33 C 1047; 33 I A 165; 4 C L J 94; 8 Bom. L R 501; 10 C W N 874; 16 M L J 300; 1 M L T 199; 3 A L J 525; 2 N L R 130 (P C).

(4) A I R 1933 Lah. 209; 141 Ind. Cas. 617; Ind. Rul. (1933) Lah. 155 (2); 34 P L R 430.

(5) 23 M 94.

(6) 161 Ind. Cas. 293; A I R 1935 Lah. 984; 8 R L 707 (2); 38 P L R 329.

ture really meant by use of the words "wholly or in part of the debt". If the contention raised by Mr. Govinda Menon were expected it would lead to startling results. If a person promises to pay only a portion of the debt which is barred by limitation, he would according to Mr. Govinda Menon's construction of the section become liable to pay the balance of the debt as well which he had not promised to pay and which apparently he had no intention to pay. This could never have been intended by the legislature and this would be the inevitable conclusion if this contention were accepted. It must, therefore, be held that inasmuch as the letter Ex. C contains no express promise to pay the portion of the debt now sued for, it is of no value to the plaintiff in this suit.

In the end it was contended that there was no proof on the record that the debt in regard to which the defendant had made a promise was barred by limitation. But the plaintiffs own statement, if read *in extenso*, leaves no room for doubt that it was.

The result is that this revision fails and is dismissed. But having regard to the fact that the plea in regard to s. 25 (3) was not raised on behalf of the defendant specifically I leave the parties to bear their own costs throughout.

N.S. *Appeal dismissed.*

NAGPUR HIGH COURT

First Appeal No. 69 of 1936
February 20, 1940
STONE, C. J. AND BOSE, J.

GAJADHAR PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
UDAICHAND—DEFENDANT—RESPONDENT

Limitation Act (IX of 1908), ss. 19, 20—Explanation 2 to s. 19—Deposition of party admitting liability for claim reduced to writing and signed by Judge—Judge, if agent for purposes of s. 19—Difference between s. 19 and s. 20—Specific performance—Agreement to mortgage.

Explanation 2 to s. 19, Lim Act means not only that the agent must be duly authorised to sign the document in question but that he must be authorised to sign for the purpose which the section contemplates, that is to say he must be authorised to sign on behalf of the person sought to be made liable for the purpose of acknowledging liability. The authorisation need not necessarily be direct. It can be implied, as for instance from the nature of the employment, but the authorisation, whether it be express or implied, must be to acknowledge the liability in question and not merely to sign the document. Though a Judge of a Court is authorised, and indeed required by law, to sign the statements which he records, he is authorised to do so for the purpose of authenticating the depositions and not for the purpose of acknowledging liability. He is in no sense the agent of the witness. He is merely fulfilling a statutory duty which is imposed upon him by O. XVIII, r. 5 of the Civil P. C., in order to bring into play the presumption raised by s. 80 of the Evi. Act. The fact that the witness is a party and consequently goes into the box voluntarily does not make any difference. 153 Ind. Cas. 957 (4), relied on. [p. 402, col. 2, p. 403, col. 1.]

[Case-law discussed.]

There is a fundamental difference between the ss. 19 and 20, Lim. Act. Under s 20 all that is necessary is that an acknowledgment of the payment, (or, under the old section as it stood before the amendment: "the fact of payment"), should appear in the handwriting of, or be signed by the person making the payment. If the person making the payment is a Judge of the Court, and an acknowledgment of the payment, (or the fact of payment if the unamended section applies) appears in his handwriting or is signed by him, then that is enough. But that is not enough under s. 19. [p. 404, col. 1.]

Obiter.—Specific performance of an agreement to mortgage can be granted. 107 Ind. Cas. 337 (1), referred to.

F. A. from the decree of the Court of the Additional District Judge, Jubbulpore, dated April 27, 1936.

Mr. *M. R. Bobde*, for the Appellants.
Rai Bahadur *M. B. Kinkhede* with him Mr. *A. R. Kulkarni*, for the Respondent.

Judgment.—The plaintiffs appeal. Their case is that there was a partnership between the parties which was dissolved by mutual consent. It was known that on a taking of accounts the defendant would owe the plaintiffs a sum of money exceeding Rs. 8,000. Therefore on February 3, 1929 the defendant agreed to mortgage one of his houses for Rs. 8,000 and he agreed to pay the balance which would be found due on the taking of accounts as a personal liability. Accounts were subsequently taken and it was discovered that the defendant owed the plaintiff a sum of Rs. 10,060. This formed the subject-matter of a previous litigation in which the plaintiffs had sued for a dissolution of partnership and for rendition of accounts. It was found there by the Appellate Court that the accounts had already been settled and that on that settlement the defendant owed the plaintiffs a sum of Rs. 10,060. It was also held that as the accounts had already been settled the suit did not lie in that form and that the plaintiffs would have to sue separately on the settled account.

That suit has now been brought and the appeal arises out of it. In the lower Court the plaintiffs sued for specific performance of the agreement to mortgage to the extent of Rs. 8,000 and for a money decree for the balance, and in the alternative, if the prayer for specific performance was not allowed, then for a decree for Rs. 10,000.

Dealing first with the prayer for specific performance a question was raised as to whether specific performance of an agreement to mortgage can be granted. As we do not think that the agreement has been proved, we need not deal with this at length. It is enough to say that, in our opinion, their Lordships of the Privy Council have decided the matter in favour of the view for which the plaintiff contends. That decision is *Jewan Lal Daga* v. *Nilmani Chaudhuri* (1). (Their Lordships examined certain facts and evidence on the question whether agreement had been proved and arrived at the conclusion that it had not been proved). That leaves the alternative case for consideration. It is admitted on both sides that the facts that there was a settlement of accounts and that the amount found due by the defendant to the plaintiffs was Rs. 10,060 is concluded by the previous judgment and that the matter is *res judicata*. But it was argued on behalf of the defendant-respondent that the present claim ought to have been included in the previous suit and that therefore the present suit is barred by O. II, r. 2. We need not examine this in detail because, in our opinion, the claim is barred by time in any event. We are of the opinion, however, that O. II, r. 2, is not a bar because the causes of action are different.

The real question is one of limitation. It is accepted on all hands that the claim is barred from the date on which the settlement sued on is said to have been made, but the plaintiffs contend that time can be extended for a variety of reasons. They rely first of all upon a deposition of the defendant in the previous suit in which he had admitted liability for the present claim. That deposition was reduced to writing and was signed by the Judge who recorded the evidence. It is argued that the Judge was an agent of the defendant within the meaning of s. 19 of the Lim. Act. If this is so, then admittedly the claim is within limitation. But we do not think he is.

Section 19 requires that the acknowledgment should be in writing and that it should be "signed by the party against whom the right is claimed, or by some person through whom he derives title or liability."

Explanation II to that section states that:

"For the purposes of this section 'signed' means signed either personally or by an agent duly authorised in this behalf."

We understand this to mean not only that the agent must be duly authorised to sign the document in question but that he must be authorised to sign for the purpose which the section contemplates, that is to say he must be authorised to sign on behalf of the person sought to be made liable for the purpose of acknowledging liability. We do not mean by this that the authorisation must necessarily be direct. It can be implied, as for instance from the nature of the employment, but the authorisation, whether it be express or implied, must be to acknowledge the liability in question and not merely to sign the document. *See Narain Rao Kalia* v. *Manni Kunwar* (2).

In *Beti Maharani* v. *The Collector of Etawah* (3) their Lordships of the Privy Council were concerned to see whether an agent appointed under a general power-of-attorney to manage lands could be said to have the authority required by s. 19, and they held that he had not because his authority was to manage lands and not to acknowledge personal liabilities. The question their Lordships posed at p. 207* was:

"Whether he was 'an agent duly authorised in that behalf' within the meaning of s. 19 of the Lim. Act."

And again

"The question then is, first, whether Raj Kuar herself was an agent duly authorised to acknowledge Pirthi's liability; and secondly, whether Ajudhia was so authorised."

What they searched for was not merely authority to sign the document but authority to acknowledge liability.

Now we think it is beyond doubt that though a Judge of a Court is authorised, and indeed required by law, to sign the statements which he records, he is

(1) 7 Pat. 305; 107 Ind. Cas. 337; A I R 1928 P C 80; 55 I A 107; 26 A L J 124; 30 Bom. L R 305; (1928) M W N 154; 54 M L J 325; 47 C L J 302; 32 C W N 565; 27 L W 740 (P C).

(2) 44 A 546; 66 Ind. Cas. 394; A I R 1922 All. 230; 20 A L J 359.

(3) 17 A 198; 22 I A 31; 6 Sar. 551 (P C).

*Page of 17 A—[*Ed.*]

authorised to do so for the purpose of authenticating the deposition and not for the purpose of acknowledging liability. He is in no sense the agent of the witness. He is merely fulfilling a statutory duty which is imposed upon him by O. XVIII, r. 5, of the Civil P. C. in order to bring into play the presumption raised by s. 80 of the Indian Evi. Act.

The learned Counsel for the appellant asks us to draw a distinction between a witness who is summoned, and thus compelled to appear, and one who is a party and who consequently goes into the box voluntarily. He argues that in the latter case the witness voluntarily subjects himself to examination and in that case authorises Counsel to examine and cross-examine him, and authorises the Judge to record and sign his deposition. We do not think that this makes any difference. The kind of authorisation contemplated by s. 19 implies the conferral of powers on a person who does not already possess them. A voluntary subjection to jurisdiction confers no powers. They exist apart from the act of submission.

The authority to record and sign the deposition of any witness who enters the box is conferred by statute and not by the witness. Once the witness is there his power of independent action is lost. He cannot leave the box without permission. He cannot refuse to answer questions, however awkward they may be, unless they tend to incriminate him. He cannot evade the consequences of not telling the truth. The final test of the kind of authority contemplated here, namely that which flows from the voluntary act of a person, is its power of recall. A witness who has entered the box cannot recall the Judge's powers. He has no *locus penitentiæ* in which to resile.

Moreover the authority required by the section is an authority to sign. A voluntary entrance into the witness box does not confer that. If it can be said to give the Judge any power which he did not possess before it would be the power to question and to examine and the power to insist upon truthful replies. The remainder of the Judge's action, namely the recording and the signing of the depositions, do not derive their force from, nor do they spring out of, the witness's action. They are derived from statute, and that statute does not empower the Judge to sign for the purposes of s. 19. Therefore, in our opinion, in no sense can the Judge be regarded as the agent contemplated by Expln. II to s. 19.

This, we think, is the view of the Rangoon High Court in *U Po Yin* v. *U Ba Chit* (4). There the deposition was signed by the Judge and a certificate at the end certifying that the deposition had been read over to the witness was signed by the clerk of Court. It was held that neither signature brought the matter within the purview of s. 19.

As regards the case cited on behalf of the appellant. In *Venkata* v. *Parthasaradhi* (5) the witness himself had signed the deposition and it was that which, according to the decision, brought the acknowledgment within the purview of s. 19. *Periavenkan Udaya Tevar* v. *Subramanian Chetti* (6) and *Daia Chand* v. *Sarfraz* (7) turned on the same fact. In the former case a witness had signed his own deposition and in the latter the defendant, or her fore-fathers, had signed the Record of Rights.

Annapagauda Tammangauda v. *Sangadigyapa* (8) was the case of a guardian appointed under the Guardians and Wards Act, and the Full Bench held that the authority contemplated by s. 19 need not spring out of contract. But it was made clear that the authority, however conferred, must empower the person signing to act on behalf of the one sought to be made liable, and to that we would add that it must also either be wide enough to embrace the kind of act contemplated by s. 19 or be specific in that behalf. That type of case is now covered by s. 21 of the Lim. Act.

Reference was made in that ruling to a decision of the House of Lords in *Chinnery* v. *Evans* (9) and this was also relied on by the learned Counsel for the appellants, but we do not think that this carries the matter any further. A receiver had been appointed there in a mortgage suit at the instance of a mortgagee. He made certain payments of the interest due on the mortgage to mortgagee and the question arose whether he could in these circumstances be considered to have been acting as an agent of the mortgagor. Their Lordships held that he could. They said that the person legally liable to pay the interest

(4) 12 R 610; 153 Ind. Cas. 957; A I R 1934 Rang. 282; 7 R Rang. 239.
(5) 16 M 220; 3 M L J 35.
(6) 20 M 239.
(7) 1 A 117.
(8) 26 B 221; 3 Bom. L R 817 (F B).
(9) (1864) 11 H L C 115; 145 R R 79; 4 N R 520. 10 Jur. (N S) 855; 11 R T 68; 13 W R 30.

was the mortgagor, and the person entitled to receive it was the morrtgagee. Therefore, any person making the payments in pursuance of the legal obligation which existed between the parties did so on behalf of the person legally bound to pay. In our opinion, the defendant here was not under any legal obligation to make an acknowledgment of liability, nor, for the reasons given, do we think that the Court can be said to have been acting on his behalf in recording and signing his deposition. We do not think that that case has any bearing on this.

In *Swaminatha Odayar* v. *Subbarama Ayyar* (10) the question considered was whether the language used in a certain deposition could be said to constitute an acknowledgment of subsisting liability, and it was held that it could, and that therefore the deposition could be used to save limitation under s. 19. The question of signing was not raised at all, and as both Counsel and the learned Judges referred to *Venkata* v. *Parthasaradhi* (5), where the deposition had been signed by the witness, we take it that that was probably the case here as well. In any case, as it stands, the ruling is not authority for the proposition contended for before us.

Govindasami Pillai v. *Dasai Goundan* (11) was concerned with a matter of payment under s. 20 of the Lim. Act and not of an acknowledgment under s. 19. A payment had been made into Court there and the money was paid over to a mortgagee by the Court. It was held that this was sufficient to extend limitation under s. 20. But there is a fundamental difference between the two sections. Under s. 20 all that is necessary is that an acknowledgment of the payment, (or, under the old section as it stood before the amendment: "the fact of payment"), should appear in the handwriting of, or be signed by the person making the payment. If the person making the payment is a Judge of the Court, and an acknowledgment of the payment, (or the fact of payment if the unamended section applies), appears in his handwriting or is signed by him, then that is enough. But that is not enough under s. 19.

Reliance was also placed upon s. 20 (2) but as there was no mortgage in this case, and, on our findings, not even an agreement to mortgage, the question does not arise.

The appeal dismissed with costs.

D. *Appeal dismissed.*

(10) 50 M 548; 100 Ind. Cas. 10; A I R 1927 Mad. 219; 51 M L J 856; 25 L W 411.

(11) 44 M 971; 68 Ind. Cas. 100; A I R 1921 Mad 704; 41 M L J 423; 14 L W 320; (1921) M W N 683.

LAHORE HIGH COURT

First Appeal No. 80 of 1939
November 22, 1940
TEK CHAND AND DIN MOHAMMAD, JJ.
SANATA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Mst. SAHIB BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Kharals of Montogomery District governed by Customary Law—Succession—Non-ancestral property—Daughters v. collaterals—Gift by daughter—Collaterals, if can contest it—Position of grand daughter.

According to the custom prevailing among the Kharals governed by the Customary Law of the Montgomery District in the Punjab, daughters are preferred to collaterals in the matter of succession to non-ancestral property and hence the collaterals cannot contest a gift by the daughter.

Daughters and grand daughters, however, stand on the same footing. 109 Ind. Cas. 590 (1), relied on.

Messrs. *Yashpal Gandhi* and *L. Saunders*, for the Appellants.

Messrs. *Barkat Ali*, *Shaukat Ali*, *Inder Dev Dua* and *Durga Das Jain*, for the Respondents.

Din Mohammad, J.—On April 20, 1937, *Mst.* Fateh Bibi, widow of one Qaim, a Kharal governed by the Customary Law of the Montgomery district, gifted 593 *kanals* 17 *marlas* of land along with a residential site occupied by *kacha* houses to her daughter, *Mst.* Sahib Bibi. Thereupon, the plaintiffs, Sanata and Mohammad, instituted a suit for a declaration that the gift would not affect their reversionary rights as well as those of the other reversionary heirs after the death of *Mst.* Fateh Bibi. The suit was resisted on various grounds. It was contended *inter alia* that the land in suit was not ancestral and consequently the gift in favour of *Mst.* Sahib Bibi could not be impugned by the plaintiffs. It was further averred that the parties were not governed by Customary Law, but this objection was withdrawn at a later stage of the cause. The Subordinate Judge found the questions at issue in favour of the defendants and dismissed the suit with costs. The plaintiffs have appealed. The principal questions involved in this case are (1) whether the land is ancestral; and (2) even

if it is found to be non-ancestral, whether the plaintiffs can attach the gift?

In respect of question No. 1, Counsel for the appellants has relied mainly on the *wajib ul-arz*, Ex. P-8, printed at p. 92 of Vol. I of the paper book. The *wajib-ul-arz* relates to *Mauza* Danaban and it is stated there that the village was founded by one Dana Beg Mughal but later Umar, a Kharal, migrated from *Mauza* Mahlo and took possession of the area lying desolate a few centuries ago. It is also mentioned therein that some of the proprietors were descended from Masta, who was married to the sister of Mamura, and that the latter sent for Masta and settled him in the village. Three chaks were formed, *viz.*, chak Haibo, chak San and chak Salat, and they were all situated in the Govt. jungle in that village. It is, however, added there that no regard was paid to ancestral shares as the proprietors attached very little importance to the land they owned and cared more for the cattle they reared. The measure of ownership depended upon the contribution each proprietor made in sinking the wells. The tenure of the village was stated to be *pattidari-chahwar-ghair mukammal*. The next document relied upon by the appellants' Counsel is a copy from the revenue papers relating to wells situated at *Mauza* Danabad. That document shows that the well in relation to which the copy was produced was sunk by Lal. The names of the sharers in the well were given as (1) Baghela, (2) Bibi Rani and (3) sons of Masta. The well in question was described as Haiboka. The third document referred to by the appellants' Counsel is Ex. D-18, which is a copy of the pedigree table of the proprietors of village Haiboka. It is stated there that, formerly, this area was included in the village Ganeshpura and, during the last settlement, it was included in the area of "Jungle Sarkar." Eight years ago, the proprietors of Haiboka and Baghela left the village Ganeshpura and chak Haiboka respectively and obtained permission of the Deputy Commissioner on October 26, 1864, to sink a well and to found a village there.

It may be stated that the land in suit is described in the deed of gift as partly situated in chak Haiboka and partly in Ganeshpura. These documents, however, conclusively establish that Ilayas, the alleged common ancestor of the parties, had never occupied the land. On the other hand, so far as Ganeshpura land is concerned, the documents unequivocally establish that it was Baghela who originally acquired it and so far as chak Haiboka land is concerned, Lal was the founder of the village and the pedigree table relied upon by the plaintiffs themselves shows that Lal was a brother of Maina and Sher, the ancetors of the plaintiffs and not their ancestor. There can be no doubt therefore that the land is non-ancestral *qua* the plaintiffs. This conclusion is further supported by the statement of Sadat (P. W. No. 21) who has admitted that, while the branch of Misri, the fourth brother of Lal owns 30 squares, the branch of Maina owns only 5 squares and that of Sher only 1 square. Nur Mohammad (D. W. No. 1) the husband of *Mst.* Sahib Bibi, has also sworn to the same effect. We have no hesitation therefore in holding that the land is non-ancestral *qua* the plaintiffs.

The next question is whether in these circumstances the plaintiffs can attack the gift. It is admitted that there is no recorded instance favouring the plaintiffs. There has been no judicial decision in connection with this matter nor any copy from the revenue records has been produced in support of the assertion. Reliance is placed only on the oral evidence of P. Ws. Nos. 1, 2, 4, 25, 27, 29, 30 and 31, but none of the instances cited by them is supported by any document and most of them are beside the point. For example, the instance of Torej deposed to by Sanata (P. W. No. 1) and Muhammad Hussain (P. W. No. 29) relates to occupancy rights in colony land and there can be no question of a daughter succeeding there as the course of succession in such cases is determined by the Collector. The instance cited by Nanusher Khan (P. W. No. 2) is mere hearsay as he admits that he was not present when the mutation was effected. The instance referred to by Bagga (P. W. No. 4) also relates to colony land where proprietary rights had not been acquired from Govt. From the similar defect suffers the instances cited by Sadiq Mohammad (P. W. No. 25). The instance referred to by Jahangir Khan (P. W. No. 27) is inconclusive as the land belonged to his paternal uncle Muhammad Khan and is said to have been mutated in the name of the witness's father on the marriage of Muhammad Khan's daughter to his own brother. This was a family arrangement in which the daughter did not suffer. The instance deposed to by Shana (P. W. No. 30) relates to ancestral land and so does the instance referred to

by Shukru (P. W. No. 21). There is therefore not an iota of documentary evidence on the record to support the plaintiff's contention and the oral evidence does not lend much support to their case.

The defendants on the other hand have produced as many as 97 witnesses, mostly belonging to the Kharal tribe, who have definitely stated that among them daugters are preferred to collaterals in the matter of non-ancestral property. Their assertion is supported by a recorded instance Ex. D-13. It clearly shows that, on the death of Bahadur the land was mutated in the name of his daughter Jowai and when she married, the collaterals claimed the land. It was, however, decided by the revenue authorities that as the land was the self-acquired property of the deceased the collaterals were not entitled to oust the daughter under the Customary Law prevailing in the tribe. The record as it stands is more in favour of the defendants than in that of the plaintiffs. The Subordinate Judge has disposed of the case on the basis of *Mst.* Sahib Bibi being a grand-daughter of Baghela rather than the daughter of Qaim on the ground that some of the witnesses had stated that Qaim had succeeded Beghela. Counsel for the appellants admits that daughters and grand-daughters stand on the same footing as was decided in *Kaman* v. *Ghafoor Ali* (1) and, consequently, the matter is immaterial whether the case is disposed of on the basis of *Mst.* Sahib Bibi being a daughter of Qaim or on that of *Mst.* Sahib Bibi being a grand daughter of Baghela. Holding therefore that the plaintiffs have failed to discharge the onus that lay upon them of proving that, under the Customary Law governing the parties, they were entitled to oust the daughter even in the case of non-ancestral land, we affirm the decision of the Court below and dismiss this appeal with costs.

D. *Appeal dismissed.*

(1) 9 L 496; 109 Ind Cas. 590; A I R 1928 Lah. 280; 29 P L R 620.

MADRAS HIGH COURT

Civil Revision Petition No. 1632 of 1938

September 4, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

AMAD KOYA AND ANOTHER— PETITIONERS

versus

APPU AND ANOTHER— RESPONDENTS

Madras Agriculturists' Relief Act (IV of 1938), *s.* 15—*S.* 15, *if can be invoked in favour of tenant whose rent is payable to assignee of rent from Malabar Jenmi.*

Section 15 of the Mad. Act IV of 1938 cannot be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar Jenmi.

The terms "Jenmi" and "Intermediary" used in s. 3 and in the succeeding ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee.

C. R. P. under s. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif, Calicut, dated August 30, 1938, and passed in I. A. No. 1362 of 1938 in S. C. No. 281 of 1937.

Mr. *K. Kuttykrishna Menon*, for the Petitioner.

Mr. *K. P. Raman Menon*, for the Respondents.

Wadsworth, J.—This Civil Revision Petition raises a question whether s. 15 of the Mad. Act IV of 1938 can be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar Jenmi. The petitioners here were the applicants in the Court below and they were the judgment-debtors. The suit was brought by the 1st plaintiff as assignee of the rent for the period from 1929-30 to 1936-37 assignor being the second plaintiff, the Jenmi. The assignment was dated February 17, 1937, and there was a decree dated October 9, 1939, in favour of the 1st plaintiff, the assignee, alone. Defendants applied under ss. 19 and 15 of Act IV of 1938 to scale down this decree.

Section 15 (1) of the Act begins as follows:—

"All rent payable by an agriculturist to a landholder or an under-tenure holder under the Mad. Estates Land Act, or to a Jenmi or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the *Fasli* year 1345 and prior *Faslis* and which is outstanding on the date of the commencement of this act shall be deemed to be discharged....."

Mr. Kuttikrishna Menon for the petitioners has contended that the effect of these orders is to give to the tenant a right

to scale down the rent, whether or not it is due to Jenmi or intermediary on the date of the commencement of the Act, provided that in its origin it partakes of the character of rent due to a Jenmi or intermediary. It is quite clear that the definitions of the words "Jenmi" and "Intermediary" in s. 3 (*K*) and 3 (*J*) of the Malabar Tenancy Act do not include an assignee of the right to collect rents, though under the corresponding provision, s. 3 (5) of the Mad. Estates Land Act, the term "landholder" does include the person entitled to collect rent. It is not very apparent why the assignee of the right to collect rent in Malabar should have been treated differently from an assignee of the right to collect rent in other parts of the presidency; but the fact remains that the terms "Jenmi", and "Intermediary" used in this section and in the succeeding ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee. It seems to us apparent that, reading s. 15 (1) in its plain terms, there must be rent outstanding on the date of the commencement of the act, which rent must be, as on that date, payable by an agriculturist to a landholder or an under-tenure holder or to a Jenmi or Intermediary. If these conditions are not satisfied. the section had no application. It may be that the omission of any provision relating to an assignee of a right to collect rent in the case of a Malabar tenancy is a lacuna due to the inadvertence of those who drafted the Act, but, even so, the remedy is the amendment of the Act. Dealing with an expropriatary measure we cannot extend the language so as to expropriate more persons than those actually comprised within its terms. In the present case it seems to us clear that as the arrears with which we are concerned were not outstanding as rent payable to a Jenmi or Intermediary on the date of the commencement of the Act, the petitioners are not entitled to the benefit of s. 15 of the Act.

We may add that to read the term "Jenmi" or "Intermediary" in s. 15 (1) as including an assignee of the right to collect rent would lead to the difficulty that under s 15 (4) there is no provision for notice to such an assignee, and in ss. 16 and 17 the same terms are repeated with reference to safeguarding of certain rights of the landholder and with reference to limitation, which also have not been extended to cover an assignee.

In the result, therefore, we dismiss the Civil Revision Petition with costs.

N.-S. *Petition dismissed.*

ALLAHABAD HIGH COURT

Second Appeal No. 1585 of 1936
October 4, 1940
IQBAL AHMAD AND VERMA, JJ.
RAM DAUR RAI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
LACHHMI PRASAD AND ANOTHER—
PLAINTIFFS AND OTHERS—DEFENDANTS
—RESPONDENTS

Lease—Construction—Lease originally granted for building and manufacturing purposes at fixed annual rent—Lessee and his successors in possession for long time during which transfers taking place without objection by zamindar—*Lease must be deemed to be perpetual with transferable and heritable rights—Mere fact of land being subsequently cultivated does not affect nature of original lease.*

Where a *semindar* has originally leased a land on a fixed annual rental for building and manufacturing purpose and the lessees and their successors have remained in possession of the land for a long time during which period the land has been the subject of numerous transfers without any exception even having been taken by the *semindar*, the lease must be deemed to be a perpetual lease with heritable and transferable rights. The mere fact of the land being brought under cultivation subsequently cannot nullify the original lease and alter the position of the lessee and his successors to that of agricultural tenants. F A. No. 60 of 1924, *A. Caspers* v. *Kader Nath Sarbadhikari* (1) and *Naba Kumari* v. *Behari Lal* (2), relied on.

S. A. from the decision of the District Judge, Azamgarh, dated July 10, 1936.

Messrs. *B. Malik* and *D. Sanyal*, for the Appellants.

Mr. *K. L. Misra*, for the Respondents.

Iqbal Ahmad, J.—The subject of dispute in the suit out of which this appeal arises was an area of 15.427 acres of land described as "Ahata Godam Nil" situated in village Bahadurpur in the district of Azamgarh. The plaintiff-respondents originally claimed a declaration that they were the owners of the land in dispute and were entitled to have their names recorded in the *khewat*. This relief was however not granted to the plaintiffs by the trial Court and, in the lower Appellate Court the plaintiffs confined their claim to a declaration that they were entitled to possession and to make collections and appropriate the produce of the plots in dispute. They

also prayed for an injunction restraining defendants second and third parties from causing interference in the plaintiffs' collection of rent and appropriation of the produce of the plots in dispute. In the alternative the plaintiffs had claimed possession of the area in dispute. The plaintiffs claimed to be entitled to the reliefs mentioned above on the basis of a sale-deed dated July 31, 1928, executed under circumstances hereinafter mentioned. Defendants second and third parties were the *zamindars* of the village and defendants first party were the vendors of the plaintiffs. The suit was contested by defendants second party who maintained that the area in dispute was agricultural land and the position of the vendors of the plaintiffs was at best that of occupancy tenants. They therefore maintained that the vendors of the plaintiffs had no right to transfer the area in dispute to the plaintiffs, and that the plaintiffs had not acquired any title to the area in dispute by virtue of the purchase made by them. The trial Court dismissed the suit. But on appeal by the plaintiffs the lower Appellate Court passed a decree declaring that the plaintiffs held the land in dispute

"under a permanent tenure subject to the payment of Rs. 88-2-0 to the *zamindars* and their right is transferable and heritable."

The history of the area in dispute is involved in some obscurity, but it is common ground that this land was originally let and was utilized for the purpose of building and running an indigo factory. This happened either towards the close of the eighteenth or the beginning of the nineteenth century. It appears from the Gazetteer of Azamgarh District (*vide* p. 56) that one Mr. Crommelin, Commercial Resident of the East India Company at Azamgarh, erected an indigo factory on the plots of land in dispute in the year 1807, and that at the time of the mutiny the factory was owned by one Mr. Venables. There was a steady decline in the indigo industry since 1877 and all the indigo factories in Azamgarh, whether owned by Europeans or by Indians, had fallen on evil days. There are no copies of the village records available concerning this area of land prior to the year 1874. A certified copy of an extract from the *khasra* of 1874 was, however, filed by the plaintiffs and one Mr. Goutier is recorded in that document in the tenants' column as an occupancy tenant of 30 years standing.

An extract from the *khatauni* of 1876 was also filed by the plaintiffs, but as that document was incomplete, we, with the consent of the appellants' Counsel, permitted the Counsel for the respondents to produce a certified copy of the *khatauni* with respect to all the plots in dispute. The respondents' Counsel has accordingly filed to-day a copy of the *jamabandi* of 1876 with respect to all the plots in dispute. It appears from this document that the area in dispute was described in the village papers as "*ahata godam* Goutier Saheb." The area of the *ahata* is shown in the *jamabandi* to be 26 *bighas* 2 *biswas* 16 *dhurs*. Out of this area an area of about 5 *bighas* was under cultivation in 1876 and the rest was *parti* land. As against the area under cultivation the names of certain *shikmi* tenants were entered in the *jamabandi* and the rent payable with respect to the same was entered as Rs. 16-7-6. The *parti* plots were also specified in the *jamabandi* and the area of the same was entered as 20 *bighas* 17 *biswas* odd and the rent payable with respect to that area was shown as Rs. 63-14-3. The rent on account of the cultivated and the *parti* area was then totalled together and was shown as Rs. 80-5-9. There is a note in the remark column of the *jamabandi* that the "*wasuli*" is Rs. 88-2-0.

There has been some controversy in this Court over the question as to whether the rent entered in the *jamabandi* on account of the cultivated portion was payable by the *shikmis*, whose names are entered in the *jamabandi*, or was payable direct by Mr. Goutier to the *zamindars*, but in the view that we take it is unnecessary to decide that question. It is enough to say that the *jamabandi* of 1876 shows that a sum of Rs. 88-2-0 was payable by Mr Goutier to the *zamindars* on account of the rent of the plots in dispute. It appears that Mr. Goutier had mortgaged the *ahata* in question along with the buildings, indigo tanks etc., to Sheo Dayal and Har Dayal. The mortgagees put their mortgage into suit and having obained a decree, put to sale the *ahata* along with the bungalow, indigo tanks etc., and purchased the same on December 12, 1882. The sale certificate, Ex. 1 shows that not only the buildings in the *ahata* but the *ahata* itself was put to sale and was purchased by the mortgagee decree-holders. Sheo Dayal and Har Dayal sold the *ahata* along with the buildings to one Mr. Fox in March 1883. The area of the *ahata* was shown in the sale-deed as 33 *bighas* odd. In the year 1887 Mr. Fox sold the *ahata* to one Mr. F. Foutier. Mr.

Foutier in his turn executed a simple mortgage with respect to the *ahata* in 1887 in favour of one Raja Ram. Raja Ram filed a suit for sale on the basis of the mortgage in 1889 and, having obtained a decree, put the *ahata* to sale and purchased the same himself. Raja Ram having died, his rights and interests in the *ahata* passed to his two sons, named Radha Raman and Badri Prasad. Radha Raman and Badri Prasad executed the sale-deed dated July 31, 1926, in favour, of the plaintiffs to which reference has already been made. Radha Raman was defendant No. 1 and Badri Prasad's son, Sugan Chand, was defendant No. 2 in the present litigation and they were impleaded as defendants first party.

Having obtained the sale-deed just mentioned, the plaintiffs filed an application in the Revenue Court praying that their names be recorded as proprietors in the *khewat*. The application was opposed by defendants second and third parties who, as stated before, are the *zamindars* of the village. The Assistant Collector considered that the owners of the factory had enjoyed an absolute and heritable right in the land and accordingly ordered that the names of the plaintiffs should be recorded as proprietors. The *zamindars* appealed to the Collector who held that the position of the plaintiffs and of their predecessors-in-title was not that of proprietors, and, as such their names could not be entered in the *khewat*. He observed that the matter was one which would ultimately have to be settled by the Civil Courts. He however ordered that the names of the vendors of the plaintiffs should continue to be shown in the revenue papers and a note should be made in the column of remarks to the effect that the property has been sold.

Both the Assistant Collector and the Collector felt considerable difficulty in deciding about the nature of the tenure of the *ahata* in question. The *zamindars* being dissatisfied with the order of the Collector, appealed to the Commissioner who was also puzzled about the case. He considered that the present plaintiffs had failed to prove that they had any proprietary rights in the land, and, as such, their names could not be entered as proprietors. He also noted that as tenancy rights could not be sold the names of the plaintiffs could not be entered as tenants. He however observed that the status of the plaintiffs was "something superior to ordinary tenant's rights." The *zanindars* eventually filed an appeal in the Board of Revenue against the order of the Commissioner and the appeal was disposed of by a judgment delivered by Mr. Oppenheim, Senior Member of the Board of Revenue, with whose judgment the Junior Member, Mr. Walton, agreed. Mr. Oppenheim noted in the course of the judgment that he was "somewhat puzzled about the correct entry to be made," but he held that he was

> "satisfied that the entry which shows as tenants people who have severed all connection with the land and who do not now claim to have any connection with it is an entry which leaves things too much in the air."

He considered that there was much to be said in favour of the view entertained by the Assistant Collector, and that the status of the occupiers of this land was not dissimilar from the status of under-proprietors in Oudh. He however observed that "in the absence of a decision of a Civil Court" it was "not desirable that the Revenue Court should commit itself to the extent of finding that the respondents have proprietary rights." He noted the fact that "the land was always treated as tenancy land, whether rightly or wrongly it is impossible to say." He also took note of the fact that at the settlement the land was treated 'for the purposes of enhancement as occupancy land." In view of these reasons he concluded that the Commissioner and the Collector were right in holding that it was not for the Revenue Court to "make an entry in the *khewat* about the respondents." As a result of his findings he ordered the names of the present plaintiffs to be recorded in the *khatauni* in certain columns. The plaintiffs being dissatisfied with the order of the Board of Revenue, filed the suit giving rise to the present appeal. The cardinal question that arose for decision in the case was as to what was the nature of the tenure of the *ahata* in question. In the trial Court the plaintiffs claimed absolute proprietary title to the land on the basis of the alleged adverse possession themselves and of their predecessors-in-title for a period of over 12 years. This contention of the plaintiffs was overruled by the trial Court on the ground that it was a matter of admission that the *zamindars* all along realized rent of the *ahata* in question, and, as such, the possession of the occupiers could not be deemed to be adverse. In arriving at this finding the trial Court took note of the entries in the revenue papers in which all along the occupiers were shown as mere tenants. In the trial Court at a late stage of the case the plaintiffs claimed that their position, in

any case, was that of under-proprietors. This contention of the plaintiffs was also overruled by that Court. But, in view of the various transfers of the *ahata* in question, to which reference has already been made, the trial Court concluded that originally the *ahata* was given on a lease "for building and manufacturing purposes." It, however, went on to observe that as the *ahata* had now assumed the character of agricultural land, the vendors of the plaintiffs were

"no longer lessees under the general law but agricultural tenants amenable to tenancy law and as such incompetent to make the transfer which is, consequently, invalid."

Having arrived at the conclusion that the status of the vendors of the plaintiffs was that of mere tenants the trial Court dismissed the suit. As already stated, the plaintiffs abandoned their claim to proprietary rights in the Appellate Court, but maintained that their tenure was permanent and that they had a transferable and heritable right in the same. The Appellate Court acceded to this contention of the plaintiffs and passed a decree accordingly.

We have noted at the very inception of this judgment that it is difficult, if not impossible, to ascertain with precision the origin of the tenure of this *ahata* and the terms and the conditions subject to which the tenure was created. It is, however, clear that in the year 1807 there was an indigo factory with appurtenant buildings in this *ahata* and that till the year 1874 the major portion of the *ahata* was uncultivated. After the manufacture of the indigo dwindled or ceased, portions of the area of the *ahata* were brought under cultivation year after year. It appears from the revenue papers that by the year 1900 the major portion of the *ahata* was under cultivation, and so it is at present. The occupiers of the *ahata* were all along entered as occupancy tenants but the rent payable to the *zamindars* was the fixed and invariable amount of Rs. 88-2-0. It is obvious that so long as a negligible area of the *ahata* was under cultivation the occupiers of the *ahata* could not be correctly described as occupancy tenants of the entire *ahata*. Further, it is clear that occupancy tenants could not exercise the right of transfer, whereas in the present case we find that the *ahata* in question was the subject of numerous transfers and no exception to those transfers was ever taken by the *zamindars*. The *zamindars* all along remained content with the receipt of the rent mentioned above and it is worthy of note that this rent was payable to the *zamindars* even when practically the whole of the *ahata* was devoid of cultivation. On these facts the conclusion is irresistible that originally the *ahata* was given by the *zamindars* to an indigo manufacturer on a perpetual lease at a fixed rental for building and manufacturing purposes. It must further be held on the facts stated above that the rights conferred on the indigo manufacturer were heritable and transferable. The position of the lessee and of his successors could not, therefore, be of agricultural tenants, nor can the mere fact of the *ahata* being brought under cultivation nullify the lease originally granted by the *zamindars*. It follows that the view taken by the lower Appellate Court is correct and ought to be affirmed.

The view that we take receives support from an unreported decision of this Court in F. A. No. 60 of 1924 decided on April 14, 1927. That appeal arose out of a pre-emption suit. In that case one Mr. Dodsworth describing himself as the proprietor of an indigo factory, and the land appertaining thereto, in the District of Azamgarh, sold the same to certain persons. Some of the *zamindars* of the village then brought a suit for pre-emption. The vendees pleaded in defence that no proprietary interest was possessed by Mr. Dodsworth and a claim for pre-emption could not, therefore, be maintained in accordance with the provisions of the Agra Pre-emption Act. This contention of the vendees was accepted both by the Court below and by this Court. In deciding the appeal this Court made the following observations :

"The land appears to have been let to his (Mr. Dodsworth's) predecessors-in-title for the purpose of building and running an indigo factory. A rent was reserved which has been regularly paid to the *zamindars*. The interest possessed by the occupier cannot therefore be proprietary interest but is analogous to that of a lessee of land for building purposes."

Although the origin of a tenancy may not be known, yet if it is proved that the tenant and his ancestors were in possession of the tenure for a long time and had built a *pucca* house on the same and from time to time the tenure had been transferred by succession and purchase without protest by the landlord, a Court is justified in presuming that the tenure is of a permanent nature. This was the view taken by the Calcutta High Court in *A. Casperz* v. *Kedar Nath Sarbadhikari* (1) and by their Lordships of the Privy Council in *Naba Kumari* v. *Behari*

(1) 28 C 738; 5 C W N 858.

Lal (2). For the reasons given above we dismiss this appeal. But in view of the fact that the plaintiffs ultimately abandoned the case as originally put forward by them in the trial Court and the relief eventually granted to them by the Appellate Court was not the relief prayed for by them in the plaint, we direct the parties to bear their own costs of this litigation in all the Courts.

S. *Appeal dismissed.*

(2) 34 C 902; 34 I A 160; 6 C L J 122; 11 C W N 865 (P C).

PATNA HIGH COURT

Second Appeal No. 318 of 1938
May 1, 1940
FAZAL ALI AND MEREDITH, JJ.
GANSU RAM AND OTHERS—
APPELLANTS
versus
Mst. PARVATI KUER—RESPONDENT

Execution sale—Decretal amount substantially reduced in appeal after sale—Judgment-debtor found not in position to pay up even reduced amount before date of sale or within 30 days from sale—Sale proceeds less than final decretal amount—S. 144, Civil Procedure Code (Act V of 1908), held did not apply and sale could not be set aside—Evidence—Duty of party—Party not producing best evidence—Court can draw inference unfavourable to party.

In execution of a decree, the property of the judgment-debtors was sold and purchased by the decree-holder. Subsequently, the amount of the decree was reduced substantially by the High Court in second appeal. The sale proceeds were less than he final decretal amount. It was found that the judgment-debtors were not in a position to pay up the whole decretal amount and thereby avoid the sale of their property, even if the decretal amount had been reduced before the sale was held or within 30 days from the date of sale;

Held, that as the judgment-debtors could not have paid up even the reduced decretal amount and the sum realised by the sale was less than the reduced decretal amount, the situation would not have been altered in any way, had the decree been modified before instead of after the sale and hence this was not a case to which s. 144, Civil P. C., was applicable and the sale could not be set aside. 137 Ind. Cas. 269 (1) and 68 Ind. Cas. 516 (3), relied on.

It is for a party to prove his case by the best evidence available to support the contentions put forward. Where, therefore, a money-lender is examined by a party wishing to prove a money transaction but fails to get his account books produced, the Court is entitled to draw an adverse inference against him.

S. A. from the appellate order of the District Judge, Patna, dated September 6, 1938.

Mr. *B. P. Sinha*, for the Appellants.
Mr. *C. P. Sinha*, for the Respondent.

Meredith, J.—This is miscellaneous second appeal by the judgment-debtors and comes before us after a remand for an additional finding of fact, this finding having now been received. The respondent obtained a decree for Rs. 963-12 15 dams, against the appellants. In execution of that decree, the property of the appellants was sold on June 15, 1936, for Rs. 300 and purchased by the decree-holder. Subsequently, in 1937, the amount of the decree was reduced by the High Court in second appeal to the sum of Rs. 507-14-6.

The judgment-debtors thereupon applied before the Munsif to get the sale set aside upon payment of the entire decretal amount of Rs. 507-14-6 and to get back their property, by way of restitution under s. 144, Civil P.C. The learned Munsif rejected this application on the ground that the sale proceeds (Rs. 300) were less than the final decretal amount; so the property would have had to be sold in any case, irrespective of the modification of the decree. The lower Appellate Court took the same view and the case then came to the High Court in second appeal. This Court thought it advisable to have a clear finding of fact as to whether, if the decretal amount at the time of the sale had been only Rs. 507-14-6, the appellants would have been in a position to get the sale set aside by paying that reduced decretal amount within 30 days of the sale. The case went back to the learned District Judge, who sent it to the Munsif, who gave both parties an opportunity of adducing evidence on this point. After considering that evidence the learned District Judge has forwarded his finding. He says that he has no hesitation in finding it as a fact that the appellants were not in a position to pay up the whole decretal amount and thereby avoid the sale of their property, even if the decretal amount had been reduced to Rs. 507-14-5 only before the sale was held or within 30 days from the date of sale.

That finding of fact is binding upon us in second appeal. It has been sought to challenge it on the ground that the learned District Judge misdirected himself. One of the circumstances, upon which he based his finding, (though, be it noted, it was by no means the only circumstance) was that it was alleged that a mortgage bond which had been executed in favour of the appellants by one Bandhu Mahto had been redeemed on February 14, 1936, on payment of Rs. 1,695. The learned Judge found that there was an endorsement of payment of

this sum on the back of the bond dated February 14,1936. The appellant's case, however, was that the mortgagor had paid this amount by giving an *ijara* of the same property to one Parbhu Chand, the brother-in-law of appellant No. 2. The learned District Judge commented adversely on the evidence of this Parbhu Chand, because though he was a substantial money-lender, he did not produce his account books in support of this transaction. It is argued for the appellants that the learned District Judge was wrong in drawing an unfavourable inference, because Parbhu Chand was not called upon to produce these account books. The contention does not appear to me to be a sound one. It was for the appellants to prove their case by the best evidence, and when they examined Parbhu Chand to support their case, it was, in my view, for them to see that their witness produced the best evidence available to support the contentions put forward. It was therefore the appellants who should have summoned this witness with his account books and the learned Judge, in my view, was quite right in drawing an unfavourable inference. Apart from that, the learned Judge, as I have said, considered a quantity of other evidence. He noted the fact that the *ijara* was in the name of Parbhu Chand, a brother-in-law of appellant No. 2, and he came to the conclusion that this was not really a cash transaction, but the substitution of a usufructuary mortgage for the original mortgage executed for the appellants in the name of this Parbhu Chand. The learned Judge noted also that direct evidence on this point was given by a witness on behalf of the respondent, and the Judge considered that the evidence of this witness was worthy of credit. He also took into account the fact that though the appellants could have secured under the orders of the Court a stay of the sale by deposit of half the original decretal amount, nevertheless they never put up that sum.

The finding of the learned District Judge cannot be called an unreasonable one and is not one which can be successfully challenged in second appeal. It must be taken then that the appellants were not in a position to pay even the reduced decretal amount at the time of the sale. This being so, the case was in essentials similar to *Doyal Sarkar* v. *Tari Deshi* (1). In that case Rankin, C. J. held that the judgment-debtor in a case of this kind could not recover the properties except upon showing that the sale was in substance and truth a consequence of the error in the original decree. For the appellants, it is argued that that was a case where the decree had only been slightly modified, and that where the decree has been substantially altered, it must be taken that the original decree ceased to exit. The principle to be followed therefore should be that laid down in *Syed Nathadu Sahib* v. *Nallu* (2). This ruling of the Madras High Court was however subsequently considered by the Madras High Court itself in *Sundaram Reddi* v. *Raghava Reddi* (3) where it was observed that under the old Code the Court was not limited, in granting such restitution as it thought fit, to place the party in the same position as he would have occupied but for the variation or reversal of the original decree. Section 144 of the present Code gave a much more restricted power, and the decision in *Syed Nathadu Sahib* v. *Nallu* (2), might be distinguished on the ground that it related to s. 583 of the old Code. Their Lordships went on to lay down a criterion precisely similar to that adopted in *Doyal Sarkar* v. *Tari Deshi* (1), namely, that the prejudice to be removed by restitution must be result of the erroneous terms of the original decree. Once therefore it is held that the erroneous character of the original decree made no difference to what took place, then manifestly, upon this criterion, there is no case for restitution, and whether the modification of the decree is slight or substantial will be irrelevant. It is quite clear having regard to the finding of fact now received that in the present case the position was not altered in any way by the modification of the decree, and as the judgment-debtors could not have paid up even the reduced decretal amount and the sum realised by the sale was less than the reduced decretal amount, the situation would not have been altered in any way, had the decree been modified before instead of after the sale. This is not a case where there was any prejudice owing to the erroneous character of the original decree, and is not therefore a case to which s. 144 Civil. P. C. is applicable. I would dismiss this appeal with costs throughout.

Fazl Ali, J.—I agree.

s. *Appeal dismissed.*

(1) 59 C 647; 137 Ind. Cas. 269; A I R 1932 Cal. 303; 54 C L J 293; 35 C W N 1298; Ind. Rul. (1932) Cal. 283.

(2) 27 M 98.

(3) A I R 1922 Mad. 96; 68 Ind. Cas. 516; 42 M L J 315; (1922) M W N 141; 16 L W 355.

BOMBAY HIGH COURT

First Appeal No. 360 of 1938
July 30, 1940
BROOMFIELD AND DIVATIA, JJ.

DAMODAR VISHNU JUVEKAR
AND OTHERS—APPELLANTS
versus
SHRIRAM LAKSHMAN JUVEKAR
AND OTHERS—RESPONDENTS

Hindu Law — Adoption — Widow — Authority to adopt —Time limit for adoption—Will providing for adoption of son of any nephew except V *and* K*— Widow permitted to adopt any one except son of* V *or* K *on refusal of nephews to give son in adoption— Eligible nephews and their wives dead—Adoption of nephew's grandson, held valid—Alienation—Widow— Trust, if alienation—Trusts Act (II of* 1882*), ss.* 13,33*— Suit challenging trust decreed — Mesne profits, awarding of, against trustees — Trustees, if can be ordered to pay costs of suit out of their own pockets.*

Apart from any express restriction in that respect imposed by the husband there is no limit to the time during which a widow may exercise her power of adoption. [p. 415, col. 2.]

A direction to operate as a prohibition against a widow adopting a boy as a son to her husband except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption to him.

Held, on facts that the direction in the will that the son of a nephew should be adopted was merely recommendatory so long as a nephew was available to give him in adoption and it was not intended that the direction was to be followed for all time and on every occasion when the widow might choose to adopt. It was reasonable to infer from the provisions of the will that the testator was desirous that an adoption should be made by his widow. He prohibited the adoption of a son of *V* or *K* and he expressed the desire that the son of one of his other nephews should be adopted if available. But he had not made it clear that in the event of such a son not being available no adoption was to be made. The adoption of the plaintiff who was a grandson of one of the eligible nephews was therefore valid as at that time, the three eligible nephews and their wives were all dead, so that, although some of their sons were living, they had no parents to give them in adoption, and it was impossible to comply with the provisions of the will. 64 Ind. Cas. 536 (3), 163 Ind. Cas. 1 (4) and *Lakshmibai* v. *Rajaji* (5), relied on. 127 Ind. Cas. 743 (1), distinguished. 57 Ind. Cas. 1 (2), explained [p. 414, col. 1.]

Quaere.—It is doubtful whether a trust deed can be regarded as an alienation.

Trustees are bound to carry out the provisions of the trust deed and are justified in continuing to do so even after the suit is brought, challenging the trust at least until the passing of the decree and hence mesne profits should not be ordered against them. They are bound by law to defend the suit which sought to put an end to the trust It is therefore unreasonable that they should be made to pay the costs of the suit out of their own pockets. [p. 416, cols. 1 & 2.]

Mr. *V. B. Virkar*, for the Appellants.

Messrs. *A. G. Desai* and *S. A. Kher*, for Respondents Nos. 1 and 2 respectively.

Broomfield, J.—The appellants in this case are the trustees under a deed of truts executed by Sagunabai widow of Laxman Damodar Juvekar. The plaintiff was adopted by Sagunabai in 1937 as son to her deceased husband and he has sued to recover the property from the possession of the trustees. Laxman before he died in 1900 made a will the principal provisions of which were as follows. He gave all his movable property to his wife and also the income of his immovable properties. But she was restrained from alienating these properties by sale, mortgage or gift. Authority was given to her to adopt a son subject to certain restrictions. A sum of Rs. 100 a year was set apart for beating drums before the family God, morning and evening and it was provided that if she did not adopt Sagunabai was to make some permanent arrangement for this and other charitable purposes mentioned by the testator. In case a son was either born to the testator or adopted, then the will provided that the son was to be full owner of the property.

Fifteen years after her husband's death Sagunabai executed a deed of trust. This deed, Ex. 45, begins by reciting that Sagunabai had been given *malki* or ownership of the estate under the will, which was not a fact. The object of the trust deed was stated to be that "the estate may continue to be managed and used as I am doing up till now." As regards the powers of the trustees the deed says,

"in order to carry out the management mentioned hereafter I have from to-day entrusted to the trustees title to the estate and I have given them all sorts of rights except the right of making a mortgage, sale or gift."

Then there are various directions to the trustees to spend the income on specified charitable object allowing Rs. 100 a year Sagunabai's maintenance. In 1919 Sagunabai decided to adopt a son and did adopt one Shrirang *alias* Siddeshwar, but the adoption was challenged by the trustees and was set aside by the Courts. The trustees continued as before in management of the property until 1937 when the plaintiff was adopted. The plaintiff's suit was resisted by the trustees who contended that the adoption was invalid on various grounds. The trial Court, however, found that it was valid and awarded possession to the plaintiff with mesne profits from the date of suit. In this appeal the learned Advocate for the appellants contends, firstly, that the plaintiff's adoption was invalid in view of the directions contained in Laxman's will, and, secondly, that if the adop-

tion is valid, the adopted son is bound by the provisions of the trust deed in 1915. In order to consider the first argument it is necessary to refer in more detail to the provisions of the will. The important paragraph in this connection is para. 4 which contains these words :

"I authorize her (*i. e.* Sagunabai) to take a boy in adoption after my death. As to the boy to be adopted she may adopt any one of the sons of my nephews other than my two nephews Vishnu Vasudeo and Krishnaji Sitaram according to her choice. If they refuse to give their son in adoption, she may adopt a boy of any other person as she likes, but she shall not adopt a boy of either Vishnu or Krishnaji."

Reference may also be made to para. 6 which says :

"In case I happen to survive this illness and a son be borne to me, then my wife should, after me, manage the properties and household affairs in the way I have been doing, until that son attains majority. If that does not happen, then, after me, a boy should be adopted by her as written in para. 4 at any time she likes."

Laxman had three brothers all of whom had sons. He had altogether five nephews, two of whom he mentioned in the will as persons whose sons he did not wish to be adopted by his widow. That left three eligible nephews and they all had sons. In 1919 at the time of the first adoption some of these nephews and sons were still living so that there was nothing to prevent Sagunabai complying with the provisions of para. 4 of the will. Instead of doing that she adopted somebody else and therefore the adoption was held to be invalid. But by the year 1937, when the plaintiff was adopted, the three eligible nephews and their wives were all dead, so that, although some of their sons were living, they had no parents to give them in adoption, and it was impossible to comply with the provisions of the will. Plaintiff is a grandson of one of the eligible nephews. Mr Virkar's argument is that on the true construction of para. 4 of the will the widow's power to adopt was restricted so that she could only adopt one of the sons of the nephews other than Vishnu and Krishnaji. The only exception to that was that if these nephews refused to give their sons in adoption the widow was authorized to adopt another boy. It is urged that the refusal of the nephews to give their sons in adoption was a condition precedent to the adoption of any other person and that as, so far as the evidence goes, Sagunabai never tried to adopt a son of one of the eligible nephews and waited until the parents of these sons were all dead, her power to adopt had become extinguished. The provisions of this will were construed by this Court in the case which arose from the first adoption and the following observations were made in the judgment in F. A. No 234 of 1921, decided on February 5, 1923, by Macleod, C. J. and Crumph, J., *Shrirang Laxman Juvekar* v. *Shri Dev Bhargavram* :

"As there was a clause in the will with regard to the widow's power of adoption the widow was bound to follow the directions given therein. She was not obliged to adopt anybody and if she were minded to adopt, then, in the first instance she could only adopt one of the sons of the testator's nephews other than the two nephews Vishnu and Krishna. There is therefore an express direction that she should adopt if she made up her mind to adopt, from a particular class of grand-nephews. It was only in case nephews, other than Vishnu and Krishna, refused to give a boy in adoption that the widow could adopt any other person she liked, always excepting the boy belonging to Vishnu or Krishna. In order to show that the widow was entitled to adopt the plaintiff according to the directions of her husband's will, it would have to be proved that there were no grand-nephews who could be adopted and that therefore the choice of the widow had become unobstructed."

Mr. Virkar says that these observations support his argument in the present case, but we do not think so. The position then was, as I have already mentioned, that there were grand-nephews alive who could have been given by their parents. Therefore, it was open to Sagunabai to comply with the directions in the will and that being so, she was no doubt bound to compiy with them. But in 1937, when the parents of the grand-nephews were all dead, it was no longer possible to comply with the directions in the will. The last sentence of the passage quoted suggests that in such circumstances there would be no longer any obstruction to the widow's power to adopt. We were referred to a decision of the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen* (1), where their Lordships said that the ordinary rule as to the construction of powers which prevails in England (as, for instance, that when a power is given to be executed with the consent of a person, and that person dies before the power is executed, the power comes to an end), is generally applicable to the construction of an *anumatipatra* executed in India. But this was a case from Patna governed by the Dayabhaga law, under which a widow cannot adopt except with the authority of her husband. That is to say, her power to adopt is derived from the husband. In Bombay, on the other hand, she has an

(1) A I R 1930 P C 242; 127 Ind. Cas. 743; 10 Pat. 187; 57 I A 296; 32 Bom. L R 1588; (1930) A L J 1184; 11 P L T 587; 32 L W 324; 52 C L J 287; 34 C W N 1161; 59 M L J 615; 7 O W N 1062; Ind. Rul. (1930) P C 359; (1931) M W N 139 (P C).

inherent power to adopt under the Hindu Law which she can exercise except in so far as it has been expressly limited or restricted by the husband. Cases under the Dayabhaga therefore in our opinion have no application to the present case. *Sitabai* v. *Bapu* (2), was also cited for the proposition that a Hindu widow under the Bombay school of law is bound to obey any mandatory direction contained in her husband's will as to the way in which her power of adoption should be exercised. That proposition is of course correct. But in our opinion it does not support the argument advanced on behalf of the appellants here. The only provisions in para. 4 of this will which can be described as mandatory is the prohibition against the adoption of a son of either Vishnu or Krishnaji

The leading authority on this point is *Yadao* v. *Namdeo* (3), where their Lordships laid down the rule that a direction to operate as a prohibition against a widow adopting a boy as a son to her husband except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption to him. This rule was re-affirmed in *Jagannath Rao* v. *Rambharosa* (4). The learned trial Judge was of opinion that, applying this rule to the present case, the direction that the son of a nephew should be adopted was merely recommendatory so long as a nephew was available to give him in adoption and it was not intended that the direction was to be followed for all time and on every occasion when the widow might choose to adopt. We are in agreement with this view. We think it is reasonable to infer from the provisions of the will that Laxman was desirous that an adoption should be made by his widow. He prohibited the adoption of a son of Vishnu or Krishnaji and he expressed the desire that the son of one of his other nephews should be adopted if available. But he has not made it clear that in the event of such a son not being available no adoption was to be made. I may refer in this connection to *Lakshmibai* v. *Rajaji* (5), where this Court approved a proposition contained in West and Buhler (p. 997*):

"It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least in Bombay, to warrant the adoption of another child, unless indeed he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference."

It can make no difference in principle we think whether the specified child dies or the parents of that child die so that his adoption becomes impossible. We think, therefore, that this authority applies directly to the present case.

Mr. Virkar suggested that it made a difference that the widow had not apparently made any attempt to comply with the provisions of the will by adopting a son of one of the nephews other than Vishnu or Krishnaji which she could have done had she been so minded. But the husband could have limited the time within which the adoption was to be made. It seems that it was not his desire to impose any such limit and in para. 6 of the will he has expressly stated that the widow might adopt at any time she liked. The law is clear that apart from any express restriction in that respect imposed by the husband there is no limit to the time during which a widow may exercise her power of adoption. Although in the trial Court the validity of the adoption was assailed on various other grounds, no other argument has been put forward in the appeal except that which I have discussed. In our opinion, the trial Court was perfectly right in the view it took of the construction of the will and in finding that the adoption was a valid one.

If the adoption was valid, it is obvious, we think, that the plaintiff cannot be affected by the provisions of the trust deed. It is clear from paras. 6, 7 and 9 of the will that if a son were borne to the testator or adopted to him, that son was to be the owner of the property. The learned trial Judge has expressed the opinion that the trust deed was void *ab initio* as being beyond the powers of the widow. Apparently he regarded it as an alienation. What was prohibited by the will was alienating the property by gift, sale or mortgage. I think it is doubtful whether the trust deed can

(2) A I R 1921 P C 88; 57 Ind. Cas. 1; 39 M L J 106; 2 U P L R (P C) 106; (19 0) M W N 556; 12 L W 386; 16 N L R 162; 25 C W N 97; 22 Bom. L R 1359; 47 I A 202; 28 M L T 408; 47 C 1012 (P C).

(3) A I R 1922 P C 216; 64 Ind. Cas. 536; 17 N L R 145; 30 M L T 53; 26 C W N 393; 42 M L J 219; 15 L W 565; 20 A L J 481; 24 Bom. L R 609; 49 C 1; 48 I A 513 (P C).

(4) A I R 1936 P C 201; 163 Ind. Cas 1; 1936 O L R 359; 1936 A L R 592; 9 R P C 32; 2 B R 671; 44 L W 120; 40 C W N 1125; 1936 A L J 874; 38 Bom. L R 776; 71 M L J 309; (1936) M W N 942; 61 C L J 13 (P C).

(5) 22 B 998.

*Page of 22 B.—[*Ed*].

be regarded as an alienation. But the point is not really material. If it was an alienation, then clearly it was void. If it was not, it was merely an arrangement made by the widow for the management of the property until such time as an adoption was made and the arrangement must necessarily come to an end when the adoption took place. It was urged that the trust deed had been executed by defendant No. 3 in accordance with her husband's instructions as given in the will of which she was made executrix. But the will itself shows that any such arrangement was only to be made in case there were no adoption. It would be quite impossible to hold therefore that the trust deed is in any way binding on the plaintiff.

On the merits, therefore, the appeal entirely fails, but we think there is force in Mr. Virkar's arguments in respect of two minor points, mesne profits and costs. Mesne profits have been awarded from the defendants from the date of the suit. But the defendants being trustees were bound to carry out the provisions of the trust deed and were justified in continuing to do so even after the suit was brought, at least until the passing of the decree by which the adoption of the plaintiff was affirmed to be valid. We think therefore, that the order as to mesne profits should be varied and it should be made subject to this, that the trustees shall be held discharged from liability in respect of sums proved by them to have been paid in accordance with the trust deed between the date of suit and the date of the decree. After the date of the decree we consider that if the defendants continued to make payments they did so at their own risk.

Then as regards costs, the trial Court's order was that the trustee-defendants were to pay the costs both of the plaintiff and of defendant No. 3. But it was the duty of the defendants as trustees to take all steps reasonably requisite for the preservation of the trust property and the assertion or protection of the title thereto (s. 13, Trusts Act, II of 1882). They were therefore bound by law to defend the plaintiff's suit which sought to put an end to the trust. Section 32 of the same Act provides that every trustee may reimburse himself, or pay or discharge out of the trust property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust property. This being the law it is unreasonable that the defendants should be made to pay the costs of the suit out of their own pockets. We think the proper order to make as to the costs of the trial Court is that the costs of plaintiff and all the defendants including defendant No. 3 should come out of the estate and we order accordingly. On the other hand we consider that there is no substance in the appeal except on the minor points to which I referred, and we are not prepared to direct that the costs in this Court should come out of the estate. The order as to the appeal will be that the appeal is dismissed with costs, but we direct that there should be one set of costs, payable to the plaintiff.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 1261 of 1940

April 18, 1940

LEACH, C. J. AND PATANJALI SASTRI, J.

MUTHU GOUNDAN—PETITIONER

versus

PERIYA GOUNDAN AND ANOTHER —RESPONDENTS

Madras Debt Conciliation Act (XI of 1936), ss. 18, 17—Board is entitled to give certificate under s. 18, even when it is bound eventually to dismiss petition of debtor under s. 17.

Action under s. 18, Mad. Debt Conciliation Act does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The opening words of s. 18 (1) make it quite clear that the certificate can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the debtor. The fact that the Board may have to dismiss a debtor's petition under s. 17, does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused.

C. Misc. P. praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a Writ of Certiorari calling for the records in D. C. B. No. 558 of 1939 on the file of the Debt Conciliation Board, Namakkal, Salem District and to quash the order passed by the said Board on November 17, 1939.

Messrs. *C. S. Krishnamurthi Iyer* and *C. S. Vidyasankara Iyer*, for the Petitioner.

Mr. *A. Srirangachariar*, for Respondent No. 1.

Leach, C. J.—This matter raises the question whether a Debt Conciliation Board is entitled to give a certificate under s. 18 of the Madras Debt Conciliation Act, 1936, when it will be bound eventually to dismiss

under s. 17 of the Act a petition for the settlement of the petitioner's debts. The respondent applied to the Debt Conciliation Board, Namakkal, for a settlement of his debts under the provisions of s. 4 of the Act. His only creditor was the petitioner in this proceedings, who has security. The petitioner appeared before the Board and informed it that he was not prepared to agree to a settlement of his debt. Before there can be a settlement of debts under the Act creditors representing more than fifty per cent. of the total amount of debts must agree to a settlement. If no amicable settlement is arrived at within 12 months from the date of the application the Board is bound by virtue of the provisions of s. 17 to dismiss the application. In this case the Board did not at once dismiss the petition as the result of the petitioner's objection, but proceeded to consider what would be the amount payable by the respondent to the petitioner if the debt was scaled down in accordance with the provisions of the Mad. Agri. Relief Act. The Board has no power to scale down the debt, as was pointed out by this Court in *Jonnalagadda Ramasami Chetty* v. *Ramachandra Rao* (1). The Board did not, however, purport to scale down the debt. It merely considered what would be the figure arrived at if the provisions of the Mad. Agri. Relief Act were applied. It found that on this basis the debt due to the petitioner would be reduced to Rs. 1954. Thereupon the respondent expressed his willingness to pay this amount with interest at 6¼ per cent. from October 1, 1937, till the date of payment. The Board considered that this was a reasonable offer and granted a certificate under s. 18 (1) of the Mad. Debt Conciliation Act. The petitioner says that the Board had no power to pass this order and therefore, it should be quashed.

Sub-s. (1) of s. 18 states that where during the hearing of any application made under s. 4, any creditor refuses to agree to amicable settlement, the Board shall, if it is of opinion that the debtor has made such creditor a fair offer which the creditor ought reasonably to accept, grant the debtor a certificate, in such form as may be prescribed in respect of the debts owed by him to the creditor. The effect of a certificate is that when a creditor sues in a Civil Court for the recovery of his debt the Court cannot allow the plaintiff any costs in the suit, or any interest on the debt after the date of the certificate in excess of simple interest at 6 per cent. per annum on the principal amount due on the date of the certificate. This provision is contained in sub-s. (2). Rules have been framed under the Act and they contain the form of certificate to be given under s. 18 (1). The form reads as follows:—

"This is to certify that during proceedings No. of under the Mad. Debt Conciliation Act, 1936, between (debtor) on the one hand and (creditor) on the other hand, for the settlement of an alleged debt of Rs. the said creditor has, in our opinion, refused a fair offer of settlement made by the said debtor, which the said creditor ought reasonably to have accepted.

(1) The following particulars of the debt were furnished by the said creditor under s. 10 (1) of the Act."

Action under s. 18 does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The opening words of sub-s. (1) of s. 18 (1) namely, "Where during the hearing of any application under s. 4" make it quite clear that the certificate can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the creditor. The form of certificate given in the rules emphasizes this. The fact that the Board may have to dismiss a debtor's petition as the Board will have to do in this case, does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused. As the Board did not purport to scale down the debt under the provisions of the Mad. Agri. Relief Act, but merely took into consideration the provisions of that act in order to consider what would be a fair offer by the respondent, it cannot be said that it has acted contrary or without jurisdiction or even contrary to law.

The petitioner's application for a *writ of certiorari* must be dismissed with costs.

Memo of costs will follow.

N.-S. *Application dismissed.*

(1) I L R 1940 Mad. 188; 188 Ind. Cas 617; (1939) 2 M L J 789; 50 L W 813; (1939) M W N 196; A I R 1940 Mad. 295; 13 R M 40.

RANGOON HIGH COURT

Second Appeal No. 42 of 1940

June 4, 1940

MOSELY, J.

MAUNG SHWE THIN—APPELLANT

versus

MAUNG THA OK—RESPONDENT

Upper Burma Land and Revenue Regulation (III of 1889), ss. 53 (2) (xii), 41—Default in payment of re-

venue by fishery lessee—Surety's land resumed without notice for payment of revenue and without attachment or sale—Surety's claim is not barred by s. 53 (2) (xii).

The words "connected with or arising out of the collection of revenue" in s. 53 (2) (*xii*) must be construed reasonably. Their meaning cannot be extended so as to include any consequence however indirect, or however unjustified by law of action taken to collect revenue. The words "collection of revenue" mean collection by payment in the ordinary course or recovery of arrears in the way allowed by s. 41, Upper Burma Land and Revenue Regulation. Consequently where on default by a fishery lessee in the payment of revenue his surety's land is resumed without serving any notice to pay the revenue and without attachment or sale of the land within the meaning of s. 41, the claim of the surety cannot be said to be connected with or arising out of collection of revenue. The claim is not therefore barred by s. 53 (2) (*xii*).

S. A. against the decree of the Assistant District Court, Minbu, dated November 4, 1939.

Mr. *G. N. Banerjee*, for the Appellant.

Mr. *U E Maung* (1), for the Respondent.

Judgment. — The plaintiff-respondent Maung Tha Ok was surety for the payment of fishery revenue on behalf of a fishery lessee in Upper Burma. That lessee failed to pay the revenue and Maung Tha Ok's land was sold. Maung Tha Ok claimed that it was *bobabaing* land, the defendant that it was State land. The trial Court did not come to any finding on the point. Under s. 27, Fisheries Act, arrears of fishery revenue may be recovered as if they were arrears of revenue, (not land revenue,) and the term "revenue" is defined in s. 37 (*c*) of the Regulation as including revenue payable on account of fisheries. The surety's land was resumed though notice to pay the revenue was never served on him. The land was taken over or resumed by Govt. and the defendant-appellant Maung Shwe Thin was allowed to take it on payment of the arrears of Rs. 70-8-0. There was however no attachment or sale of the land within the meaning of s. 41 which gives the processes by which arrears may be recovered. Resumption is only allowed by the rules in the case of arrears of land revenue itself, and only in the case of State land; *vide* r. 174 framed under s. 41 (1) (*d*): (r. 34 quoted by the Court of First Appeal has been cancelled).

The two lower Courts were of the opinion that a Civil Court had jurisdiction and that the plaintiff's claim was bound to succeed. The case quoted by the lower Appellate Court, *Maung Po Cho* v. *Maung San Bwin* (1), is irrelevant. That concerns the jurisdiction of the Civil Courts to entertain disputes between private persons as to the right to occupy land over which no landholders rights have been acquired under the Lower Burma Land and Revenue Act. There are similar decisions in Upper Burma as to the effect of s. 53 (2) (*ii*) of the Regulation *Sonilal Sheoshankar* v. *Delawar* (2) and *Burma Oil Co. Ltd.* v. *Baijnath Singh* (3). The only contention raised in this appeal is that the suit was barred by the provisions of s. 53 (2) (*xii*) of the Regulation which says that a Civil Court shall not exercise jurisdiction over

"any claim connected with, or arising out of, the collection of revenue, or the enforcement of any process for the recovery of an arrear of revenue or any sum recoverable as such an arrear."

Ko Cheik v. *Secretary of State* (4) is quoted in this connection. That however was a case where there were properly instituted recovery-proceedings for the recovery of *thathameda* tax, and the claim was in respect of the property sold in connection with the collection of revenue. The question in the present case is whether the plaintiff's claim is connected with, or arising out of, a collection of revenue, or the enforcement of any process for the recovery of an arrear of revenue. The words "connected with or arising out of the collection of revenue" must be construed reasonably. Their meaning cannot be extended so as to include any consequence however indirect, or however unjustified by law of action taken to collect revenue. I do not think it can be said that the plaintiff's claim in this suit was connected with or arose out of a collection of revenue merely because, when the revenue was not collected, the revenue authorities proceeded without jurisdiction to resume the land. In my opinion, the words "collection of revenue" mean collection by payment in the ordinary course or recovery of arrears in the ways allowed by s. 41. No doubt, if the revenue authorities had proceeded to enforce any process (process is defined in s. 41) for the recovery of arrears of revenue the jurisdiction of a Civil Court would be barred; but there was no attachment and sale here, and what was done was not done in enforcement of any process for the recovery of revenue as defined in the Act. To hold otherwise would mean that if the revenue authorities did anything they

(1) 3 R 171; 86 Ind. Cas. 531; A I R 1925 Rang. 203.

(2) 2 U B R 151; 39 Ind. Cas. 367; A I R 1918 U B 46.

(3) 3 U B R 212; 59 Ind. Cas. 960; A I R 1920 U B 1.

(4) 1939 Rang. 275; 181 Ind. Cas. 590; A I R 1939 Rang. 160; 11 R Rang. 473.

pleased with total absence of jurisdiction under the Act in order to collect revenue the jurisdiction of Civil Courts would be barred. For these reasons, I consider that the orders of the lower Courts were correct and this appeal is dismissed with costs, Advocate's fee two gold *mohurs*.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 220 of 1936
August 21, 1940

NASIM ALI AND B. K. MUKHERJEA, JJ.

Raja JANAKI NATH ROY AND OTHERS—DEFENDANTS Nos. 5 to 7—APPELLANTS

versus

JYOTISH CHANDRA ACHARYA CHOWDHURY—PLAINTIFF AND OTHERS—RESPONDENTS

Evidence Act (I of 1872), s. 35—Age—School Register—Evidentiary value—Hindu Law—Widow—Surrender—Surrender with consent of daughter of next reversioner—Daughter reserving to herself as consideration substantial part of property or stipulating for any benefit to her save and except what was necessary for maintenance—Surrender to preserve husband's estate—Surrender, if binding on next reversioner—Surrendering female, if can take portion of immovable property for maintenance—Such maintenance reserved—If it can be enjoyed by widow's successor after her death—Suit by presumptive reversioner for declaration that surrender by limited owner is invalid—Onus to prove that surrender is valid, where lies.

Where there is no evidence to show on what materials the entry in the school register about the age of a person was made the statement in the register about his age has no evidentiary value. [p. 421, col 1.]

Under Hindu Law a widow can, with the consent of her daughter who is the next heir of her husband, relinquish the estate in favour of the daughter's son. But the consent given by her must show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting, in substance, to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. If the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same, a substantial part of the property which she is also presumed to surrender, or stipulates for any benent to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life interest for consideration, but that could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice of the actual reversioner at the time of her death. Mere consent might operate as a personal estoppel against the consenting daughter or any other person claiming through her, but it cannot bind the actual reversioner. Such a surrender is not binding on the actual reversioner even if it is made to preserve the husband's estate. Protection of the husband's estate is, no relevant matter for consideration in determining the validity of a surrender by the widow. [p. 432, col. 1; p. 433, col. 2]

[Case-law discussed.]

In a suit by presumptive reversioners for a declaration that alienations by the intermediate limited owners is not binding on the actual reversioners the onus of proving legal necessity, is upon the alienee. The suit for a declaration by a presumptive reversioner that surrender by the limited owners is invalid and does not destroy rights of actual reversionors should be governed by the same rule of onus inasmuch as under the Hindu Law the intermediate limited owners have only life interest and the estate vests absolutely only in male reversioners. [p. 425, col. 2.]

The maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering female heir from taking a portion of the immovable property or a lump sum at once for purposes of maintenance provided it is not unreasonable. 148 Ind. Cas. 828 (3), 57 Ind. Cas. 325 (13) and 53 Ind. Cas. 386 (14), relied on. [p. 432, col. 2; p. 433, col. 1]

A surrendering female heir can always reserve for herself a right to be maintained out of the estate which she surrenders, but the maintenance can be enjoyed by her only during her lifetime. It would be against the spirit of the doctrine of surrender if the widow would stipulate for a maintenance allowance not only to be paid to her during her lifetime, but which would be payable for ever to her heirs and successors. [p 433, col. 2.]

The widow has full powers over the income of her husband's estate, and a gift of the accumulated income, unless she had already chosen to treat it as a part of the corpus, cannot affect the validity of surrender.

Where the immediate reversioners were parties to the alienation by the widow, and consequently precluded themselves from bringing a suit for having it declared to be improper, the remote reversioner is competent to maintain a suit for a declaratory relief under s. 42, Specific Relief Act. As the Act makes no express provision for such cases, the suit must necessarily be referred to Art. 120, under which it should be instituted within six years from the date when the right to sue accrued. The right to sue would accrue ordinarily as soon as the alienation is made, but in a case where the plaintiff was not born when the widow executed the deed, his right to sue could not come into existence before the date of his birth. *Abinash Chandra* v. *Hari Nath* (15) and 81 Ind. Cas. 522 (16), relied on.

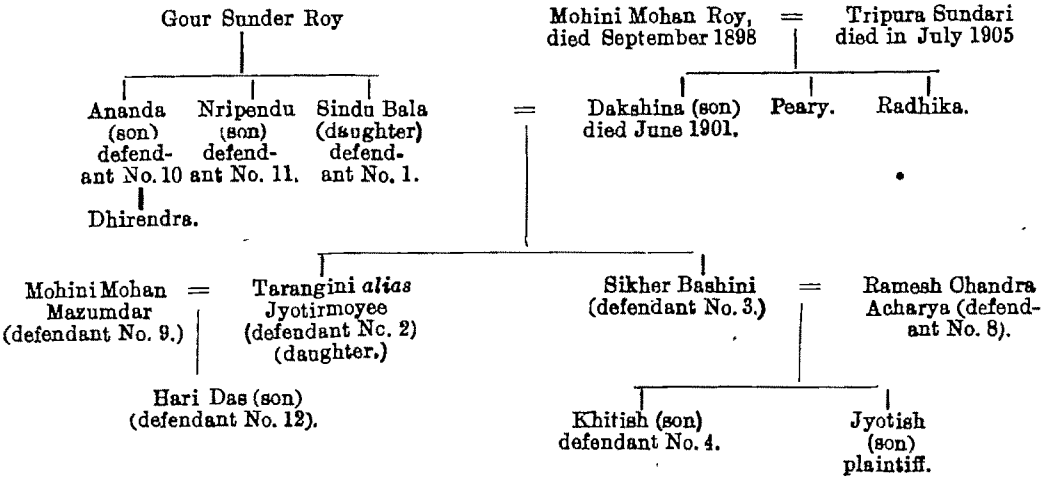
A. from original decree of the Sub-Judge, 24-Parganas, 2nd Court, dated June 30, 1936.

Messrs. *Atul Chandra Gupta* and *Bankim Chandra Banerjee*, for the Appellants.

Dr *N. C. Sen Gupta*, Messrs. *Jatindra Nath Lahiri*, *Bepin Chandra Basu*, *Priya Nath Dutta* and *Surajit Chandra Lahiri*, for the Respondents.

Nasim Ali, J.—This appeal arises out of a declaratory suit by a Hindu reversioner. The property in dispute belonged to Baboo Mohini Mohan Roy who was Vakil of this Court. The following genealogy will show the relationship of the plaintiff

to the defendants other than defendants Nos. 5, 6 and 7.



Defendant No. 2, defendant No. 14 and defendant No. 8 died after the institution of the suit. Defendant No. 2 is represented by her husband and son and defendant No. 10 by his son Dhirendra. On August 13, 1905, defendants Nos. 1 to 3 executed a deed (Ex. 1) in favour of defendant No 4, then a minor, surrendering and relinquishing their right to the properties which Dakshina inherited from his father. On August 16, 1918, defendant No. 8 as guardian of defendant No. 4 mortgaged the disputed properties to defendant No. 5 and the father of defendants Nos. 6 and 7. On March 18, 1930 the mortgagees purchased the mortgaged properties in execution of a decree obtained on the basis of the mortgage. This sale was confirmed on February 29, 1932. On May 25, 1932, plaintiff raised the present suit. His case briefly stated is this : The deed of surrender executed by defendants Nos. 1 to 3 in favour of defendant No. 4 is invalid under the Hindu Law. The auction sale at which defendants Nos. 5 to 7 have purchased the disputed properties therefore cannot affect the right of the reversionary heirs of Dakshina. Defendant No. 1 made an absolute gift of Rs. 1,20,000 to defendants Nos. 10 and 11, from the estate of Dakshina. This gift is not binding on the reversionary heirs of Dakshina.

He accordingly prayed for a declaration : (*a*) that the deed of surrender and all acts done on the strength of the said deed by defendants Nos. 1 to 4 and 8 are not binding against the reversionary heirs of Dakshina; (*b*) that the reversionary heirs of Dakshina are entitled to get back from defendants Nos 10 and 11, Rs. 1,20,000. Defendants Nos. 1 to 3 and 12 did not appear in the suit. Defendants Nos. 4 and 8 filed written statement but did not contest the suit during trial. Defendants Nos. 5 to 7 filed a joint written statement. Their case is that the suit is barred by limitation and that the surrender by defendants Nos. 1 to 3 in favour of defendant No. 4 is valid in law and that they have acquired absolute interest in the disputed properties on the basis of their purchase at the mortgage sale. Defendants Nos. 10 and 11 also filed a joint written statement. Their case is that Rs. 1,20,000, was paid to them by defendant No. 1 not out of the corpus of Dakshina's estate but out of the income accumulated after the death of Dakshina.

The material issues raised in suit are these :

"1. Is the suit barred by limitation ?

2. Is the alleged deed of surrender and relinquishment dated August 12, 1905 by defendants Nos. 1 to 3 of their respective life interest in favour of defendant No. 4 a valid and *bona fide* deed ? Did the entire estate of late Babu Dakhina Mohan Roy vest in defendant No. 4 by the alleged surrender ? Is the alleged relinquishment and surrender binding upon the plaintiff ?

3. Did the sum of Rs. 1,20,000 claimed appertain to the corpus of the estate of late Babu Dakhina Mohan Roy or was it at the absolute disposal of defendant No. 1 ?

The trial Judge has answered all the three issues in favour of the plaintiff and has decreed the suit. Hence this appeal by the defendants Nos. 5 to 7. The dispute in this appeal between Dhirendra (son of defendant No. 10) and the plaintiff has been settled out of Court. The points for determination in this appeal are: (1) Whether the suit is barred by limitation

(2) Whether the surrender by defendants Nos 1 to 3 in favour of defendant No. 4 is valid and binding on all the reversionary heirs of Dakshina.

The first point.—The deed of surrender was executed on August 13, 1905. Plaintiff was born thereafter. The present suit was instituted on May 25, 1932. Plaintiff's case is that he was born in 1318 *B. S* (1911). The case of the appellants is that he was born in 1908. P. W. No. 2 and P. W. No. 3 support the plaintiff's case. P. W. No. 2 was an officer under plaintiff's father from 1312 *B. S* to 1335 *B. S.* while the other witness served under him from 1309 *B. S.* to 1342 *B. S.* P. W. No. 2 says that the plaintiff was born in 1318 *B. S.* P. W. No. 3 says that defendant No. 4 was 1½ or 2 years old when he entered service and that plaintiff was born after he entered service. He also says that the difference in age between defendant No. 4 and the plaintiff is 10 or 11 years. It is clear from the evidence in this case that defendant No. 4 was born in *Agrahayan* 1307 *B. S.* The evidence of P. W. No. 3, therefore, materially corroborates the evidence of P. W. No. 2. In support of their case the appellants rely on the statement in the school register about the age of the plaintiff. There is no evidence to show on what materials the entry in the register about the age of the plaintiff was made.

Defendant No. 11 stated in his evidence that plaintiff was born in 1313 *B. S.* The trial Judge has believed the evidence of P. W. No. 2 and P. W. No. 3. The school register has not much evidentiary value. D. W. No. 11 is vitally interested in the result of this litigation. In view of these facts and circumstances I agree with the Subordinate Judge that plaintiff was born in 1318 *B. S.* It is not disputed in this case that on this finding the plaintiff's suit is within time. I therefore hold that the suit is not barred by limitation.

Second point.—The portion of the deed of surrender (Ex. 1) which is material for the purposes of this appeal is as follows :

First party—Khitish Chandra Acharyya Chowdhury minor represented by his certificated guardian and father Rames Chandra Acharyya. Second party—Sindu Bala Debi. Third party—Jyotir Moyee Debi. Fourth party—Sikhar Basini Debi.

"Annoda Mohan Roy and Peary Mohan Roy made an application on July 25, 1901, in the original side of Hon'ble High Court for obtaining the probate of the will which was a forged one, on the allegation that it was executed by late Dakshina Mohan Roy on May 31, 1901...On March 10, 1903, the said will was declared to be a forged one and the said probate case was finally dismissed .. ...

Radhika Mohan Roy .....produced another will which was a forged one on the allegation that it was executed (by Dakshina Mohan Roy) on May 2, 1901 and made an application on the original side of the Hon'ble High Court on June 19, 1901 for obtaining probate of the same. In that proceeding... Sindu Bala filed objection ..Considering and knowing that the prosecution of the suit would entail unnecessary expenditure, waste of time and harassment and that even in case of success in the case all the expenses incurred and compensation money would not be recoverable and with the object of doing good and benefit to the reversioners to the estate of late Dakshina Mohan Roy .. the said Radhika Mohan Roy and the second party Sindu Bala Debi both jointly executed a mortgage bond and agreement dated *Chaitra* 7, 1310 *B. S...* As consideration for the said deed Sindu Bala Debi promised to pay Radhika Mohan Roy Rs. 50,000 amicably and out of that she paid to him Rs. 5,000 in cash and with regard to the balance of Rs. 45,000 she executed a *kistibandi* mortgage bond in favour of the said Radhika Mohan Roy. In accordance with the said agreement and the terms of the said deed the aforesaid Radhika Mohan Roy did not appear in the last mentioned probate case which was dismissed on March 22, 1904.

The late Dakshina Mohan Roy left a heavy amount of debts at the time of his death and after his death the second party Sindu Bala Debi has had to contract a loan of a large sum to carry on litigations for the protection and benefit of the estate left by him especially in order to carry on the first mentioned probate case brought by Annoda Mohan Roy and Peary Mohan Roy to its last stage and in connection with the carrying out of the last mentioned probate case brought by Radhika Mohan Roy up to its present stage. There is also some money due to the attorneys, etc., also in connection with the aforesaid two cases and other cases relating to the estate of the late Dakshina Mohan Roy. Loans having been contracted and there having been debts for the protection and benefit of the estate and the amounts of all those loans and debts having been spent for the purposes of and for the benefit of the estate, it (the estate) is liable for the said debts and loans and they are binding against the estate.

I, second party, Sindhu Bala Devi, am a Hindu widow. To perform religious acts etc, is the principal vow of my life; specially I am a *pardanashin* lady and remain in the inner apartment of the house. I have not sufficient experience and power to manage the properties. Under these circumstances it is very difficult for me to manage and preserve the estate by paying the following, *viz.* the balance of what has been left out of the debts, etc. contracted by my husband after payment of portion thereof.....and all the debts etc., contracted by me for the purposes and requirements of the estate.....and besides the above dues of the attorney's etc, also for the period they worked for the estate and other debts of the estate of which the amount could not be ascertained .....

With regard to the *sahom* allotted to my share in the partition suit.....by the said Peary Mohan Roy the *sadar* revenue thereof is so excessive and the collections thereof are so inconvenient and expensive .....it will be very difficult rather impossible for me to preserve the estate.....

My two daughters *viz.*, the third party *Srimaty* Tarangini Devi and the fourth party *Srimaty* Sikhar Basini Debi, who will be heirs to the estate left by

my husband after my death, will also obtain the same in life interest only. Even if I relinquish my life interest in their favour and place my husband's estate in their hands there is no chance that they would properly manage the estate of my husband and repay the debts etc., and would protect the estate properly for (the benefit of) their successors who would be entitled to the same in absolute right. I have no son and as far as I know, I have no power to take a son in adoption.....

For the aforesaid reasons I have considered it to be beneficial to me in this life as well as in after life if I and my two daughters, the third and fourth parties cause the absolute right in the estate left by my husband to vest in you from the present time by jointly conferring upon you whatever right, title and interest we have and may have to the same and by making gift of the same to you and by relinquishing the same in your favour absolutely and I think that to be necessary.

We, *viz.*, I, Tarangini Debi, the third party and I, Sikhar Basini Debi the fourth party, have at present no rights of possession and enjoyment in respect of the estate left by our father. We shall have only life interest to the said estate on the death of our mother the second party. We are *purdanashin* ladies and inmates of the seraglio. We have no properties of our own. We have no experience whatever about worldly affairs. We have also no desire to enjoy the properties. For all these reasons and under the aforesaid circumstances if the estate remains in the hands of my mother, there is no chance of our making any arrangement or rendering any assistance in the matter of protection of the estate and in the works of management and administration etc, thereof and even if the said estate come to our hands it will be difficult for us to manage and protect the said estate. At present you, the first party, are the only reversionary heir to the estate in absolute right alive. If we jointly and in agreement with our mother the second party confer upon you and relinquish in your favour whatever right, title and interest we have to the said estate, you being entitled to the same wholly and in absolute right shall be able to protect it. There seems to be no other good arrangement for protection of the estate except the above. If the estate is ruined, I, the third party shall not have any chance of getting the benefit I have been deriving on the basis of this document, and if any son be born of my womb or if I take a son in adoption then they will have no chance of obtaining the benefit which has been obtained for them on the basis of this document. For all these reasons for the benefit of myself and my future son or adopted son and in order to prevent harm in future, after taking proper consideration under the circumstances, I have thought it proper to cause full and absolute right to accrue to you by conferring upon you my entire right, title and interest in the said estate and by relinquishing the same in your favour.....

After careful consideration of all the circumstances of the estate, I have fixed Rs. 41,111 as mentioned in schedule jha, as the consideration for conferring upon you and relinquishing in your favour whatever right, title and interest I have got to the said estate, and your father and other well-wishers on your behalf have admitted the said consideration to be adequate. I have no right of enjoyment of the estate before the death of my mother the second party and the future affairs are uncertain in every way and I shall be entitled to the said consideration money from the very beginning and shall be competent to enjoy the interest in the said money from now without any opposition and loss even from now. If, out of the said consideration money, Rs 11,111 be set apart for my own use and enjoyment and the balance of Rs. 30,000 be kept in the custody of my husband by making him trustee under a trust deed, the income derived therefrom also having remained in his custody will swell to a big sum and if a son be born to me in future or if I take a son in adoption the said son or adopted son on attaining majority will be entitled to receive the said money from the said trustee and will derive great benefit and profit thereby.

You the first party, are the only son born of the womb of me, Sikhar Basini Debi, fourth party.

I have regarded it as my duty to confer upon you and to relinquish in your favour whatever right, title and interest we have got and may get in future to the estate left by my father on acceptance of the monthly allowance mentioned in schedule (Ena). In accordance therewith I, third party Tarangini Devi and I, fourth party Sikhar Basini Debi have decided to join our mother the second party and to execute this deed of *ekrar* surrendering and relinquishing right in your favour.

As consideration for the above deeds and the consideration money mentioned therein, whatever right title and interest I, the second party, Sindhu Bala Devi have or may acquire or which may accrue to me in future in.....the self-acquired properties and the personal properties of the late Dakshina Mohan Roy and all sorts of decrees and suits etc., relating to the estate left by the said late Dakshina Mohan Roy and the accumulated money and all sorts of dues etc. and all sorts of claims etc. and in the deed of agreement executed by the said Radhika Mohan Roy on *Chaitra* 7, 1310, *B. S.* in the aforesaid manner, and whatever right, title and interest we, *viz.* I, the third party Taragini Devi and I, the fourth party Sikhar Basini Devi have in respect of the properties.....and in respect of the decrees and suits etc, relating to the estates left by our father and the accumulated money and all sorts of dues etc., and claims etc., and whatever right, title, and interest we have and may have and which will accrue to us and be enforceable after the death of our mother and whatever right title and interest and possession we have and may acquire in connection with the said estate on the basis of the agreement, dated *Chaitra* 7, 1310 *B. S.* executed by our paternal uncle Radhika Mohan Roy in favour of our mother the second party, we jointly and severally confer upon you by this document subject to the terms thereof hereinafter mentioned and relinquish the same in your favour.

Herein below are mentioned, item by item, all those terms and conditions under which the property mentioned in this deed are given away to you in relinquishment of right and interest therein on the basis of this deed :

(*a*) You, first party agree to pay me, second party, Sindhu Bala Debi Rs. 850 per month as *britti* or monthly allowance during my life time out of the estate left by my husband on acconnt of my religious acts and maintenance.....As security for payment of the said *britti* or monthly allowance the property No. 1, out of the properties mentioned in the Schedule marked (Kha), which lies within District Nokhali and which is encumbered with the charge of Rs 45,000 the unpaid money of the agreement dated *Chaitra* 7, 1310, *B. S.* executed by the said Radhika Mohan Roy in favour of myself, is encumbered with that charge. You shall not be competent to transfer the said property by sale etc., by ignoring the said *britti* or monthly.

allowance, that is to say, without being subject to the charge thereof.

(*b*) My step-brother Srijukta Babu Ananda Chandra Roy and my full-brother Srijukta Nripendra Chandra Roy have laboured hard and made great sacrifice. Especially if Srijukta Babu Ananda Chandra Roy had not rendered pecuniary help continually, it would have been impossible for me to support my objection in the said will case. But for their efforts and care, the estate could not have been preserved so long. Although out of affection for me they did not demand proper remuneration from me yet if I do not make payment to them by way of compensation according to the circumstances of estate and according to my own consideration I shall be morally guilty. Therefore, I have decided to give them the sum of Rs. 1,20,000 by way of gift as compensation for the above. By this deed the right I had and have to enjoy and appropriate according to my pleasure the income of the estate left by my husband which is now in the hands of the administrator *pendente lite* and the arrears of rent etc., have been entirely given away to you and with regard to that in consultation with your father *sriman* Ramesh Chandra and your other well-wishers and with the approval and consent of them and the third and fourth parties it has been settled that as consideration for my making wholesale gift of the income and arrears of rent etc, which I am entitled to enjoy according to my pleasure by this deed and for my relinquishing the same in your favour you shall give me Rs 1,20,000 (one lac twenty thousand rupees) with right to exercise full ownership therein and to use and appropriate the same according to my pleasure and on that condition. Out of the said sum you paid Rs. 10,000 in cash on *Asharh* 19, and out of the balance of Rs. 1,10,000, you shall pay to me Rs 20,000 within two months of the coming of this estate in your own possession from the administrator *pendente lite*. In default interest will run on the said sum of Rs. 20,000 at the rate of 1 per cent. per annum from that date.

(*c*) I, third party, Tarangini Debi having made a gift in your favour of the right and interest I have and shall have in future in the estate left by my father and having relinquished the same in your favour, as consideration for the same you have promised to pay me Rs. 41,111. Out of that you paid to me Rs. 5,111 in cash on *Asharh* 10, 1312, *B. S.* and as regards the balance of Rs 36,000 you shall pay the same according to the *kistbandi* mentioned in Schedule (Jha) and having stipulated to pay interest on the defaulted *kist* at the rate of as. 8 per Rs. 100 per month in case you make default in payment of any *kist*, you execute an instalment mortgage bond in my favour ..by keeping in mortgage the properties of the Schedules marked Ka, Kha, Ga and the properties of the items Nos. 1 and 2 of the Schedule marked Gha as security for payment of the aforesaid sum...I shall get the said sums in absolute right with right to make all kinds of transfer thereof such as gift, sale, etc, and with right to possess and enjoy the same down to my sons, grandsons and other heirs and representatives in succession...After my death neither you nor any other person shall be entitled to claim the said money as heirs of Dakshina Mohan Roy under any circumstances ..I, third party, Tarangini Debi have no son. You are at present the sole reversionary heir to the estate left by my father in absolute right. Consequently, my mother the second party and myself the third party and my full sister the fourth party all having jointly made a gift of all our right, title and interest in the said estate to you and having relinquished the same in your favour, you become owner thereof in indefeasible and absolute right.

(*d*) You, first party shall pay monthly allowance at the rate of Rs. 50 per month to me, third party, Tarangini Debi, during my life-time (after the death of her mother). In default of paying the monthly allowance month after month interest will run on the monthly allowance in arrear at the rate of Re. 1 per cent. per month. The liability of this monthly allowance shall become operative after the death of my mother.

(*e*) In consideration of my making a gift of and relinquishing in your favour whatever right and interest I, fourth party, Sikhar Basini, have at present and shall have in future in the estate left by my father you shall pay to me Rs. 100 per month as *britti* or monthly allowance with right to enjoy the same down to my son, grandsons and other heirs in succession, but during the life-time of my mother, the second party, Sindhu Bala Debi, I shall get monthly allowance at the rate of Rs. 50 per month. After the death of my mother you shall pay monthly allowance at the full rate of Rs. 100 in the aforesaid manner .....In case of failure to pay the said two kinds of monthly allowance at the end of one month interest will run on the said monthly allowance in arrear at the rate of Re. 1 per cent. per month from the next month."

The contention of the appellant with regard to Ex. 1 are two-fold: (1) that the transaction embodied in this deed amounts to surrender by a Hindu widow in favour of the second reversioner with the consent of the first reversioner. Such surrender is valid under Hindu Law. The consent of the immediate female reversioner even if purchased for consideration specially when the estate is in danger and cannot be saved except by vesting it in a male reversioner does not vitiate the surrender. (2) Assuming that the transaction embodied in Ex. 1 can be justified only on the basis of double surrender *i. e.*, first surrender by the widow in favour of the daughter and then surrender by the daughter in favour of the daughter's son, the transaction embodied in Ex. 1 binds the actual reversioners.

The first contention can be divided into two parts *viz.*: (*a*) the effect of the consent of the first reversioner on the transaction, (*b*) the effect of the payment of consideration for obtaining the consent of the first reversioner on the transaction. In support of the first part of the contention reliance was placed by the appellants on the following passage in the judgment of this Court in *Protab Chunder Roy* v. *Srimati Joy Monee Dabee* (1).

"We think that it admits of no reasonable doubt that under Hindu Law a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession; and if she does this in favour of second reversioners in the present instance with the consent of the first, then or afterwards expressed, the relinquishment is

(1) 1 W R 98.

valid, and this, notwithstanding that it may be expressed in a form which, under some circumstances, might be open to question."

In that case however, the consenting first reversioner was a male and not a female or limited owner as in the case before us. We were asked by the appellant to extend this rule to the facts of the present case as the rule stated in that case is in general terms. The first part of the rule is a rule of the Hindu Law. By operation of this part the succession of the immediate reversioner is accelerated on the surrender by the widow. This acceleration does not depend upon the consent of the immediate reversioner. The second part of the rule states the effect of the consent of the immediate male reversioner on his accelerated interest is the interest accrued from the operation of the law of surrender by a Hindu limited owner. Where the immediate reversioner is a male, the accelerated interest vests in him absolutely and he can deal with it in any way he likes. He may make a gift of his interest. He can transfer it for consideration. If there is no consideration for the consent the consent may imply a gift. If there is consideration for such consent it may be a sale. Where however the immediate reversioner is a female and the accelerated interest is the interest of a limited owner she can only deal with her limited interest. She cannot, by her dealing, affect the interest of the actual reversioners unless by her consent she effaces her own limited interest and thereby accelerates the absolute interest of the second male reversioner.

The second part of the rule in *Protab Chunder Roy* v. *Srimati Joy Monee Dabee* (1), therefore cannot be extended to the consent of defendants Nos. 2 and 3 unless their consent amounted to an effacement of their life interest or surrender according to Hindu Law as except an alienation for legal necessity. I am not aware of any other principle of Hindu Law under which a limited owner can accelerate the absolute interest of the second male reversioner and thereby destroy the interest of actual reversioners. In support of the second part of the first contention reliance was placed by the appellants on the following observations of Sadasiva Ayyar J., in *Chinnaswami Pil'ai* v. *Appaswami Pillai* (2) at p. 29:

"The act of a daughter who being next heir surrenders the whole estate, vests the absolute inheritance in the next male heir even if she received consideration for her surrender of the full enjoyment of the property during her life-time."

These observations however must be read along with the facts of that case. In that case the consideration for the surrender by the daughter was maintenance of the daughter and such consideration does not invalidate surrender by a Hindu limited owner under the Hindu Law. The contention of the appellants however is that the relinquishment by defendants Nos. 2 and 3 even if it was for consideration other than maintenance cannot invalidate the relinquishment and prevent the destruction of the right of the actual reversioners as the spirit of the Hindu Law is, inasmuch as it is a meritorious act on the part of a Hindu widow to preserve the estate of her husband for the spiritual benefit of her husband and that if the estate is in such danger that it cannot be saved except by vesting it in a male reversioner the consent of the intermediate female reversioners can be purchased for consideration other than their reasonable maintenance. No authority was cited before us in support of this contention excepting the observations of Sadashiva Ayyar J., quoted above. Assuming that it is the duty of a Hindu widow to save the estate of her husband the imposition of the burden by Ex. 1 on the estate left by Dakshina already over-burdened with liabilities was not a step leading to the preservation of the estate.

I am therefore unable to give effect to the first contention. The second contention raises two points: (1) Whether the surrender by the widow is valid under Hindu Law. (2) Whether the surrender by the daughters is valid under Hindu Law. The basis of the doctrine of surrender by a Hindu widow is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about. The result merely is that the next heir of her husband steps into the succession in the widow's place. There is no difference between surrender to a daughter and surrender to the nearest male reversioner: *Vytla Sitanna* v. *Mariveda Viranna* (3) at pp. 207-208. The voluntary self-effacement is sometimes referred to as a surrender sometimes as a relinquishment or abandonment of her rights. It may be effected by any process having that effect provided that there is a *bona fide* and total renunciation of the widow's right to hold the property; *Bhagwant*

(2) 42 M 25 (29); 48 Ind. Cas. 147; A I R 1919 Mad 865; 35 M L J 512; 8 L W 512; (1918) M W N 756; 24 M L T 403.

(3) 61 I A 200 (207-208); 148 Ind. Cas. 828; 6 R P C 142; A I R 1934 P C 105; 11 O W N 596; (1934) M W N 414; 39 L W 607; (1934) A L J 433; 38 C W N 697; 59 C L J 354; 67 M L J 20; 36 Bom. L R 563; 15 P L T 497 (P C).

Koer v. *Dhanuk Dhari* (4) at p. 270-271. The surrender cannot be considered *bona fide* if the arrangement is for dividing the estate with the reversioner: *Radha Rani* v. *Srimati Brindarani* (5). Reasonable provision for the maintenance of the widow, regard being had to the position in life of her husband and the size of her estate is not an arrangement for dividing the estate with the reversioner: *Vytla Sitanna* v. *Marvieda Viranna* (3) and *Radha Rani* v. *Srimati Brindarani* (5). While dealing with the question of the payment of Rs. 1,20,000 to the widow by defendant No. 4 in order to enable her to make a gift of this amount to defendants Nos. 10 and 11, the trial Judge has observed :

"The onus was upon the widow and upon the assignees, defendants Nos. 10 and 11 to show that the said amount had accumulated on the date of surrender. No evidence had been adduced to prove that Rs. 1,20,000 was available out of the income of the estate of Dakshina Babu on the date of surrender. The only evidence in this point is the deposition of Nripen Babu who is an interested witness. From the circumstances of the case, it appears to me that Ananda Roy and Nripendra Roy have taken advantage of the helpless condition of their sister Sindhu Bala and they have taken a good share in the division of Dakshina Babu's properties and that the recitals in the deed of surrender that the gift of Rs. 1,20,000 was made out of the income of Dakshina Babu's estate is not a *bona fide* recital. I hold therefore that the said gift of Rs. 1,20,000 was invalid against plaintiff who seeks a declaration to the same effect."

The contention of the appellants is that the trial Judge was wrong in holding that the onus was upon the widow and defendants Nos. 10 and 11 to show that Rs. 1,20,000 was available out of the income of the estate on the date of the surrender inasmuch as in the present suit plaintiff wants a declaration that the surrender by the widow was invalid and in such a suit the onus is upon the plaintiff to substantiate the grounds of invalidity of the surrender. In support of this contention reliance was placed upon certain observations of this Court in *Brojo Kishoree Dassee* v. *Sreenath Bose* (6) at p. 467. The observations relied upon were made in a suit for a declaration that a certain adoption was invalid. Plaintiff is admittedly a reversioner of Dakshina. The properties covered by the deed of surrender belonged to Dakshina. The deed of surrender does not state that the amount of accumulations was Rs. 1,20,000 or thereabout. If the actual reversioner brings a suit after the death of the limited owner or owners for possession of the estate of the last full owner and his claim is opposed by persons claiming under alienation by the intermediate limited owners for legal necessity the onus is upon the alienees to prove legal necessity. I do not see any reason why the claim based on surrender by limited owners would stand on a different footing.

In a suit by presumptive reversioners for a declaration that alienations by the intermediate limited owners is not binding on the actual reversioners the onus of proving legal necessity, in my opinion, is also upon the alienees. The suit for a declaration by a presumptive reversioner that surrender by the limited owners is invalid and does not destroy rights of actual reversioners should be governed by the same rule of onus inasmuch as under the Hindu Law the intermediate limited owners have only life interest and the estate vests absolutely only in male reversioners. There are certain exceptional circumstances under which the right of the actual reversioners can be destroyed by the intermediate limited owners. The person pleading these exceptional circumstances must prove them.

The Subordinate Judge, in my opinion, was right in holding that the onus was upon the widow and the defendants Nos. 10 and 11 to prove that Rs. 1,20,000 or thereabout was the accumulated income from the death of Dakshina up to the date of surrender particularly in view of the fact that this amount was not stated in Ex. 1 to be the accumulated income on the date of the surrender. Peary Mohan instituted a suit in the year 1901 before the death of Dakshina for partition of the estate of Mohini Mohan. Dakshina was appointed Receiver of the estate in May 1901. After his death in June 1901, no Receiver was appointed till March 6, 1902. Thereafter the entire estate was again in the possession of a Receiver appointed in the partition suit. This Receiver was discharged on November 15 1905.

On June 19, 1901, Radhika started the case for obtaining the probate of the will alleged to have been executed by Dakshina on May 2, 1901. An administrator *pendente lite* of Dakshina's properties was appointed in the same year. Although the probate case was dismissed on March 2, 1904, the administrator was not discharged till January 8, 1906. The administrator in-

(4) 46 I A 259 (270-271); 53 Ind. Cas. 347; A I R 1919 P C 75; 47 C 466; 37 M L J 513; 17 A L J 1036; (1919) M W N 860; 1 P L T 1; 2 U P L R (P C) 27 (P C).

(5) 43 C W N 337; 179 Ind. Cas. 615; A I R 1939 P C 27; 5 B R 307; 11 R P C 140; 1939 O W N 210; 1939 O L R 83; (1939) 1 M L J 215; 49 L W 222; (1939) M W N 219; 69 C L J 174; 41 Bom. L R 689; I L R (1939) Kar. 110 (P C).

(6) 9 W R 463 (467).

the probate case did not get possession of Dakshina's ancestral properties but he used to receive from the Receiver in the partition suit monies paid by the latter from the income of Dakshina's share and the income if any from the self-acquired properties of Dakshina.

Plaintiff examined defendant No. 1 as a witness on his behalf. In the course of her cross-examination by defendants Nos. 10 and 11 she said :

"Q.—Did the said sum of one hundred and twenty thousand rupees accumulate in the Receiver, out of the income of your husband's estate during the pendency of the case in the High Court ?

A.—I have heard that some money did accumulate.

Q.—I put it to you that the sum of Rs. 1,20,000 which Ramesh told that he would pay to you was in stock in the hands of the Receiver out of the income of your husband's estate.

A.—I have heard that some money was in stock".

From the evidence of plaintiff's witness Kashi Nath Mitter, the income from the properties inherited by Dakshina from his father from the time of the death of Dakshina to the date of surrender by his widow would be about Rs. 1,20,000.

Dakshina had certain self-acquired properties. There is no evidence to show how much the administrator *pendente lite* received from those preperties during this period.

The evidence of defendant No. 11 is that the arrears of rent in the hands of the administrator were more than Rs. 1,20,000. In his cross-examination he admitted that he did not look into the accounts. He is an interested witness. The trial Judge has disbelieved his evidence and I see no reason to believe him.

The Receiver paid about Rs. 70,000 to the administrator *pendente lite* and took about Rs. 5,000 for his salary.

Out of the amount received by the administrator he paid about Rs. 31,200 for the maintenance of defendant No. 1 and Rs. 11 000 towards the payment of Dakhina's debt. Out of this amount he took his commission (Rs. 3,500) also and met the costs of the litigation.

The debts, left by Dakshina amounted to about Rs. 1,82,000. The annual interest on this amount was about Rs. 10,000. If there had been any substantial surplus accumulations either in the hands of the administrator *pendente lite* or of the Receiver further payments towards the satisfaction of the liabilities on Dakshina's estate would have been met. I therefore agree with the trial Judge that the widow took a very substantial amount from the corpus of the estate, and that the arrangement about the payment of Rs. 1,20,000 was a device to divide the estate with the reversioners. From the deed of surrender it appears that defendant No. 2 took a monthly allowance of Rs. 50 after the death of the widow and a sum of Rs. 41,111 as consideration for the gift and relinquishment in favour of defendant No. 4 of the right and interest which she had or could have in future in the estate left by Dakshina. It further appears that defendant No. 3 took a hereditary monthly allowance of Rs. 50 for maintenance during the life time of her mother and of Rs. 100 thereafter.

The Subordinate Judge has found that this arrangement also was a device to divide the estate with the reversioner. It is not the appellants' case that this arrangement amounted to an alienation by the daughters of their life interest for legal necessity. The contention of the appellants is that this arrangement was a reasonable provision for the maintenance of the daughters during their lives and consequently the transaction amounted to a surrender of their life interests under the Hindu law. The argument in support of this contention is this : The monthly income of the estate was Rs. 30,000. The monthly allowance of Rs. 50 for defendant No. 2 was too small for her maintenance. She was entitled to taken more. If Rs 41,111 be taken as the capitalised value of the balance of her reasonable maintenance, the arrangement for the payment of this amount out of the estate should be considered as a reasonable arrangement for her maintenance during her life. Defendant No. 3 was also entitled to take a reasonable maintenance for her life. A monthly allowance for life of Rs. 50 during the life time of defendant No. 1 and of Rs. 100 thereafter for her life would be too small. If she had chosen to take an allowance only for her life, she could have taken a larger amount. If instead of taking a larger amount only for her life defendant No. 3 took smaller hereditary allowance the arrangement should be considered as a reasonable arrangement for her maintenance during her life.

I am unable to accept this contention and my reasons are these : (1) The question as to what amount would be a reasonable provision for the maintenance of defendants Nos. 2 and 3 is a question of fact. (2) This question of fact was not raised in the trial Court and was not even raised in the memorandum of appeal to this Court. (3) The estate was heavily involved and had to pay a large

amount as interest to creditors. Rs. 850 had to be paid to defendant No. 1 monthly for her maintenance. The estate was involved in litigation. The allotments in Dakshina's share were not yet final as an appeal against the allotments made by the trial Judge was pending in this Court. The *sadar* revenue payable for the allotments made by the trial Court was excessive and the collections were inconvenient and expensive. (4) From the materials on the record of the present case it is not possible for me to say that the payment of Rs. 41,111 in cash and of Rs. 50 monthly as allowance after the death of the widow to defendant No. 2 or a hereditary monthy allowance of Rs. 50 to defendant No. 3 during the lifetime of the widow and Rs. 100 thereafter, was a reasonable arrangement for the maintenance of the two daughters for their lives.

For the reasons given above, I hold that the transactions embodied in Ex. 1 did not amount to a valid surrender of the life interests of defendants Nos. 1 to 3 under Hindu Law and that the arrangement contained therein was merely a device to divide the estate with defendant No. 4. The result, therefore, is that this appeal fails and is dismissed with costs to the plaintiff-respondent. Hearing fee is assessed at ten gold *mohurs*.

B. K. Mukherjea, J.—I agree with my learned brother, that this appeal should be dismissed. The facts giving rise to the appeal may be shortly stated as follows :

One Dakshina Mohan Roy, a Hindu resident of Bhowanipur in the suburbs of Calcutta, who was possessed of considerable properties both movable and immovable, died on June 6, 1901, leaving behind him his widow, Sindhu Bala, who is defendant No. 1 in the suit, and two daughters, namely, Tarangini and Sikhar Basini, who are defendants Nos. 2 and 3, respectively. Sindhu Bala succeeded to the properties left by her husband in the limited interest of a Hindu widow. Soon after Dakshina's death there were two probate proceedings commenced by the brothers of Dakshina in the original side of this Court for obtaining probate of two wills alleged to have been left by the deceased. Radhika, the youngest brother of Dakshina, was the propounder of one of these wills and his application for probate was filed on June 19, 1901. The other will was propounded by the other two brothers, named Annada and Pyari, and the probate proceedings in respect of the same was started on July 15, 1901. The widow, Sindhu Bala, appeared as an objector in both these proceedings. The second probate case which was commenced by Annada and Pyari came up for hearing first and Sale, J., who heard the case rejected the application for probate and pronounced the will to be a forgery. This decision is dated February 21, 1902. There was an appeal taken against this judgment which was also dismissed on March 10, 1903. The earlier probate case in which Radhika figured as a propounder ended in a compromise and was eventually dismissed for non-prosecution, the widow agreeing to pay a sum of Rs. 50,000 to Radhika as consideration for inducing him to withdraw from the litigation and renouncing all claims under the will set up by him.

It may be mentioned here that a step-brother and a brother of Sindhu Bala who were made defendants Nos. 10 and 11 in the suit materially assisted her in contesting this protracted litigation with her husband's brothers and Babu Annada Chandra Roy, defendant No. 10, who was a leading lawyer of Dacca, and who died after the institution of the suit advanced the entire money that was necessary for the purpose of carrying on the litigation. On August 13, 1905, Sindhu Bala along with her two daughters, Tarangini and Sikhar Basini, who were the immediate female reversioners executed a deed, which has been called a *satyarpan* and *nadabi ekrar patra* and by which she purported to renounce her widow's interest in all the properties left by her husband in favour of defendant No. 4, Kshitish Chandra Acharyya who was her only daughter's son then existing he being a son of Sikhar Basini, the youngest danghter of Dakshina. Kshitish was a minor at that time and he was represented in this transaction by his father Ramesh, who was defendaat No. 8 in the suit and who has died since then. Under this document Kshitish was to get the entire estate of Dakshina in absolute right as a full male heir on cessation of the limited interests of the widow and her two daughters subject to certain terms and conditions which may be summarised as follows : (1) He was to pay a sum of Rs. 850 a month to Sindhu Bala, the widow, as her *britti* or maintenance allowance and this payment was made a charge upon certain properties which were described in schedule Kha to the document. (2) Defendant No. 4 was to pay out of the estate the amount due on a decree made by the

High Court on the basis of a promissory note both against Dakshina and defendant No. 8, the father of defendant No. 4, but for which loan, defendant No. 8 was really liable. (3) Defendant No. 4 was to pay off the entire amount including interest due on a bond for Rs. 48,845-11-3 dated *Baisakh* 7, 1310 *B. S.* executed by defendant No. 1 in favour of her step-brother defendant No. 10 for the money that was advanced by the latter to enable the widow to contest the probate proceedings. (4) Defendant No. 4 was to hand over for the absolute use of the widow a sum of Rs. 1,20,000 and this was to be given by the widow to her two brothers, defendants Nos. 10 and 11 as a token of love and gratitude for the services they rendered in connection with the litigations with her husband's brothers. (5) Defendant No. 2, Tarangini, who was the elder daughter of Dakshina was entitled to Rs. 41,111 out of the estate as consideration for joining with her mother in the deed of surrender. She was also to have Rs. 50 a month from after her mother's death, and so long as she would herself live. (6) Defendant No. 4 was to pay to defendant No. 3 his own mother a monthly allowance of Rs. 50 so long as Sindhu Bala would remain alive, and an allowance of Rs. 100 a month after Sindhu Bala's death which was made hereditary and which would devolve after Sikhar Basini's death on her heirs and successors. (7) Defendant No. 4 was also to pay a sum of Rs. 45,000 odd which was still due to Radhika on account of the compromise entered into between him and the widow.

The plaintiff, who is a son of Sikhar Baisni and a younger brother of defendant No. 4 and who was born subsequent to the execution of the deed of surrender, brought the suit out of which this appeal arises for a declaration that the document was ineffectual as an act of surrender in creating an absolute estate in defendant No. 4 to the detriment of the reversionary rights of the plaintiff. The ground alleged in the plaint was that it was not a *bona fide* act of renunciation by the widow in favour of the nearest reversioner and the whole scheme was one to divide the properties of Dakshina between defendant No. 4 on the one hand and certain nominees and relations of the widow on the other.

It appears that on August 16, 1918 defendant No. 8 as guardian of defendant No. 4 executed a mortgage in respect of a large number of properties comprised in the deed of surrender in favour of defendant No. 5 and the predecessors of defendant Nos. 6 and 7 to secure an advance of Rs. 1,60,000. The mortgagee got a mortgage decree on the basis of this as well as another mortgage bond which was executed by defendant No. 8 in respect of his own personal properties. In execution of this decree the mortgaged properties were sold in two instalments and purchased by the mortgagee decree-holders. The sale was held partly in 1930 and partly in February 1932 and the present suit was commenced by the plaintiff on May 25, 1932.

Besides the parties already mentioned there were two other persons joined as defendants in the suit. One was the husband of Tarangini who was made defendant No. 9 and the other her son who was made defendant No. 12. The relief prayed for by the plaintiff was a declaration that the rights of the future reversionary heirs of the late Dakshina Mohan Roy other than defendant No. 4 to the properties left by Dakshina were not affected by the deed of surrender executed by defendants Nos. 1, 2 and 3 in favour of defendant No. 4 on August 13, 1905 and all subsequent acts done by the defendants on the basis of the said deed were not binding on such reversionary heirs. There was a further prayer for a declaration that the reversionary heirs of Dakshina were entitled to get back from defendants Nos. 10 and 11 the sum of Rs. 1,20,000 which they obtained from the estate.

The suit was contested by defendants Nos. 5 to 7 who filed one joint written statement and by defendants Nos. 10 and 11 who filed another. The rest of the defendants did not take part in the proceedings though written statements were filed by defendants Nos. 4 and 8. The contentions raised by defendants Nos. 5 to 7 in substance were that the plaintiff had no *locus standi* to maintain the suit which was not a *bona fide* one and was barred by limitation. It was averred that the surrender made by the widow was a valid and *bona fide* surrender which had the effect of vesting the estate absolutely in defendant No. 4 and it was binding on all the reversionary heirs of Dakshina. These defendants, it was said, had obtained a valid mortgage of the lands described in Sch. Ka and acquired a good title to the same by purchase at the mortgage sale. The defence of defendants Nos. 10 and 11 was that they rendered very great and valuable services both financial and otherwise in connection with the litigations between the widow and her husband's

brothers and that the sum of Rs. 1,20,000 which was given to them by the widow was no part of Dakshina's estate, but represented the accumulations of the income of the estate and the outstanding arrears of rent at the date of the surrender and over these moneys the widow had absolute power of disposal. They further contended that the bond for Rs. 4,845 was lawfully executed by defendant No. 8 as guardian of defendant No. 4 with the permission of the District Judge and that this debt was a charge upon Dakshina's estate.

The trial Court decided all the issues in favour of the plaintiff and decreed the suit. It was declared that the deed of surrender executed by Sindhu Bala and her two daughters was not binding on the plaintiff after the death of these three ladies. It was further declared that the gift of Rs. 1,20,000 in favour of defendants Nos. 10 and 11 as well as the mortgage in favour of defendants Nos. 5 to 7 and the sale on the basis thereof were not binding on the plaintiff. It is against this decree that defendants Nos. 5 to 7 have preferred this appeal. No appeal was filed by defendant No. 11 or the substituted heir of defendant No. 10 but they were made respondents. It is reported to us that the heir of defendant No. 10 settled his dispute with the plaintiff and is not interested any further in this litigation. Mr. Gupta who appears for the appellants has raised a two-fold contention in support of the appeal. He has contended in the first place that the deed of surrender executed by the widow was a perfectly valid and lawful act which had the effect of vesting the entire estate of Dakshina upon defendant No. 4 and that the Subordinate Judge was wrong in holding that it was a mere device to divide the estate between the reversioner and certain nominees of the widow. The second point taken is that the plaintiff's suit for a declaratory relief is barred by limitation.

As regards the first point it is not disputed on behalf of the respondents that the deed of surrender comprises the entire estate of Dakshina. It is further conceded that the validity of the deed as an act of surrender is not in any way affected by the provision for payment of a sum of Rs. 850 as a maintenance allowance to the widow or the provisions relating to payment of debts due to defendants Nos. 10 and 11 on the one hand and Radhika Mohan Roy, the youngest brother of Dakshina on the other. It is admitted that these debts are lawful charges on the estate of Dakshina. The validity of the deed of surrender is attacked substantially on two grounds. The first ground is that as defendant No. 4 was not the next heir of her husband, and the immediate reversioners were her two daughters, the estate could not vest absolutely in defendant No. 4, unless the daughters themselves had withdrawn their life estates by a valid act of surrender. The second ground taken is that it was not a *bona fide* act of self-effacement by the widow, but was a mere device to divide the property between defendant No. 4 on the one hand and the nominees of the widow on the other. These are really the two matters which require investigations in connection with the first point taken in this appeal. The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well-settled doctrine of Hindu Law which has been established by a long series of judicial pronouncements. So far as the Bengal Law is concerned, its origin is attributed to Jimutbahan's commentary on the well-known text of Katyayana which runs as follows :

"Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable protector enjoy the property with moderation until her death. and after her let the heirs take it—*Vide* Dayabhag Chap 11, s. 1, para. 59."

As was pointed by Sir Asutosh Mookerjee, J., in *Debi Prosad* v. *Golap Bhagat* (7), at p. 771, Jimutbahan while commenting upon this passage observed that the persons who would be next heirs on failure of prior claimants succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect. The theory of relinquishment as the learned Judge observed

"was foreshadowed in this passage by Dayabhaga and in fact the words used by Jimutbahan, namely, 'if her right ceases or never takes effect' are comprehensive enough to include not merely the case of the death of the widow but all cases where her right ceases. In other words, the reversioners take the estate not merely when the widow dies but also when her title is extinguished, for instance, by renunciation, remarriage or the like."

Though the doctrine has undergone development in recent years, yet its basis remains unaltered, namely, that it is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of

(7) 40 C 721 (771); 19 Ind. Cas. 273; 17 C L J 499; 17 C W N 701.

the deceased husband to his next heirs on that date. "It must be remembered" so observed their Lordships of the Judicial Committee in *Vytla Sitanna* v. *Mariveda Viranna* (3),

"that the basis of the doctrine is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession the widow's place."

This being the principle underlying the doctrine of surrender, no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. By surrendering the estate the widow brings about the same result as would happen in the case of her natural death and the next heir steps into the inheritance as a matter of law without any act of consent or acceptance on his part. The Privy Council has held further in the case mentioned above that the fact that the immediate reversioners are female heirs who take only a limited interest in the property does not make any difference, and a surrender in favour of such limited heirs is equally effective though certainly the interest which they take in the property is not thereby enlarged. In the present case the immediate reversioners were the two daughters of the widow who joined with the latter in making a surrender in favour of the daughter's son who might be described to be a reversioner of the second degree. The question is whether such a surrender is valid in Hindu Law. Mr. Gupta argues that it is valid provided the immediate reversioners give their consent as they have done in the present case.

The point is not free from dobut, and it was expressly left open by the Judicial Committee in *Narayanaswami Ayyar* v. *Rama Ayyar* (8). In support of his contention Mr. Gupta has relied upon certain decisions, to wit, *Protap Chunder Roy* v. *Srimati Joy Monee Dabee* (1), *Chinnaswami Pillai* v. *Appaswami Pillai* (2), *Chito* v. *Jhunnilal* (9) and *Antu* v. *Yeshwant* (10), and his contention is that the different High Courts in India have practically concurred in holding that such surrender is permissible in Hindu Law. The cases referred to by him really come under two heads. The first head comprises cases where there is an alienation by the widow in favour of a remoter reversioner or a stranger with the consent of the immediate reversioner who is a male heir or is otherwise capable of taking an absolute interest in the property. The second head relates to cases where the immediate reversioner is a female heir who takes only a limited interest in the property and with her consent the widow surrenders the estate to a reversioner who is remoter in degree. The case in *Protap Chunder Roy* v. *Srimati Joy Monee Dabee* (1) is the earliest of the first type of cases. Here the widow with the consent of her husband's brother Parbati who was the immediate reversioner, made a gift of the entire estate in favour of the four sons of the latter. It was held that the deed of gift vested a complete estate in the donees. The learned Judges expressed themselves very generally when they observed as follows:

"We think that it admits of no reasonable doubt, that under Hindu Law, a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners, their period of succession and if she does this in favour of second reversioners in the present instance with the consent of the first then or afterwards expressed, the relinquishment is valid and this notwithstanding that it may be expressed in a form which under some circumstances might be open to question."

It may be pointed out that it was not really a case of surrender by the widow in favour of a reversioner of the second degree it was a gift or alienation to persons who were really in the position of strangers at that time with the consent of the immediate heir. It was held by this Court in a number of cases which were reviewed and confirmed in *Nobo Kishore Sarma* v. *Hari Nath Sarma* (11) that a widow is entitled to sell or transfer the entire estate without any necessity but with the consent of the next male heir so as to bar the rights of the actual reversioners at the time of her death. This was explained by the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (12) as an extension of the principle of surrender. "The surrender, once exercised" so observed their Lordships

"in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a

(8) 57 I A 305; 128 Ind. Cas. 261; A I R 1930 P C 297; 53 M 692; 32 L W 656; 59 M L J 666; 32 Bom. L R 1564; 52 C L J 442; 7 O W N 1166; 34 C W N 1045 (P C).

(9) A I R 1930 All. 395, 124 Ind. Cas. 713; Ind. Rul. (1930) All. 569.

(10) A I R 1932 Bom. 430; 140 Ind. Cas. 258; 34 Bom. L R 811; Ind. Rul. (1932) Bom. 597.

(11) 10 C 1102 (F B).

(12) 46 I A 72; 50 Ind. Cas. 498; A I R 1918 P C 196; 42 M 523; 36 M L J 493; 17 A L J 536; 29 C L J 539; 21 Bom. L R 640; 23 C W N 777; (1919) M W N 62; 26 M L T 5; 10 L W 105 (P C).

third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by *Nobo Kishore Sarma* v. *Hari Nath Sarma* (11) already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate; but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth."

It will be seen that the Privy Council did not disapprove of the principle that a transfer by the widow with the consent of the reversioner could be treated as equivalent to a renunication by the widow which vested the estate in the immediate reversioner followed by an alienation by the latter in favour of the alienee. In *Nobo Kishore Sarma* v. *Hari Nath Sarma* (11) it must be remembered, the widow really sold the property to a stranger and presumably received the consideration herself. Sir Richard Garth, C. J., entertained considerable doubt as to the propriety of the view which would make a sale by the widow to or with the consent of the reversioners stand on the same footing as a real relinquishment by her. But, in view of a series of prior decisions of the Court, he was constrained to accept that view as correct. In view of the recent pronouncements of the Judicial Committee that the surrender must be a voluntary and *bona fide* act of self-effacement by the widow and what is to be given up is the whole estate of the husband or the whole less what is necessary for her maintenance, it is extremely doubtful whether a sale by the widow which has the effect of converting her husband's estate into money can be regarded as a surrender at all. It would certainly be an indirect way of getting absolute control over the money into which the husband's estate was converted and could not but be regarded as a dodge either to enlarge her own interest or to divide the estate between herself and the reversioner with whose consent the transfer is effected. This aspect of the question was not considered by the Privy Council probably because the transfer in *Nobo Kishore Sarma* v. *Hari Nath Sarma* (11) was upheld on the ground of legal necessity as well. The principle laid down in *Pratap Chunder Roy* v. *Srimati Joy Monee Debee* (1) was applied by the Bombay High Court in *Anto* v. *Yeshwant* (10). There the widow made a surrender of her husband's estate in favour of the husband of a deceased daughter with the consent of an existing daughter who was the next heir at the time and who according to the Bombay Law was entitled to take an absolute interest in the estate. Baker, J., expressly invoked the authority in *Nobo Kishore Sarma* v. *Hari Nath Sarma* (11) as explained by the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (12).

These decisions are no direct authorities on the present point. They only show that when a transfer is made in favour of a stranger or a remoter reversioner with the consent of the immediate heir it is possible to construe the transaction as a surrender in favour of the consenting reversioner followed by a transfer by him in favour of the alienee. The other two decisions relied on by Mr. Gupta come under the second head. The first of these *viz.*, *Chinnaswami Pillai* v. *Appaswami Pillai* (2) is a decision of the Madras High Court. Here, the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son, and a deed was executed by them both in which there was a stipulation that the reversioner should maintain them during their life-time. On the death of all of them, the actual reversioners who happened to be different persons sued to recover the estate from the father of the deceased daughter's son who got the properties by right of inheritance. It was held that the surrender was valid in law and operated to vest the estate in the daughter's son. What was invoked in this case was in substance a fiction of a double surrender. It was held by Sadasiva Ayyar, J., that a surrender by a widow with the consent of the next female heir to the secondary male heir can be treated as a joint surrender by both, and that such a joint surrender might be treated as a surrender by the widow to the next female heir which vests the property in her for a moment and an immediate surrender of the property thus vested in the female heir by the latter to the next male heir, the result being to vest an absolute title in the secondary male heir. In this case the daughter actually joined with her mother in executing the deed of surrender but the same principle was held applicable to a case where the immediate female heir instead of joining in the deed of surrender simply expressed her consent to it by signing it as an attesting witness: *vide Chito* v. *Jhunnilal* (9).

In my opinion, the principle formulated by the Madras High Court is the only con-

ceivable principle, upon which a widow can be held competent to surrender the estate in favour of the secondary male reversioner with the consent of the immediate female heirs. In a way it can be said to be a logical extension of the doctrine of surrender. If the immediate reversioner who consents to the alienation by the widow is a male heir we can conceive of an antecedent surrender by the widow in his favour which entitles him to deal with the property in any way he likes by way of a sale or gift. If, however, the immediate reversioner is a female heir, the presumed surrender in her favour by the widow does not enlarge her interest and the next male heir can get an absolute estate only on the footing of another surrender by the immediate female reversioner unless there is legal necessity to support the transaction.

I am inclined to hold that a widow can, with the consent of her daughter who is the next heir of her husband, relinquish the estate in favour of the daughter's son. But the consent given by her must show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting, in substance, to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. I think therefore that if the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same a substantial part of the property which she is also presumed to surrender, or stipulates for any benefit to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life-interest for consideration, but that could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice of the actual reversioner at the time of her death.

I cannot accept the contention of Mr. Gupta that we cannot and need not look beyond the fact that the daughter has given consent to the surrender and it is immaterial as to whether her consent was procured by paying her a large sum of money. Mere consent might operate as a personal estoppel against the consenting daughter or any other person claiming through her, but it cannot bind the actual reversioner. There is a passage indeed in *Chinnaswami Pillai* v. *Appaswami Pillai* (2), where Sadasiva Ayyar, J., observes that the act of a daughter who being next heir surrenders the whole estate vests the absolute inheritance in the next male heir, even if she received consideration for her surrender of the full enjoyment of the property during her lifetime. But, as the facts of the case show, the only consideration there was a provision for maintenance of the daugher and nothing else. In the case before us the two daughters of Dakshina joined with the widow in executing the deed of surrender and they purported to confer upon defendant No. 4 and relinquish in his favour whatever right, title and interest they had in the estate. It was also recited that the daughters had no desire to enjoy the property. So far as Tarangini was concerned the consideration that she received for relinquishing her rights was Rs. 41,111 as described in Schedule Jha to the document. Out of this Rs. 11,111 was set apart for her own use and enjoyment and the balance of Rs. 30,000 was to be kept in the custody of her husband and suitably invested for the benefit of any son that might be born to her in future. "If the estate is ruined", so runs the deed,

"I, the third party, shall not have any chance of getting the benefit I have been deriving on the basis of this document, and if any son be born of my womb or if I take a son in adoption, then they will have no chance of obtaining the benefit which has been obtained for them on the basis of this document. For all these reasons, for the benefit of myself and my future son or adopted son and in order to prevent harm in future after taking proper consideration under the circumstances, I have thought it proper to cause full and absolute right to accrue to you by conferring upon you my entire right, title and interest ...I have fixed Rs. 41,111 as the consideration for conferring upon you and relinquishing in your favour whatever right, title and interest I have got to the said estate, and your father and other well-wishers on your behalf have admitted the said consideration to be adequate."

Paragraph 10 of the deed provides further that a monthly allowance of Rs. 50, would be paid to Tarangini for her life after the death of Sindhubala. No exception can possibly be taken to the stipulation in the deed relating to the payment of a monthly allowance of Rs. 50. But the question is whether the acceptance of a consideration of Rs 41,111 is consietent with the deed being construed as an act of surrender on her part, Mr. Gupta argues that having regard to the extent of the properties left by Dakshina a sum of Rs. 41,111 would be quite a reasonable and modest amount which could be paid to her in lieu of maintenance. It is said that the maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering fe-

male heir from taking a portion of the immovable property or a lump sum at once for purposes of maintenance provided it is not unreasonable. This as proposition in law need not be disputed. In *Sureshwar Misser* v. *Maheshrani Misrain* (13), the widow was given a small portion of immovable property which she was to enjoy for her life. In *Vytha Sitanna* v. *Marivada Viranna* (3), she reserved six acres out of her husband's estate for her own maintenance and surrendered the rest. In *Angamuthu Chetti* v. *Varatharajulu Chetti* (14), there were two widows, and the reversioner in whose favour the surrender was made gave a personal undertaking to maintain one of them and paid a sum of Rs. 500 to the other. In all these cases the provisions were held to be quite consistent with a *bona fide* surrender.

In the present case a difficulty arises by reason of the fact that this question was not raised in this shape before the Subordinate Judge and we have no materials before us to decide as to whether Rs. 41,111 would be a reasonable sum to be paid to one of the daughters by way of a maintenance allowance. The estate is indeed large, but there are very heavy liabilies upon it, and the document itself shows that Tarangini herself was doubtful as to whether there would be anything left of her father's estate after the death of her mother. It was a prudent course she adopted to accept a lump sum and avoid all uncertainties regarding the future. But quite apart from this, the very recitals in the deed would, in my opinion, go to show that this sum of Rs. 41,111 was not taken by Tarangini as a provision for her maintenance. It was expressly stated in the document that a sum of Rs. 11,111 was to be taken by her for her own personal use and the balance was to remain with her husband who was to invest it for the benefit of her future children. To me it seems that the receipt of this sum of money by Tarangini was not compatible with the idea of effacing herself completely and letting the estate go down to the next heir. It was really a sale of her interest for a consideration which she deemed to be adequate under the circumstances of this case.

So far as the other daughter, Sikharbasini, is concerned no objection has been taken to the stipulation to pay her a monthly sum by way of maintenance. What is objected to is the provision which makes the allowance hereditary. In my opinion, this objection is quite justified. A surrendering female heir can always reserve for herself a right to be maintained out of the estate which she surrenders, but the maintenance can be enjoyed by her only during her lifetime. It would be against the spirit of the doctrine of surrender if the widow would stipulate for a maintenance allowance not only to be paid to her during her lifetime, but which would be payable for ever to her heirs and successors. My conclusion is that although the two daughters undoubtedly gave their consent to the vesting of the entire estate in defendant No. 4, yet that consent was not an indication of a voluntary self-effacement on their part and the transaction cannot be upheld on the footing of a surrender.

I am not impressed with the argument of Mr. Gupta that it was justifiable in the circumstances of the present case to secure the consent of the daughters even by paying them money consideration, inasmuch as it was an act of religious merit on the part of the widow to protect her husband's estate and there was no other way of protecting the same except by vesting it in a male heir. Protection of the husband's estate is, I think, no relevant matter for consideration in determining the validity of a surrender by the widow. Whatever be the motives that actuate her, it is always open to the widow to efface herself and put an end to her legal existence. The estate then automatically vests in the next heir; and unless the next heir chooses to pass it on to some other person, in some manner recognized by law the widow cannot arrogate to herself the right of making a sort of testamentary disposition, and direct that the property should go not to the immediate heir but to some other person who might be more competent to manage the same. Further, it is difficult to believe that the estate could not be protected except by relinquishing it in favour of defendant No. 4. The widow was certainly a *purdanashin* lady having no experience in *zamindary* affairs, and it is expressly recited in the deed, that Dakshina had incurred considerable debts during his lifetime and the properties which were allotted in his share on partition, were inconveniently situated and bore very heavy revenues. But an infant of five years, as defendant No. 4 was at that time, would hardly be a proper person to be entrusted with the duties of manage-

(13) 47 I A 233; 57 Ind. Cas. 325; A I R 1921 P C 107; 48 C 100; (1920) M W N 472; 39 M L J 161; 28 M L T 154; 2 U P L R (P C) 128; 12 L W 461; 18 A L J 1069; 25 C W N 194; 41 C L J 433 (P C).

(14) 42 M 854; 53 Ind. Cas. 386; A I R 1920 Mad. 627; 37 M L J 384; 26 M L T 301; (1919) M W N 716; 11 L W 11 (F B).

ment. It was really the father of defendant No. 4 upon whom the widow relied, but the services of Ramesh were availbable to her even if she kept the estate in herself or renounced it in favour of the daughters. A full owner certainly could secure loans more easily than a limited owner, but the full owner, in this case being a minor, had also similar disabilities to encounter.

Assuming now for the sake of argument, that the widow was competent to surrender the estate in favour of her daughter's son, with the consent of the two daughters who were the immediate heirs, and it was immaterial that the latter received consideration for giving their consent, it is necessary to enquire whether the act of the widow herself constituted a valid surrender according to Hindu Law, that is to say, was a *bona fide* act of self-effacement on her part, and not a mere device to divide the estate of her husband between the reversioner and her own nominees.

The answer to this question depends on the propriety or otherwise of the provision in the deed of surrender under which the reversioner bound himself to hand over to the widow a sum of Rs. 1,20,000 and which the latter wanted to make a gift of, to her own brothers, defendants Nos. 10 and 11. As has been said at the beginning, Babus Ananda Chandra Row and Nripendra Chandra Roy, the two brothers of Sindhubala, assisted her a good deal, in connexion with the litigation she had with her husband's brothers. In fact, but for the financial help which she received from Ananda Babu, it would have been impossible for her to contest the litigation. Ananda Babu had advanced a sum of Rs. 48,845 for litigation expenses and it is not disputed that he was entitled to recover this sum from the estate left by Dakshina Mohan.

In the deed of surrender, defendant No. 4 not only undertook to pay this amount for which a boud was already executed by the widow, but he took the further liability of paying a sum of Rs. 1,20,000 to the lady, which the latter wanted to hand over to her two brothers out of affection and gratitude for the services they had rendered. For this money the estate of Dakshina was not liable, and if this was to come out of the estate surrendered by the widow, she would admittedly have a large slice out of her husband's estate in absolute right for the benefit of her own relations. Mr. Gupta has frankly conceded that if this money was to be paid out of the corpus of the estate left by Dakshina the surrender would not be valid in law. He contends, however, that the money represented the accumulations out of the income of the estate which were in the hands of the administrator *pendente lite* and the outstanding arrears of rent realizable from the tenants, and these the widow could dispose of absolutely at her discretion. It is necessary to examine the evidence on this point carefully; for, it cannot be disputed as a matter of law, that the widow had full powers over the income of her husband's estate, and a gift of the accumulated income, unless she had already chosen to treat it as a part of the corpus, could not affect the validity of surrender. By the deed of surrender the accumulated income, and outstanding arrears of rent, were given to defendant No. 4 along with the corpus of the estate. Paragraph 5 of the deed recited as follows:

"By this deed, the right I had and have to enjoy and appropriate according to my pleasure the income of the estate left by my husband which is now in the hands of the administrator *pendente lite*, and the arrears of rent etc., have been entirely given away to you and with regard to that in consultation with your father Sriman Ramesh Chandra and your other well-wishers and with the approval and consent of them and the third and fourth parties it has been settled that as consideration of my making wholesale gift of the income and arrears of rent to which I am entitled to enjoy according to my pleasure, by the deed and for my relinquishing the same in your favour you shall give me Rs. 1,20,000 with right to exercise full ownership therein, and to use and appropriate the same according to my pleasure and on that condition."

In substance the lady sold the accumulated income in the hands of the administrator and the arrears of rent to the reversioner for a consideration of Rs. 1,20,000. If the evidence makes it probable, that an amount near about Rs. 1,20 000 was really due to the lady as arrears of rent, or accumlated income in the hands of the administrator *pendente lite* at the time of the surrender the bargain would be quite a fair one, and as this was no part of the husband's estate which she was surrendering, the retention of this benefit would not be inconsistent with the withdrawal of her life-estate. Mr. Gupta argues that the burden is upon the plaintiff to show that the recital in the deed is not true and that the accumulated income did not amount to Rs. 1,20,000 at the date of surrender. I do not think that this contention is sound. The document does not mention what amount there was in the hands of the administrator, and it does not specify the extent of the arrears of rent that had accrued due at that time. The plaintiff moreover was no party to the deed and is not bound by its recitals. A Hindu widow has only restricted powers of.

alienation with regard to the properties she inherited from her husband and it is only under exceptional circumstances, that she can confer an absolute title on other. Any person, therefore, who asserts that he has acquired an absolute title to such property, on the basis of an act of surrender or alienation by the widow must make out the circumstances which would make such act valid and binding on the actual reversioner. (After considering evidence his Lordship concluded.) I think that the finding of the Court below on this point is correct. There was little or no money in the hands of the administrator and the outstanding if any were also insignificant. It was under the guidance of Babu Ananda Chandra Roy who was himself an experienced lawyer, that the deed of surrender was drawn up. He and his brother were the persons largely benefited by the deed, and I think that this untrue recital was made in the document only to make out a plausible justification in law for the widow's giving such a large sum of money to her own brothers. In my opinion as this money was really a part of the estate left by Dakshina, the surrender by the widow was not a valid surrender in law.

The only other question that remains for consideration is the question of limitation. Both sides have accepted the position that the present suit is governed by Art. 120 and not Art. 125, Lim. Act. The position seems to be correct, as the plaintiff in this suit is not the immediate reversioner who could succeed, if the widow were to die at the time when the suit was brought. Here the immediate reversioners were parties to the alienation by the widow, and consequently precluded themselves from bringing a suit for having it declared to be improper. The remote reversioner, therefore, was competent to maintain a suit for a declaratory relief under s. 42, Specific Relief Act: *vide Abinash Chandra* v. *Hari Nath* (15). As the Act makes no express provision for such cases, the suit must necessarily be referred to Art. 120, under which it should be instituted within six years from the date when the right to sue accrued. The right to sue would accrue ordinarily as soon as the alienation is made, but as in this case the plaintiff was not born when the widow executed the deed, his right to sue could not come into existence before the date of his birth. *Das Ram Chowdhury* v. *Thirtha Nath* (16). The plaintiff would get exemption for the entire period that he was a minor, and would have to institute the suit within three years after the attainment of majority as provided by s. (8), Lim. Act,

The plaintiff's case is that he was born in 1911 and attained majority in 1929 and the suit being filed within three years from that date is not barred by limitation. No horoscope or birth certificate has been produced, but the plaintiff has examined two witnesses in suppport of his case. The first is Biswanath Dhar, who at the time of the plaintiff's birth was in the service of his father. He swears that the plaintiff was born in 1318 B. S. and at that time Khitish the elder brother was about 11 or 12 years old. It is not disputed that Khitish was born in 1900. The other witness, Peary Mohan Das is also an old employee of Ramesh, the father of the plaintiff and he also says that the plaintiff was born when he was in the service of the father. He says, however, that he makes the statement on guess. As against this the contesting defendants have produced extracts from the admission register of a public school at Dacca, where the plaintiff is said to have prosecuted his studies and also a transfer certificate signed by the headmaster of the same institution. If these certificates are to be believed, the year of birth of the plaintiff would be 1908 and not 1911. The school registers are undoubtedly admissible in evidence, but the Sub-Judge I think righly refused to attach much value to the same. It is not clear on whose statement the age was recorded, and the register mentions the name of one Nagendra Lall Chowdhury as guardian of the plaintiff though there is no evidence to show who the gentleman, was and whether the plaintiff ever lived under his guardianship. Mr. Gupta refers in this connexion to the evidence of Sindhubala who says that the difference between the age of Khitish and that of the plaintiff would be three or four years but that is manifestly incorrect, as the plaintiff was admittedly not born when the deed of surrender was executed. Though the evidence adduced by the plaintiff as regards his age is not very satisfactory, I am unable to say that the trial Judge who had the opportunity of seeing the two witnesses was not justified in believing them. In my opinion the decision of the Court below on this point must be affirmed. In the view that I have taken, it is not necessary to consider whether a fresh right to sue accrued to the plaintiff on the sale of the properties in execution of the mortgage

(15) 32 C 62; 9 C W N 25.
(16) 51 C 101; 81 Ind. Cas. 532; AIR 1924 Cal. 481.

decree obtained by defendants Nos. 5 to 7. The result is that the appeal fails and must be dismissed with costs.

D. *Appeal dismissed.*

PRIVY COUNCIL

Appeal from the Lahore High Court

August 17, 1940

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN AND MR M. R. JAYAKAR.

Mst. SUBHANI AND OTHERS—APPELLANTS

versus

NAWAB AND OTHERS—RESPONDENTS

Custom (Punjab)—Succession — Non-ancestral property—Married daughters versus collaterals of tenth degree —Tulla clan resident at mouza *Mahmad Tulla, Tahsil and District Shahpur—Daughters take precedence—Onus to prove special custom to contrary lies on collaterals—Ancestral property — Proof of—Revenue pedigree, value of—Custom—Proof of—Statements in* riwaj-i-am *—Admissibility of, under ss.* 48 *and* 35, *Evidence Act (I of* 1872)—Riwaj-i-am, *entries in—Presumption of correctness—Extent of—Rebuttal of—Nature of evidence required — Rights of females who had no opportunity of being consulted by officer compiling* riwaj-i-am, *adversely affected — Custom recorded not in conformity with general customary law — Presumption is weakened—Judicial decision, value of, in rebutting presumption—Custom—Validity —Essentials—Antiquity — If must in every case be carried back to period beyond memory of man—English rule as to antiquity, whether applicable in India.*

Under the customary law applicable to the members of the Tulla clan resident at *mauza* Mahmad Tulla in the Tahsil and District of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner cannot take precedence over his married daughters in succession to his non-ancestral estate 172 Ind. Cas 158 **reversed.** [p. 437, col. 1.]

Where non-ancestral property is claimed by collaterals in preference to married daughters of the deceased owner the initial onus lies on the plaintiffs to prove that the general custom in favour of the daughter's succession had been varied by a special custom enabling the plaintiff to exclude the daughters [p. 449, col 1.]

(Indian case-law reviewed).

In the Punjab as a whole, the daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as *e. g.*,) uncles or nephews), and, even as regards ancestral property, it is now well-settled that, more usually, the fifth degree is found to be the remotest customary limit. Some of the answers recorded in Wilson's Manual are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest as the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father and this with the recent judicial decisions are sufficient to abrogate the custom to the contrary laid down in Wilson's Manual of Customary Law.

[*Held*, that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, it was a weak presumption which had been sufficiently discharged by the evidence adduced in the case.] [*ibid.*]

It is now settled law in the Punjab that the mere mention of the name of a person in the revenue pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. A genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is no doubt presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village. To establish the ancestral character of land it is not therefore sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance. 102 Ind. Cas. 313 (2) and 138 Ind, Cas. 280 (3), referred to. [p. 438, cols. 1 & 2.]

The answers (*riwaj-i-am*) contained in a Manual complied by Mr. (afterwards Sir) James Wilson, called a "General Code of the Tribal Customs in the Shahpur District of the Punjab", published in 1896, are clearly admissible in proof of custom under s. 48 of the Evi. Act, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under s. 35 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty. [p. 439, col. 2.]

Though the entries in the *riwaj-i-am* are entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded was in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case. Where, for instance, the *riwaj-i-am* laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this is not the case and the custom as recorded in the *riwaj-i-am* is opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it. 130 Ind. Cas 709 (6), referred to. [p. 441, col. 1.]

The effect of the statements in the *riwaj-i-am* (Wilson's Manual) is weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law and by the fact that the custom recorded was not in conformity with the general customary law though the degree of the weakening would depend upon the facts of each case. 169 Ind. Cas. 909 (1), **overruled.** [p. 448, col. 2.]

A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption enjoyed by the *riwaj-i-am*. In such a case, the value of the decision arises from the fact not that it is relevant under

ss. 13 and 42 of the Evi. Act as forming in itself a "transaction by which the custom in question was "recognised, etc., etc" but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties of proving a custom. 169 Ind. Cas. 909 (1) explained. [p. 448, col. 1].

The English rule, that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" is neither apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient: but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. 169 Ind. Cas. 909 (1), **overruled.** [p. 448, cols. 1 & 2.]

Sir *Hari Singh Gour* and Mr. *S. P. Khambatta*, for the Appellants.

Mr. M. R. Jayakar.—The question in this appeal is whether, under the customary law applicable to the members of the Tulla clan resident at *Mauza* Mahmad Tulla in the Tahsil and District of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner can take precedence over his married daughters in succession to his non-ancestral estate. The question arose as follows:—

One Sahlion, a Muhammadan landowner of the Tulla clan, resident as stated above, died, leaving him surviving a widow and two married daughters (appellants before the Board) and some immovable property. The widow subsequently gave the property to the daughters by a registered deed of gift dated September 8, 1934. The respondents, claiming to be his collaterals, instituted a suit against the widow (defendant No. 1) and the daughters (defendants Nos. 2 and 3) asserting that Sahlion's property was ancestral as regards the plaintiffs and that the widow had no right to make the gift, which should be declared void and ineffectual as against the plaintiff's rights and invalid after the death or re-marriage of the widow. The widow and daughters denied the claim on the ground that the property was not ancestral and that the plaintiffs had no *locus standi* to sue, because daughters succeeded to the non-ancestral property as against collaterals, "especially when the plaintiffs are collaterals of the tenth degree."

The Subordinate Judge who tried the suit dismissed it, holding that the plaintiffs were Sahlion's collaterals of the tenth degree, that the lands in the suit were not ancestral and that according to the general rule of custom prevailing among the Muhammadan tribes of the district of Shahpur which applied to the parties, the daughters were not ousted by the plaintiffs with regard to succession to the non-ancestral property of their father. In arriving at his decision, the learned Judge relied on the oral and documentary evidence adduced by the parties and upon certain rulings of the Punjab Courts.

The plaintiffs appealed to the High Court at Lahore and that Court, in a judgment remarkable for its brevity, allowed the appeal. The material part of the High Court judgment* begins with the statement

"that it is common ground that under the customary law which governs all the Musalman tribes of the Shahpur district, married daughters do not inherit their father's estate in any circumstances."

Their Lordships have a difficulty in understanding this statement, because the question stated by the High Court as the "common ground" was precisely the issue in controversy in the case. The judgment bears, in several places, indications that the High Court, instead of examining the disputed question on the fact and the evidence in the case carefully considered in the Subordinate Judge's judgment, proceeded entirely on the authority of the questions and answers contained in a Manual compiled by Mr. (afterwards Sir) James Wilson, called a

"General Code 'of the Tribal Customs in the Shahpur District of the Punjab', published in 1896. (It may be convenient to refer hereafter to this publication as Wilson's Manual.) Basing their views on certain questions and answers in Wilson's Manual the learned Judges of the High Court held that there was a presumption against inheritance by the daughters and that this presumption had not been rebutted. They therefore allowed the appeal. The judgment contains no detailed criticism of the oral and documentary evidence of custom adduced by the parties, all of which was ignored with the brief observation that in a Full Bench decision of the Punjab High Court (*Bahadur* v. *Nihal Kaur* (1)) it had been stated that recent judicial decisions are

(1) I L R (1937) 18 Lah. 594; 169 Ind. Cas. 909; 39 P L R 349; A I R 1937 Lah 451; 10 R L 81 (F B).

* 172 Ind. Cas. 158.—[*Ed.*]

not sufficient to abrogate the custom so clearly laid down in Wilson's Manual of Customary Law."

Their Lordships have consequently derived less assistance than they would have expected from the High Court judgment in elucidating the important question in controversy in this appeal.

Before examining the value to be attached to the statements in Wilson's Manual, and the effect of the Full Bench decision, it will be useful to state what the true legal position of the parties was as it emerged from the pleadings. The basis of the plaintiff's claim was that the property in suit was ancestral so far as their rights were concerned. This was denied by the defendants. The onus was therefore on the plaintiffs to prove that the property was ancestral. The Subordinate Judge held that the onus had not been discharged. The learned Judges of the a High Court did not consider this question, as the statements in Wilson's Manual on which they relied made no distinction between ancestral and non-ancestral property, and stated generally that married daughters "in no case" inherited their father's estate or "any share in it". Before this Board, the respondents did not appear in support of the High Court judgment. Their Lordships have therefore to decide the question on the evidence which is available in this case, and, on reviewing it, they agree with the finding of the Subordinate Judge that the land was not proved to be ancestral. In more than one decision of the Lahore High Court (see, for instance, *Jhanda Singh* v. *Banto* (2) and *Rahmat Ali Khan* v. *Sadiq-ul-Nisa* (3), it has been laid down that to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance. It is now settled law in the Punjab that the mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. As is explained by Tek Chand, J. in *Jhanda Singh* v. *Banto* (2).

"a genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is no doubt presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village."

The extracts from the settlement records relating to the land in dispute, which are a part of the evidence in this case, justify the finding of the Subordinate Judge.

Before examining the questions and answers in Wilson's Manual, it will be useful to ascertain the customary rights of daughters against collaterals with reference to ancestral and non ancestral land as they are stated in Sir W. H. Ratigan's Digest (of Civil Law for the Punjab, chiefly based on customary law, 1935 edition), a book of unquestioned authority in the Punjab. In para. 23 (p. 79) it is stated that (1) a daughter only succeeds to the ancestral landed property of her father, if an agriculturist, in default (*a*) of heirs mentioned in the preceding paragraph (*viz.* male lineal descendants, a widow or mother), or (*b*) of near male collaterals, provided that a married daughter sometimes excludes near male relatives, especially amongst Muhammadan tribes, under circumstances specified in the paragraph (not material to the present issue); (2) but in regard to the acquired property of her father the daughter is preferred to collaterals. It is further stated (p. 92)

"that the *general* custom of the province (the Punjab) is that a daughter excludes collaterals in succession to self-acquired property of her father," and the *initial* onus therefore is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a *special* custom excluding the daughters."

This being the legal position of the parties, the question arises whether, the property being non-ancestral, the plaintiffs have discharged the onus by proving the existence of a special custom excluding daughters. They endeavoured to do this in two ways (1) by relying on the authority of Wilson's Manual, and (2) by producing oral evidence at the trial.

As the questions and answers in Wilson's Manual formed the main basis of the High Court judgment, it is necessary to examine in detail their value and effect. In the preface of that book, it is stated

(2) 8 L 584 (589-90); 102 Ind. Cas. 313; A I R 1927 Lah. 477; 9 Lah. L J 433; 28 P L R 643; 29 P L R 199

(3) 13 L 404 (406); 138 Ind. Cas. 280; 33 P L R 117; A I R 1932 Lah. 353; Ind. Rul. (1932) Lah. 462.

that the compilation combines the results of several separate enquiries made of village headmen and other leading men to the important tribes in the District, summoned together at different times in November, 1893 and January, 1894, when certain questions of tribal custom were put to them and their answers recorded in the vernacular. The answers were read out to the assembled representatives of the tribe in the presence of the author, and admitted by them to be correct. Notes were taken in English by the author, but vernacular codes were also drawn up in five parts. These codes contained numerous instances of the custom and the author suggests a precaution that the vernacular codes should be consulted when any question regarding custom arises, as they were accepted as a statement of "the opinions of person having special means of "knowledge" of the usages of the tribe. A table is added, enumerating the tribes consulted and containing details relating to the consultations. One general heading (No. 5) is "Miscellaneous Musalman Tribes," and the tribes included in this category are also specified. The author concludes that "the code thus drawn up represents the tribal custom of the whole of the land-owning and the trading classes in the Shahpur District." It is to be noted that the Tulla clan, the material tribe in this case, is not mentioned amongst the tribes consulted separately and must therefore be included among the "Miscellaneous Musalman Tribes."

The material portions of questions Nos. 16 to 18 (in Wilson's Manual) on which the High Court has relied are as follows —

"*Question* No. 16 (p. 48)—Under what circumstances are daughters entitled to inherit? Are they excluded by the sons or by the widow, or by the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughter? If so, how is the limit ascertained? If it depends on descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come.

Answer No. 16—All Musalmans.

A married daughter in no case inherits her father's estate or any share in it. An unmarried daughter succeeds to no share in presence of agnate descendants of the deceased, or of her own mother; but if there be no agnate descendants and no sonless widow, the unmarried daughters succeed in equal shares to the whole of their father's property, movable and immovable, till their marriage, when it reverts to the agnate heirs. If there be a widow and daughters of another wife who has died, the unmarried daughters of the deceased wife succeed to their mother's share till their marriage.

Question No. 17 (p. 49)—Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, (2) the movable or acquired, property of their father?

Answer No. 17—All Musalmans

As regards the right of the daughter to inherit, no distinction is made between the movable and immovable, ancestral and acquired, property of the father. If she inherits at all she takes the whole estate."

The material part of answer No.18 (p. 49) is as follows :—

"*Answer* No. 18—All Muslamans.

A married daughter has no claim upon her father's estate in any case, whether she be widowed, or have children or not, or she and her husband live with her father. An unmarried daughter, if she does not herself inherit her father's estate, is entitled to proper maintenance out of it until her marriage and to the reasonable expenses of her marriage."

These answers are clearly admissible under s. 48 of the Indian Evi. Act, 1872, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under s. 35 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty.

This Board held in the case of *Beg* v. *Allah Ditta*(4), in which a similar *riwaj-i-am* relating to the Muhammadan Jats of the Jhang District in the Punjab was concerned, that the statements contained in the *riwaj-i-am* formed a strong piece of evidence in support of the custom therein entered, subject to rebuttal. In a later case, *Vaishno Ditti* v. *Rameshri* (5), the Board further held that the statements contained in the *riwaj-i-am* might be accepted even if unsupported by instances.

On a careful examination of the relevant questions and answers in Wilson's Manual, a few considerations arise *in limine* which cannot be ignored :—

(1) That some of the answers are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest of the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father.

(2) It cannot be disputed that, in his lifetime, a Muhammadan proprietor (as, for instance, an Awan in the Shahpur District) possesses unlimited power to give

(4) 44 I A 89 (97); 38 Ind. Cas. 354; 21 M L T 310 32 M L J 615; 19 Bom. L R 388; 45 P R 1917; 15 A L J 535; A I R 1916 P C 129; 21 C W N 842; 44 C 749; 26 C L J 175 (P C).

(5) 10 L 86; 113 Ind. Cas. 1; 29 P L R 654; A I R 1928 P C 294; 55 M L J 746; 28 L W 908; 49 C L J 38; 55 I A 407; (1929) M W N 5 (P C).

away his property to his daughters and their issue. This is clear from Wilson's Manual, p. 71 where it is recorded :

"a father having no son or son's son, has full power to give the whole of his immovable property to his daughter, daughter's son, sister, sister's son, or son-in-law, or to one of his agnate heirs, without the consent of the other agnates. No distinction is made between ancestral and acquired property."

Again, at p. 73, it is stated as regards Awans and Miscellaneous Musalmans (Tullas are included in this category) :

"a proprietor having no son or son's son, can, without the consent of the agnate heirs, make a gift of immovable property, ancestral or acquired, divided or not, to a person not related to him,"

and an explanatory note is added that

"among the Awans there is a general feeling that a sonless man is absolute owner of all his property, including his land, and can do with it as he likes, as his agnate heirs are generally his enemies!"

If this is the rule, it is difficult to understand why, on the death of such an absolute owner, his married daughters, whom he could have made the objects of his bounty at his will during his lifetime, should be superseded, even with regard to his self-acquired property, by collaterals, irrespective of the degree of remoteness in which they stood. Though Punjab Act II of 1920:

("an Act to restrict the power of descendants and collaterals to contest an alienation of immovable property . . . on the ground that such alienation . . . is contrary to custom")

does not apply to alienations made by a female (as in the present case), s. 7 thereof throws light on the absolute right of the proprietor to give away his non-ancestral property. The section applies to the whole of the Punjab, and provides that

"no person shall contest any alienation of non-ancestral immovable property . . . on the ground that such alienation . . . is contrary to custom."

(3) In answer No. 17 in Wilson's Manual no distinction is made between ancestral and non-ancestral or between movable and immovable property, and the rule is stated as a wide generalisation (in answer No. 16) with reference to "all "Muslmans" that a married daughter "in no case" inherits her father's estate or "any share in it." This answer is in conflict with numerous decisions of the Punjab Courts (some of them are noticed in a subsequent part of this judgment) which have laid down in clear terms that in the earlier records of customs throughout the Punjab, rules stated in such wide and general terms must be taken to govern ancestral property only.

(4) In the province as a whole, numerous decisions of the Punjab Courts show that daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as, *e. g.*, unles or nephews), and, even as regards ancestral property, it is now well-settled that more usually, the fifth degree is found to be the remotest customary limit. (See Rattigan's Digest, para. 23, cl. (1), sub-cl. (2), and authorities quoted at p. 84 and following). This general rule, prevalent in the entire province, appears to have found expression in s. 6 of the Punjab Act II of 1920, which lays down the fifth degree as the limit of collateral relationship able to contest an alienation of ancestral immovable property, on the ground that it is contrary to custom.

(5) It is remarkable that in answer No. 16 as recorded in the English version of the *riwaj-i-am*, no limit is mentioned within which the kindred must stand towards the deceased in order to exclude his daughters, though the question clearly contemplated enquiry into this point. It is not possible to say whether the omission to answer this part of the question was due to the fact that the point was lost sight of in the investigation or whether the answer was really intended to lay down that custom permitted collaterals, however remote (even of the tenth, fifteenth, or remoter degrees), to exclude daughters. Tek Chand, J., in the course of an examination of answer No. 16 in *Khan Beg* v. *Fateh Khatun* (6) had occasion to consult the vernacular version of the *riwaj-i-am*. He came to the conclusion that though the last part of the question was not specifically answered, it was clear from certain expressions—*Chacha* (father's younger brother) and *Taya* (father's elder brother) used in the corresponding vernacular answer, that it was not intended to lay down that collaterals of remote degrees should be preferred to daughters.

This case of *Khan Beg* v. *Fateh Khatun* (6) (their Lordships have derived considerable assistance from Tek Chand, J.'s judgment) deserves to be examined carefully as it related to the Shahpur district and the dispute was also very similar to the one in the present case. The contest there was between married daughters and collaterals of the sixth degree, and arose (as in the present case) in connection with a gift of non ancestral property by the widows to their married daughters. As in the present case, the collaterals relied

(6) 13 L 276 (296-297); 135 Ind. Cas. 769; 32 P L R 890; A I R 1932 Lah. 157; Ind. Rul. (1932) Lah. 161.

on the *riwaj-i-am* in Wilson's Manual, and with reference to it Tek Chand, J. made some observations which seem to their Lordships very pertinent. He pointed out that it was significant that not a single instance had been cited in the *riwaj-i-am* of married daughters being excluded from succession to non-ancestral property. The learned Judge went on to observe, quoting from a judgment of a Division Bench of the Lahore High Court that though the entries in the *riwaj-i-am* were entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded was in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case; where, for instance, the *riwaj-i-am* laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this was not the case and the custom as recorded in the *riwaj-i-am* was opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affected adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it.

Their Lordships are in complete agreement with this view, which is confirmed by a weighty pronouncement of Roe, J. in *Harnarain* v. *Deoki* (7) where that learned Judge, who was regarded as one of the most eminent exponents of the principles of Punjab tribal customs, and had himself compiled an important *riwaj-i-am*, observed :

"There is no doubt a general tendency of the stronger to over-ride the weak and many instances may occur of the males of a family depriving females of rights to which the latter are legally entitled. Such instances may be followed so generally as to establish a custom, even though the origin of the custom were usurpation; but the Courts are bound to carefully watch over the rights of the weaker party and to refuse to hold that they had ceased to exist unless a custom against them is most clearly established."

In a later case, *Sayad Rahim Shah* v. *Sayad Hussain Shah* (8) a similar caution was uttered by Robertson, J., who observed that :

"The male relations, in many cases at least, have been clearly more concerned for their own advantage than for the security of the rights of widows and other female relatives with rights or alleged rights over family property and the statements of the male relatives in such matters have to be taken *cum grano salis* where they tend to minimize the rights of others and extend their own."

These views were endorsed by another high authority—Clark, C. J. (Reid, J. concurring), in *Maula Baksh* v. *Muhammad Baksh* (9), and, two years later in the case of *Bholi* v. *Man Singh* (10) where the *riwaj-i-am* under consideration had laid down that daughters were excluded by collaterals, even up to the tenth degree, it was observed :

"As the land is rising in value under British rule the land-holders are becoming more and more anxious to exclude female succession. They are ready to state the rule against the daughters as strongly as possible, but if the custom is so well established it is strange that they are unable to state a single instance in point on an occasion like the compilation of the *riwaj-i-am* when detailed enquiries are being made and when the leading men are supposed to give their answers with deliberation and care."

A more emphatic warning was uttered a year later in *Gunpatrai* v. *Kesho Ram* (11) that where the entries in the *riwaj-i-am* :

"Seek to support a custom in defeasance of the rights of persons who were no parties to the declarations *i. e.*, the female relatives of the signatories, it is quite clear that no body of men can deprive another set of right-holders under personal law by their mere *ipse dixit*. No doubt, usurpation successfully carried out for a long time may possibly eventually establish a custom, but it is necessary in such a case to show not merely that certain persons desire that such and such be the custom to the detriment of the rights of others but that such and such have really become a binding custom, fully established and followed."

With reference to answers in the *riwaj-i-am* (like answer No. 17 in Wilson's Manual) which state that no distinction is made in the matter of the daughter's right of inheritance between self-acquired and ancestral property of the father, or between movable and immovable property, Shadi Lal, C. J., in the case of *Sultan* v. *Sharfan* (12) remarked that though the entry in the *riwaj-i-am* raised a presumption in favour of the custom recorded therein, it was clear that

"the general custom of the province favours the succession of the daughter to the acquired property of her father in preference to collaterals *vide*

(7) 24 P R 1893 (124, 131).
(8) 102 P R 1901 (353, 359); 119 P L R 1901.
(9) 54 P R 1906 (208, 210); 74 P L R 1907; 87 P W R 1906.
(10) 86 P R 1908 (402, 404); 146 P W R 1908.
(11) 34 P R 1909 (97, 99); 1 Ind. Cas. 691; 181 P L R 1908.
(12) 10 L 249 (251); 111 Ind. Cas. 846; A I R 1928 Lah. 703.

Rartigan's Digest, para. 23, sub-paragraph (2), and that the custom invoked by the plaintiffs (in that case) must be treated as an exception to the general rule,"

and for that reason the onus placed upon the daughter was a light one and did not require much evidence to repel it.

Their Lordships have thought it desirable to refer, in some detail, to these observations of the Judges of the Punjab Court, because they held eminent positions and some of them had experience of the preparation of official codes of tribal custom. But none of these considerations appear to have been kept in view by the learned Judges of the High Court in this case, who, in arriving at their decision have not only ignored (as will be shown below) the entire body of evidence adduced in the suit, but also a long course of judicial decisions of their own province, extending over nearly thirty years, in which similar questions arose with reference to the tribes in the Shahpur and neighbouring districts and which were uniformly decided against the collaterals of much nearer degree than in the present suit, except in two cases of exceptional character where there was no rebutting evidence at all. [*See Jawaya Shah* v. *Fatima* (13) and *Gulab* v. *Umar Bibi* (14)]. As the question at issue affects large classes of the Muslim community, it is, in their Lordships' opinion, of sufficient importance to justify their briefly reviewing a few of these important decisions.

To begin with, there is Ex. D-7 in the case, the judgment of the Chief Court of the Punjab, C, A. No. 665 of 1905 (Judges Rattigan and Lal Chand) in *Samand* v. *Jind Waddi*, dated May, 5, 1906. It related to the Muslim tribe of Majoks of the Shahpur district. The dispute concerned a gift (as in the present case) by the widow of the original owner, and arose between his collaterals (the exact degree of relationship is not stated) as plaintiffs, and his widow, sister, and married daughters, as defendants. The land was the acquired property of the owner. The collaterals relied on a *wajib-ul arz* of 1865 (similar to answer No. 16 in Wilson's Manual) stating that the daughters of a sonless proprietor succeeded to his landed property and retained possession merely till marriage, when the land reverted to the male agnates. The Divisional Judge and the Chief Court both held that though the *wajib-ul-arz* was stated in general terms, its operation, on a proper construction, must be restricted to ancestral property, and that in the case of non-ancestral property the dauther's estate was not limited till marriage, nor was it one for life, but would remain in their line after their death for such time as there existed a male lineal descendant. The suit was accordingly dismissed. This ruling is referred to with approval in *Ghulam Muhammad* v. *Gauhar Bibi* (15) and also in *Khan Beg* v. *Fateh Khatun* (6).

The first of these two cases (Broadway and Bevan Petman, JJ.) related to the Sipras of Miana Hazara Tahsil Bhera of Shahpur district (the tribe is included in miscellaneous Musalmans in Wilson's Manual). Here too, the dispute was about a gift made by the widow of her husband's land in favour of her daughter and her deceased daughter's son. Plaintiffs, nephews of the owner, sued for a declaration that the gift did not affect their reversionary right after the death or re-marriage of the widow. Some property was found to be ancestral and some not. The nephews relied on entries in the *riwaj-i-am* in Wilson's Manual pp. 46, 48, 49 (the same as in the present case), against married daughrers succeeding to the father's property. The High Court disallowed the collaterals' claim as regards non-ancestral property, holding that (1) as regards the *riwaj i am* the entries carried with them certain presumptions of correctness, but, when positive instances were given, the *riwaj-i-am* could not be regarded as overriding them; (2) as regards ancestral property, the general custom was against the daughter succeeding; (3) in the case of self-acquired property, however, the general custom is that daugthers are preferred to collaterels. Reference was made to Rattigan's Customary Law, Art. 23, cl. (2), and to the decision Ex. D-7, cited above, and it was held that there was no reason to doubt the correctness of the dictum in that ruling that similar general entries about custom should be read as referring to ancestral property only. This case is an instance where answer No. 17 in Wilson's Manual, stating that no distinction exists between ancestral and acquired property of the father and married daughters are excluded from both, was not given effect to, even in favour of such near kindred as

(13) 6 L 356; 89 Ind. Cas. 656; A I R 1925 Lah. 482; 7 Lah. L J 295; 26 P L R 590.

(14) A I R 1936 Lah. 403; 164 Ind. Cas. 796; 38 P L R 807; 9 R L 159.

(15) 1 L 284 (291); 54 Ind. Cas. 419; 10 P L R 1920.

nephews. This ruling was followed in 1933 in the decision noted below as Ex. D-6.

The case of *Jawaya Shah* v. *Fatima* (13) (LeRossignol and Fforde, JJ.) related to the Sayyads (included in Wilson's Manual in miscellaneous Musalman tribes) of the Shahpur district. The contest was between married daughters and collaterals (the exact decree of relationship is not stated). The property belonged to a Muhammadan who died twenty-two years before the suit and was succeeded by his widow. On her death, mutation was effected in favour of his two daughters. In 1919, on the marriage of one of the daughters, mutation of her share was effected in favour of her unmarried sister. The married daughter subsequently brought a suit against the unmarried daughter for a declaration that, in spite of her marriage she was entitled to her half share. This claim was decreed on the confession of the unmarried sister. The suit was then brought by the collaterals on the ground that the unmarried sister was entitled to the estate only until her marriage. The trial Court dismissed the plaintiff's claim, holding that the land in suit was non-ancestral, and consequently they had no right to the property in the presence of the daughters. The collarerals preferred an appeal to the Lahore High Court. After the institution of the appeal, the unmarried daughter was married and compromised with the plaintiffs, and the first married daughter remained the only defendant to resist the appeal. It was held by the High Court (1) that, on the evidence the land in suit was not ancestral *qua* the plaintiffs; (2) that it was uncompromisingly stated in the answers in Wilson's Manual that daughters did not succeed to their father's estate "in any case" if they were married, and that when an unmarried daughter took the succession, it lapsed on her marriage; (3) that this statement of custom in Wilson's Manual was open to rebuttal, but that the defendants had failed to prove a single instance in which married daughters succeeded to or retained their father's estate; (4) the that it was significant that on the marriage of the first-married daughter the mutation of her share was sanctioned in favour of her unmarried sister. On these grounds the collateral's claim was decreed.

This ruling has been treated by subsequent decisions of the Lahore High Court as an exceptional case decided on the ground that not a single instance had been proved by the defendants to rebut the presumption arising from the answers in Wilson's Manual. Likewise, the exact degree of the collaterals' relationship does not appear on the record. See the comments on this ruling in *Khan Beg* v. *Fateh Khatun* (6), at 307 & 308* and in the decision Ex. D. 6 (cited below).

This case *Khan Beg* v. *Fateh Khatun* (6), (Tek Chand and Coldstream, JJ.), related to Awans (first tribe mentioned in preface to Wilson's Manual) in *mauza* Mardwal in Khushab Tahsil of Shahpur district. A reference has been made to this case in an earlier part of this judgment. A Muhammadan land-owner died sonless, leaving two widows and daughters from each. After his death, the widwos partitioned the property among themselves. Subsequently, each of the two widows gifted her share to her married daughter at different dates. Plaintiffs, collaterals of the sixth degree, instituted two separate suits at different dates impugning the two gifts. The trial Court dismissed both the suits. The collaterals appealed to the High Court. The two appeals were heard together. In the first suit no oral evidence had been led by the parties. In the second suit the collaterals produced sixteen witnesses who made bald statements about the custom, which were rejected by the Subordinate Judge as worthless as none of them was able to cite a single instance in which the collaterals had succeeded in preference to daughters in respect of non-ancestral property. The collaterals, however, relied on answers to questions Nos. 16 and 17 in Wilson's Manual. The High Court held (1) that the land was not ancestral; (2) that though the *riwaj-i-am* was entitled to an initial presumption in favour of its entries dealing with this question, on the facts of the case it was of limited value. Referring to questions and answers Nos. 16 and 17 in Wilson's Manual and the general answer as governing all Musalman tribes, it was observed that not a single instance where married daughters had been excluded from succession to non-ancestral property had been cited, either in the *riwaj-i-am* or proved at the trial. The judgment then refers (p. 282*) to three rulings—one of 1905 (the same as Ex. D. 7 above) and two of 1920, where the answers in Wilson's Manual were not followed. It is further stated (p. 310*) that there were:

"more than twenty cases in which daughters were proved to have excluded collaterals from succession to the property of their fathers, while there is not a

*Pages of 13 Lah.—[*Ed.*]

single well-ascertained instance of collaterals as distantly related as the plaintiffs (sixth degree) succeeding to non-ancestral property in preference to daughters of the last male holder. The plaintiffs had succeeded in proving only three instances of succession of collaterals to non-ancestral property, but in all these cases the plaintiffs were 'near kindred'."

The suit was accordingly dismissed. The remarks at the end of the judgment (p. 310)* are valuable as showing that on the authority of Wilson's Manual (answers Nos. 16 and 17) and the admission of both Counsel in that appeal, the custom discussed in the judgment was the same among all the Musalman tribes of the Shahpur district.

Bhug Bhan v. *Mohammad* (16), (Dalip Singh, J.), also related to the Awans of Tahsil Khushab, Shahpur District. The contest there was between the daughters (defendants) and collaterals of the fifth degree (plaintiffs). The case followed the decision in *Khan Beg* v. *Fateh Khatun* (6). The judgment goes on to add that the twenty instances relied on in the judgment in that case were of such a character that they would apply to the fifth degreee, collaterals as much as to the sixth degree, and that out of the three contrary instances in that case only one was helpful to the plaintiffs. It was held that the presumption in the *riwaj-i-am* had been rebutted and that the daughters succeeded.

Jallo v. *Sajjadan*, (1933) (Ex. D. 6 in the present case), related to the tribe of Khokhars (fourth tribe mentioned in preface to Wilson's Manual) of Kalas, Tahsil Bhalwal, Shahpur District. This is a judgment of the District Judge at Sargodha Shahpur District. The contest was between a daughter and the sons of another daughter as plaintiffs and collaterals of the fifth degeree as defendants. In addition to the usual defences the collaterals pleaded a local custom of the Shahpur district under which daughters and their sons were excluded even if the land was not ancestral. The first Court held that the land was not ancestral that defendants were collaterals of the fifth degree and daughters were preferential heirs, and their suit was decreed. On appeal, the District Judge confirmed the findings, and stated, as regards the custom of the Shahpur district, that the evidence for the collaterals consisted (1) of entries in the revenue record; and (2) of oral evidence of nine witnesses, but that not one single instance had been cited to prove the preference of collaterals over daughters. He held that if the property was ancestral, the collaterals would succeed, but that if the property was not ancestral, the general custom of the province was in favour of the daughters, and that the local custom, contrary to the general custom, had not been established, as no instance of daughters' exclusion was proved. As for the record of the custom which stated (like the relevant answers in Wilson's Manual) that daughters did not obtain any share of the father's property, the learned Judge remarked that no distinction was made in it between ancestral and non-ancestral property and, therefore, following the case in *Ghulam Muhammad* v. *Gauhar Bibi* (15) (cited above), he held that the operation of the statemant must be confined to ancestral property. Turning to the facts of the case before him, the learned Judge held that on account of the various instances proved in the case, the presumption raised by the *riwaj-i-am* in favour of collaterals, so far as succession to non-ancestral property was concerned, had been rebutted. The suit was accordingly decreed. The Judge relied on the case in *Khan Beg* v. *Fateh Khatun* (6), as being "most important."

Exhibit D.8 (referred to in the trial Court's judgment in this case) is a decision of the Lahore High Court relating to the Mekans (tribe included in miscellaneous Musalmans) of the Shahpur district. Plaintiffs there were collaterals of the seventh degree as against married daughters. It was held that, according to the custom prevailing amongst the Mekans, and the Muhammadan land-holders of the Shahpur district generally, collaterals were excluded by married daughters in succession to the non-ancestral property of a sonless proprietor. It was also pointed out that according to answers No. 16 and 17 in Wilson's Manual, the same custom existed amongst all the Musalman tribes of the district (except the Tiwanas and Sayads, in whose cases there were minor variations). It was held that the plaintiffs (seventh decree collaterals) were excluded by the daughters. The judgment followed *Ghulam Muhammad* v. *Gauhar Bibi* (15), *Khan Beg* v. *Fateh Khatun* (6) and *Bhag Bhari* v. *Muhammad* (16).

The decisions cited above have been referred to in some detail because they were all from the Shahpur district and related to the Musalman tribes mentioned in Wilson's Manual. But the Lahore High

(16) 15 L 73; 150 Ind. Cas. 786; A I R 1934 Lah. 404; 7 R L 29 (1); 36 P L R 449.

*Page of 13 Lah.—[*Ed.*]

Court have, in some of their decisions relating to the Shahpur District referred also to rulings from the other districts of the Punjab, where, owing to the contiguity of the district or analogous circumstances, a similarity of customs was found to have existed, tending to prove that, with regard to non-ancestral property, the custom was more or less general in the whole province of the Punjab that daughters married or unmarried, excluded collaterals, beyond the fifth degree. A few of these decisions which relate to the material period of 1905-1936 may be usefully noticed here.

Jhanda Singh v. *Banto* (2) (Campbell and Tek Chand, JJ.), was a case of a Kanj Jat of *mauza* Burewal in the Amritsar district. The contest was between collaterals of the sixth degree (plaintiffs) and the daughters (defendants) of a daughter's son appointed by the widow of the owner, under his directions, as a son to her husband. The Subordinate Judge held (and the High Court confirmed) that the land was not ancestral and the appointee took it as his absolute property with a complete power of disposal over it, and that consequently, on the latter's death, it would descend to his daughters, and plaintiffs had no right to it; that the rule of reversion mentioned in the *riwaj-i-am* of the Amritsar district, prepared in 1913-14, stating (like the answers in Wilson's Manual) that the collaterals excluded the daughters even with regard to non-ancestral property, had no application where the property was non-ancestral in the hands of the appointee and his power of disposal over it was absolute. In support of this view reference was made to paragraph 55 of Rattigan's Digest.

Sultan v. *Sharfan* (12) (Shadi Lal, C. J and Johnstone, J.), related to Awans of the village Khardar in the district of Jhelum. The owner was succeeded by his widow, who made a gift of a plot of the land to her daughter. Plaintiffs, brothers and a nephew of the owner, brought the suit, impugning the alienation. The property was admittedly self-acquired. Plaintiffs relied on an entry in the *riwaj-i-am* of the district (similar to answer No. 16 in Wilson's Manual), limiting the unmarried daughter's interest until her marriage, without distinction between self-acquired and ancestral property or movable or immovable property. The Subordinate Judge decided in favour of the daughters (the High Court confirmed the decision), holding that it was clear that the general custom of the province favoured the succession of the daughter to acquired property of her father in preference to collaterals. (Reference was made to Rattigan's Digest, paragraph 23, subparagraph (2).) The Subordinate Judge thought that a declaration in the *riwaj-i-am* that a married daughter cannot inherit even the self-acquired property of her father "verges on an absurdity"; no instances were mentioned in support of it. He added that the author of the *riwaj-i-am* had himself stated in the preface that his Code

> "must not in all cases be regarded as a correct record of the customs actually existing and that the more intelligent tribesmen who usually act as spokesmen on an occasion of this kind sometimes allow their opinion as to what customs are expedient to override their knowledge of the customs as they really are."

The daughter produced evidence of at least four instances in her favour, as against one contrary instance proved by the collaterals, but the latter related to property which was jointly acquired by the deceased owner and his brother and went to the collaterals without any contest by the daughters. It may be noted that this case was treated by Tek Chand, J. in *Khan Beg* v. *Fateh Khatun* (6), (case of Awans of Shahpur) as of particular importance, as the question for decision in this ruling was precisely the same as before him and related to the neighbouring District of Jhelum.

Shahamad v. *Muhammad Bibi* (17), (Shadi Lal, C. J. and Agha Haidar, J.), was a case of Jats of the Sialkot district. The suit was brought by the daughter for a declaration that after the death of her mother she would inherit the property. Her claim was opposed by the nephew. The land was non-ancestral. The trial Judge, upon examination of the evidence, came to the conclusion that among the Jats of the Sialkot district, from where the original owner had migrated, the daughter is by custom entitled to succeed to the self-acquired property of her father in preference to his nephew. This finding was not challenged before the High Court.

Said v. *Said Bibi* (18), (Broadway and Harrison, JJ.), was also a case of a Jat in the Sialkot district. The contest was between a married daughter and her father's brothers. On a reference by the Collector, the daughter filed the suit for the usual

(17) 10 L 485; 116 Ind. Cas. 189; A I R 1929 Lah. 58; 30 P L R 678.

(18) 10 L 489; 118 Ind. Cas. 398; A I R 1929 Lah. 465; Ind. Rul. (1929) Lah. 750; 30 P L R 618.

declaration. The trial Court and the High Court both admitted her claim, holding that by the custom of the Jats of the Sialkot district a married daughter succeeds to the self-acquired property of her father in preference to collaterals. The uncles had relied on a *riwaj-i-am* of the Sialkot district (similar to answer No. 16 in Wilson's Manual) stating that married daughters did not inherit in the presence of collaterals. The High Court observed that a presumption of correctness attached to such an entry, but in the case before it the entry was qualified by the following remarks:

"this is the general rule, but, under the influence of judicial decisions, some people assert that daughters succeed in preference to collaterals of the fifth or more remote degree. Mughals assert that agnates of the fourth degree are excluded by the daughters."

The Judges gave effect to this qualification on finding that eight instances were cited in the *riwaj-i-am* in which daughters inherited to the exclusion of collaterals of varying degrees, and that in the case itself two more contested instances were proved in the daughter's favour. The case *Shahamad* v. *Muhammad Bibi* (17), was relied upon as affording strong evidence in support of the qualification of the custom set out in the *riwaj-i-am*.

Rahmat Ali Khan v. *Sadiq-ul-Nisa* (3) (Addison and Hilton, JJ.), related to Muhammadan Rajputs of Panipat, Karnal district. The contest was between collaterals of the sixth degree (plaintiffs) and a daughter (defendant No. 1) and widow (defendant No. 2). There was a will by the owner in favour of the daughter. The suit was for a declaration that the will was of no effect against reversionary rights, as the property was ancestral and there was a general custom excluding daughters and also a special custom of the Rajputs of Panipat that daughters married outside Panipat did not inherit. The Subordinate Judge dismissed the suit, holding that the will was genuine and valid, the property was non-ancestral and there was a general custom preferring daughters to collaterals, and that the special custom pleaded was neither ancient nor reasonable. The High Court held that the property was not ancestral and that plaintiffs had not proved that the general custom favoured sixth degree collaterals even if the property was ancestral. The plaintiffs had relied upon a *riwaj-i-am* of Panipat of 1880, stating that "daughters succeed provided they be married in Panipat proper and are alive." This *riwaj-i-am* was supported by one instance proved in the case. Notwithstanding this, the High Court, following its previous decisions in *Ghulam Muhammad* v. *Gauhar Bibi* (15), (cited above) and *Sham Das* v. *Moolo Bai* (19), limited the operation of the *riwaj-i-am* to ancestral property as no mention of self-acquired property was made in it. The High Court proceeded to observe that assuming that the property was ancestral, the daughter was unmarried at her father's death when succession opened out and the property having vested in her, her subsequent marriage would not divest it. It is interesting to compare the last-mentioned principle with answer No. 16 in Wilson's Manual which states that unmarried daughters succeed to their father's estate but that on their marriage it reverts to the agnates.

Mahi v. *Barkate* (20), (Tek Chand and Skemp, JJ.), related to Kalon Jats of the Sialkot district. The contest was between brother's son's sons (plaintiffs) and daughter (defendant). After the death of the owner and his widow, the Collector ordered mutation in favour of the daughter. The brother's son's sons brought the usual suit against the daughter, claiming, *inter alia*, that according to the custom prevailing in the tribe, collaterals succeeded to self-acquired property to the exclusion of daughters. The Subordinate Judge found against plaintiffs on all points and dismissed the suit. The High Court held that the daughter was legitimate and therefore had a right to succeed in preference to the brother's son's sons. The collaterals had relied upon a *riwaj-i-am* of the Sialkot district of 1916, with reference to which the High Court observed that, though the initial presumption must be in favour of its correctness, the lower Court had rightly held, after careful examination of the evidence on the record and also the previous decisions, that the daughters had succeeded in displacing the presumption. It is significant that the High Court proceeded to add that Counsel appearing for the collaterals

"conceded that there were several instances of daughters excluding collaterals in succession to non-ancestral property of their sonless fathers, while there was not even one instance in support of the answers as recorded. This entry in the *riwaj-i-am* has been examined in several cases by this Court and in every one of them it has been found that it was not in accord with the actual prevailing custom."

(19) 7 L 124; 95 Ind. Cas. 337; 27 P L R 154; A I R 1926 Lah. 210.

(20) A I R 1936 Lah. 339; 161 Ind. Cas. 24; 16 L 985 38 P L R 509; 8 R L 665.

Reliance was placed, among other rulings, on *Shahamad* v. *Muhammad Bibi* (17) and *Said* v. *Said Bibi* (18), (cited above).

It is interesting to compare the last ruling with another case reported in the same volume—*Gulab* v. *Umar Bibi* (14), (Addison and Abdul Rashid, JJ.). This case related to a Dillu Jat of the village of Godha in the Sialkot District. The contest was between collaterals of the eleventh degree (far remoter than any collaterals concerned in any of the previous decisions) as plaintiffs and a married daughter (donee from the widow) and her husband (donee from her) as defendants. The trial Court dismissed the suit, holding that the plaintiffs were very remote collaterals, that the land was not ancestral and that under the custom the daughter was entitled to succeed. It is to be noted that no evidence was produced by either party on the question of custom and the Subordinate Judge decided the issue on the basis of the general custom of the province as made out in the previous decisions of the Lahore High Court (cited above) dealing with the different tribes in the Sialkot and other districts. The High Court reversed the decision and decided in favour of the plaintiffs, relying entirely on the *riwaj-i-ams* of 1865, 1895 and 1916, holding that these *riwaj-i-ams* had remained unchanged during all these years and were clearly to the effect that married daughters did not inherit in the presence of collaterals "in any case," and, as they were not rebutted by the contrary evidence in the case, the *riwaj-i-ams* must be given effect to. It is clear that this case is an extreme instance where collaterals of the eleventh degree succeeded. It ignores the previous decisions, and some of them (cited above) from the same district of Sialkot, where collaterals of a much nearer degree, like nephews, were excluded by the daughters with reference to self-acquired property. The decision likewise fails to take note of the interpretation adopted in several of the previous decisions that where a *riwaj i-am* makes no distinction between ancestral and self-acquired property and states, as a wide generalisation, that daughters do not succeed in any case, it must be limited to ancestral property. It is to be noted that in this case, as in *Jawaya Shah* v. *Fatima* (13), (cited above), there was not a single instance adduced to rebut the presumption created in favour of the collaterals by the *riwaj-i-am*. It is on this ground that Bhide, J. in his differing judgment in *Bahadur* v. *Nihal Kaur* (1), (cited below) rightly describes this case as of an exceptional character.

It now remains to consider the Full Bench case of *Bahadur* v. *Nihal Kaur* (1), (differing judgments of Coldstream and Bhide, JJ. and Full Bench decision of Young, C. J., Monroe and Din Mohammad, JJ.). At the High Court in the present case has treated this ruling as an authority for ignoring the previous judicial decisions, it is necessary to examine closely the facts and effect of this ruling. The case related to the Jats of Daska Tehsil in Sialkot district. The contest was between a married daughter (plaintiff) and collaterals of the fourth degree (defendant). The land was non-ancestral. The trial Court decreed the suit, holding that the land being non-ancestral the custom favoured the daughter's preferential right. This decision was upheld on appeal by the District Judge. The collaterals appealed to the High Court, and that Court dismissed the suit. It is to be noted that neither party had proved any specific instances in the case, so there was no rebutting evidence against the presumption raised in favour of the collaterals by the answers in the *riwaj-i-am* relating to the district. The only material question was whether previous decisions of the Lahore High Court of a character contrary to the custom recorded in the *riwaj-i-am* would be sufficient evidence to rebut the presumption. None of the earlier decisions, for instance those cited above, nor even those relating to the Jats in the Sialkot district, were noticed in the Full Bench judgment, which referred only to two previous decisions: one of 1922, which Young, C. J. (who delivered the judgment of the Full Bench) thought was based on a wrong view of the law; and the other of 1928, which was held to be too recent to prove a custom. The *riwaj-i-am* relevant to the suit, which was noticed and commented on in some of the earlier decisions cited above, was clear so far as it went, but its qualifications were not given effect to as was done in some of the earlier decisions. There was a difference of opinion between Coldstream, J. and Bhide, J., and on a reference to the Full Bench, the reasoning adopted by the former Judge was virtually approved, but several vital considerations urged by Bhide, J. in his differing judgment do not appear to have received adequate consideration in the Full Bench judgment

If the Full Bench decision is intended to lay down the rule that a *riwaj-i-am*, being presumptive evidence, cannot be over-

ridden by recent instances, either in the form of specific cases proved at the trial or the decisions of the Law Courts, their Lordships have little comment to make on it. The case cannot, however, be treated as an authority for the view that judicial decisions, even if they are not of recent date, cannot be treated as evidence against the statements in the *riwaj-i-am*. A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under s. 13 and 42 of the Indian Evi. Act as forming in itself a "transaction by which the custom in question was "recognised, etc., etc.," but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties of proving a custom.

Their Lordships are not convinced that Young, C. J.'s reference to the English rule, stated in Blackstone's Commentaries, that

"a custom, in order that it may be legal and binding, must have been used so long that the memory of man-runneth not to the contrary"

was either apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient ; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. Insistence upon such proof would also involve a complete ignoring of the caution, which was uttered in a judgment of this Board in the case of *Abdul Hussein Khan* v. *Bibi Sona Dero* (21), where their Lordships adverted to the difficulty of applying

"the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here"

Likewise, their Lordships do not find themselves in agreement with the view of the Full Bench that the effect of the statements in the *riwaj-i-am* was not weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law or by the fact that the custom recorded was not in conformity with the general customary law. The presumption enjoyed by the *riwaj-i-am* was, in their Lordships' opinion, weakened to the extent of both these considerations, though the degree of the weakening would depend upon the facts of each case. Their Lordships prefer, in this behalf, the observations of the Punjab Judges, cited in a previous part of this judgment, which are of a contrary character.

Whatever value the Full Bench decision might have with reference to the customs of the Sialkot district the High Court in the present case was in error in accepting it as an authority for excluding from consideration the several instances, both judicial and otherwise, which were proved in this case with reference to the customs of the Shahpur district. By no straining of language could these decisions be described as recent. They commence from 1905-6 and range over a period of nearly thirty years. In many of these decisions the claimants in the position of the daughters proved specific instances of their superseding collaterals of varying degrees of remoteness, sometimes even nephews, with reference to non-ancestral property. The case of *Gulab* v. *Umar Bibi* (14), on which the Full Bench judgment relied, was as shown above, of an exceptional character and could hardly be regarded as indicating any rule of custom of general application as against

(21) 45 I A 10 (14); 43 Ind. Cas. 306; 45 C 450; 12 S L R 101; 16 A L J 17; 20 Bom. L R 528; 27 C L J 240; 22 C W N 353; 1 P L R 1918; 34 M L J 48; 23 M L T 117; 4 L W 27 (P C).

numerous instances of a contrary character. Besides, both parties had led, in the present case, evidence of specific instances which had received careful consideration in the judgment of the Subordinate Judge. The High Court virtually ignored all this evidence on the basis of the Full Bench judgment. Their Lordships have examined this evidence and they agree with the view of the Subordinate Judge that the evidence produced by the daughters was of a more convincing character.

For the reasons indicated in this judgment, their Lordships are of opinion that the true legal position was that, the property being non-ancestral, the initial onus lay on the plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom enabling the plaintiffs to exclude the daughters and that the plaintiffs have not discharged this onus. Their Lordships would add that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, having regard to the considerations mentioned in this judgment, it was a weak presumption, which has been sufficiently discharged by the evidence adduced in the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be reversed and that of the Subordinate Judge restored. The respondents will pay the appellants' costs in the High Court and before this Board.

S. *Appeal allowed.*

Solicitors for the Appellants.—Mr. *Hy. S. L. Polak & Co.*

BOMBAY HIGH COURT

Appeal No. 16 of 1940
September 25, 1940
BEAUMONT, C. J. AND KANIA, J.

CHITNIS AND KANGA, SOLICITORS—APPELLANTS

versus

WAMANRAO S. MANTRI—RESPONDENT

Bombay High Court Original Side Rules, rr. 534, 895—Discretion of Judge to direct taxation under r. 534—Dispute as to fact or terms of employment of solicitor, order of taxation, if can be refused—Client, whether can challenge his liabitity to pay under r. 895—Work done in mofussil *—Bill can be taxed on original side—Work done on appellate side cannot be so taxed.*

A Judge has discretion to direct attorneys' bills to be taxed under r. 534 and where a bill is taxed, the attorney can apply by summary process for payment under r. 895. The taxation of a bill does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place. When an application is made *ex parte* for a common form order for taxation, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. The Taxing Master is entitled to tax the bill of costs in relation to work done in the *mofussil*, on the original side scale but costs incurred on the appellate side of the High Court cannot be so taxed. 94 Ind. Cas. 149 (1), relied on.

Mr. *F. J. Coltman*, for the Respondent.

Mr. *V. F. Taraporewala*, for the Law Society.

Beaumont, C. J.—This is an appeal from a decision of Somjee, J., setting aside an order made by the Prothonotary for taxation. The learned Judge gave no judgment and therefore we do not know on what view his decision was based. The order made by the Prothonotary was the common form order for taxation of a bill of costs of Messrs. Chitnis & Kanga in relation to certain matters, one of which was an appeal on the appellate side of the High Court. An order for taxation on the original side cannot be made in respect of costs incurred on the appellate side of the High Court, and as to this item, admittedly the order to tax was wrong. The solicitors' case is that they were employed by the client and his father in connexion with probate proceedings in the Satara District Court, and in those proceedings they filed a formal retainer. They did a certain amount of work in that case partly as attorneys and partly as Pleaders, although a Pleader was employed to argue the case. They also allege that they did miscellaneous work in the *mofussil*. The order made by the Prothonotary was under r. 534 which provides that

"the Taxing Master shall tax the bills of costs on every side of the Court (except the appellate side) and in the insolvency Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

So that a Judge has discretion to direct attorneys' bills to be taxed in any case, and where a bill is taxed, the attorney can apply by summary process for payment under r. 895. It is argued by Mr. Coltman in the first place that the fact of employment of the solicitors and the terms of employment are disputed, and it is unreasonable to put

parties to the expense of taxing a bill when ultimately nothing may be payable. The taxation of a bill does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place. As I have pointed out the power of a Judge to direct taxation under r. 534 is discretionary. When an application is made *ex parte* for a common form order for taxation, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. In the present case, on the affidavits, I do not think there is such serious doubt as to the client's liability to pay as to justify us in refusing to make an order for taxation.

Then it is said that the costs of proceedings in the *mofussil* cannot be taxed by the Taxing Master of the High Court, who will tax the bill on the ordinary original side scale. With regard to that there is a direct authority in the decision of this Court in *Nowroji* v. *Kanga* (1) where the Court of Appeal held that an attorney of this Court was entitled to have his bill taxed on the original side although it related to work done in the *mofussil*. That case, as is noted in the judgment, related to costs incurred before the Pleaders Act of 1920 came into operation, but in my view that Act has no effect on the present question. The Act provides in s. 17, which has been replaced by s. 3, Legal Practitioners' Fees Act of 1926, that a legal practitioner (which includes an attorney) may enter into a special agreement as to the terms of his remuneration. But there is no question of special remuneration here. Section 18, which was also relied upon, deals merely with the amount of Pleader's fees which can be recovered against the opposing party. That again has nothing to do with the present matter. In my opinion we are bound by the decision in *Nowroji* v. *Kanga* (1) to hold that the Taxing Master is entitled to tax the bill in relation to work done in the *mofussil*. In my opinion therefore the appeal must be allowed with costs.

Kania, J.—The jurisdiction of the Court to make the order for taxation under r. 534 in connection with matters sought to be taxed here (excluding the work done on the appellate side) cannot be disputed. Rule 534 in terms is applicable. It is therefore improper to contend that the order made by the Prothonotary was *ultra vires*. Such orders are ordinarily made *ex parte*, and on the footing that the attorney is employed as such. The client's liability to pay the taxed costs can be disputed when the attorney takes out a summons for payment under r. 895. Even before that it does not appear to be out of place for a client to take out a summons to set aside the *ex parte* order and on the hearing of that summons the Court may direct either that the enquiry sought to be made in connection with the employment of the attorney by the client may be made at that stage or having regard to the disputes raised by the client the attorneys should be referred to a separate suit. If however, there is *prima facie* evidence or the Court is satisfied on the affidavits that no such order revoking the previous order should be made, the taxation under the order obtained *ex parte* may proceed and the client can still, when an order is sought for enforcing payment, raise the contentions permitted to him. In the present case it appears that the learned Judge set aside the *ex parte* order passed by the Prothonotary on the footing that it was *ultra vires*. I am led to this conclusion from the statement found in the affidavit of the respondent. The learned Judge does not appear to have decided that there was no employment of the appellants by the respondent or his father or that there was no satisfactory evidence to lead to that conclusion and therefore left the appellants to their ordinary remedy of filing the suit. On that footing I agree that the appeal should be allowed.

Per Curiam. — Appeal allowed with costs; chamber summons dated February 7, 1940 dismissed with costs, Rs. 135.

S. *Appeal allowed.*

(1928) Bom. L R 384; 94 Ind. Cas. 149; A I R 1926 Bom. 272.

CALCUTTA HIGH COURT

Second Appeal No. 162 of 1939
May 8, 1940
EDGLEY, J.

Shekh TAMIZALI—APPELLANT
versus
MD. NASARALI BHUIYA
AND ANOTHER—RESPONDENTS

Practice—New plea—Important question of law, if can be taken for first time in second appeal—Civil Procedure Code (Act V of 1908), ss. 115, 47, O. XXI, r. 90—Court taking erroneous view of law acts illegally in exercise of jurisdiction—Revision, if maintainable—Plea not taken before sale should be regarded as waived—Rule does not apply to debtor applying under Bengal Agricultural Debtors Act (VII of 1936), s. 8—Validity of sale is question in execution—Sale held—Application under Bengal Agricultural Debtors' Act (VII of 1936), s. 8—Onus to prove that sale was illegal—Onus discharged—Effect—Bengal Agricultural Debtors Act (VII of 1936), ss. 8, 35, 34—Application under s. 8—Execution proceedings relating to debt included in application, if automatically stayed even if no notice under s. 34 is issued.

A point which was not directly raised in either of the Courts below but which involves an important question of law, can be raised in second appeal. [p. 452, col. 1.]

Where the Courts below have taken an erroneous view of the law with regard to a matter and have acted illegally in the exercise of their jurisdiction it is open to the High Court, to interfere in the exercise of its revisional jurisdiction under s. 115, Civil P. C. [*ibid.*]

The question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. Such a plea should be regarded as waived unless such plea is expressly taken before the sale. This plea of waiver does not, however, apply to the case of the judgment-debtor who has applied under s. 8, Beng. Agri. Debtors' Act. [p. 452, col. 2.]

The question as to the validity of the execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of s. 47, Civil P. C. But when once an execution sale had been held there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case, the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. On discharge of this onus, the Court would have no option but to set aside the sale even if it had received no notice under s. 34, Beng. Agri. Debtors Act The result would therefore be that even if the debt had been extinguished by the sale it would revive after the sale had been set aside and the provisions of the Beng. Agri. Debtors Act would apply thereto. [p. 453, col. 2]

The intention of the Legislature was to provide that all proceedings for the execution of decrees for debts included in an application under s. 8 should be automatically stayed as soon as the application was filed before a Board. In view of the language of s. 35 of the Act it is impossible to hold that it could have been the intention of the Legislature that a judgment-debtor should be deprived of a valuable right which had been conferred upon him by the Act by reason merely of some carelessness on the part of the Board, which might result in failure to issue the required notice under s. 34. [p. 453, col. 1.]

S A. from the appellate order of the District Judge, Mymensingh, dated March 13, 1939.

Messrs. *Birendra Kumar De* and *Abani Kanta Roy*, for the Appellant.

Messrs *Ramendra Chandra Roy* and *Chandra Nath Mukherjee*, for the Respondents.

Judgment.—The judgment-debtor is the appellant in this case and the appeal arises with reference to the dismissal of an application filed by the judgment-debtor under s. 47, Civil P. C., in which he sought to set aside an execution sale. It appears that the decree-holder obtained a decree for rent against the appellant on July 12, 1937. On May 28, 1938 he put this decree into execution and the requisite processes had been served by June 14, 1938. On June 30, 1938 the appellant applied to the Debt Settlement Board for the settlement of his debts and he alleges the rent decree which the decree-holder was seeking to execute was included in the application under s. 8, Ben. Agri. Debtors Act. He maintained that the Debt Settlement Board in due course issued a notice under s. 34 of the Act but, in spite of the issue of this notice, the execution sale was held on August 9, 1938. Thereafter, on November 11, 1938 the appellant applied to the Court under s. 47, Civil P. C., to have this sale set aside. Issues were framed by the trial Court with regard to the question of the maintainability of the application and also on the points whether or not the application to the Board was a bar in respect of the subsequent proceedings in execution and whether the sale was vitiated by reason of the alleged issue of the notice under s. 34, Ben. Agri. Debtors Act. Although it was decided that the application was maintainable, the other two points were decided against the appellant and the trial Court held that in fact no notice under s. 34, Ben. Agri. Debtors Act, had been issued by the Board and that in these circumstances the sale which was held on August 9, 1938 could not be impeached by the appellant. The judgment-debtor thereafter appealed

to the learned District Judge of Mymensingh and his appeal was dismissed.

The main point which has been argued on behalf of the appellant in this case is that, in view of the fact that an application had been made to the Debt Settlement Board under s. 8, Ben. Agri. Debtors Act, which included the decree which was the subject-matter of the execution proceedings in Execution Case No. 54/C of 1938, the Court had no option but to set aside the sale under s. 47, Civil P. C., as soon as the fact had been brought to its notice that the application had been actually made to the Board and, in this connection it was further contended that the non-receipt of the stay order under s. 34, Ben. Agri. Debtors Act, must be regarded as immaterial. With regard to this matter it may be noted that the appellant places particular reliance upon the provisions of s. 35, Ben. Agri. Debtors Act. This was a point which was not directly raised in either of the Courts below but, as it involves an important question of law there is no reason why it should not be raised in this Court.

In the first place, it has been argued by the learned Advocate for the respondents that no appeal lies to this Court having regard to the principles laid down in *Prafulla Krishna Deb* v. *Nosibannessa Bibi* (1). In view of the fact that the decree which it was sought to execute was in respect of a sum of Rs. 19-11 6 only this contention must be accepted having regard to the provisions of s. 153 (*a*), Ben. Ten. Act. At the same time, I am of opinion, for the reasons which will presently appear, that the Courts below have taken an erroneous view of the law with regard to this matter and have acted illegally in the exercise of their jurisdiction. It is, therefore, open to this Court to interfere in the exercise of its revisional jurisdiction under s. 115 Civil P. C. The learned Advocate for the appellant in this case, as already pointed out, relies mainly upon the provisions of the first part of s. 35, Ben. Agri. Debtors Act, which is in the following terms:

"Notwithstanding anything contained in any Act, no decree of a civil Court or certificate under the Bengal Public Demands Recovery Act, 1913, shall be executed (*i*) for the recovery of a debt included in an application under s. 8 or in a statement under sub-s. (1) of s. 13, until (*a*) the application has been dismissed by the Board in respect of such debt; or (*b*) an award in which such debt is included has ceased to subsist under sub-s. (5) of s. 29... .."

(1) 24 C L J 331; A I R 1917 Cal. 308; 37 Ind. Cas. 425 (S B.)

His argument is to the effect that, as soon as an application to the Board is made under the provisions of s. 8 of the Act, the Civil Court loses its jurisdiction to execute any decree which may have been included in the application in question. He admits that, according to the ordinary procedure which should be followed by Debt Settlement Boards, a notice under s. 34 of the Act should be issued to the Court concerned and that, on receipt of such notice, the Court should stay all further proceedings in the matter. He contends, however, that in a case in which the Board failed to fulfil its duty under s. 34, and the execution sale was held by reason of such failure, it would be open to the judgment-debtor himself to bring the matter to the notice of the executing Court which would be bound to set aside the sale if the judgment-debtor succeeded in showing that he had duly applied for the settlement of his debts under s. 8 of the Act and his application included the decree which had been put into execution by the sale in question.

The main argument of the decree-holder is to the effect that the question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. He contends that such a plea should be regarded as a plea in bar, which should be deemed to be waived unless such plea is expressly taken before the sale. In support of this contention reliance is placed upon the decision of the Madras High Court in *Moturi Seshayya* v. *Venkatadri Appa Row*, 36 Ind. Cas. 289 (2). In that case the learned Judge observed that:

"It must be remembered that the plea of *res judicata* is one which does not affect the jurisdiction of the Court, but it is a plea in bar of a trial of a suit or an issue, as the case may be which a party is at liberty to waive."

This case was cited with approval by this Court in *Rajani Kumar Mitra* v. *Ajmaddin Bhuia* (3) in which the learned Judge observed that:

"If a party does not put forward his plea of *res judicata* in a suit he must be taken to have waived it or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue in the suit under explanation (4) of s. 11, Civil P. C."

In the cases cited above, it would appear

(2) 36 Ind. Cas. 289; A I R 1917 Mad. 950; 31 M L J 219; (1916) 2 M W N 219.

(3) 48 C L J 577; 114 Ind. Cas. 129; A I R 1929 Cal. 163; Ind. Rul. (1929) Cal. 193.

that the plea of *res judicata* had not been expressly taken in the pleadings and it was on this account that it was held that this defence had been waived. In the present case however, it cannot be said that the appellant had at any time waived his right to rely on the provisions of s. 35, Ben Agri. Debtors Act. As soon as he filed his application to the Debt Settlement Board on June 30, 1938 he was justified in assuming that the Board would comply with the mandatory requirements of s. 34 of the Act and would issue a notice to stay all further proceedings in execution of the decree in respect of any debt which might have been included in his application. Ordinarily, therefore, no occasion would have been arisen for him to inform the Court that he had actually made an application to be Board for the settlement of his debts or to contend that by reason of such application the decree had become incapable of execution. In this view of the case, the decisions upon which the learned Advocate relies are of little avail to him. In my view, there can be no doubt that the intention of the Legislature was to provide that all proceedings for the execution of decrees for debts included in an application under s. 8 should be automatically stayed as soon as the application was filed before a Board, and for this purpose it was provided under s. 34 of the Act that due notice with regard to such application should be given to the civil Court. The terms of this section are mandatory inasmuch as it says that :

"....."the Board shall give notice thereof to such Court in the prescribed manner and thereupon, the suit or proceeding shall be stayed until the Board has either dismissed the application in respect of such debt or made an award thereon."

At the same time in view of the language of s. 35 of the Act it is impossible to hold that it could have been the intention of the Legislature that a judgment-debtor should be deprived of a valuable right which had been conferred upon him by the Act by reason merely of some carelessness on the part of the Board, which might result in failure to issue the required notice. It is contended on behalf of the respondent that, when once a rent sale has been held the debt must be regarded as satisfied and the matter will therefore no longer fall within the scope of the Ben. Agri. Debtors Act and that a rent sale which has been held by the Civil Court in the exercise of its jurisdiction cannot be set aside under s. 47, Civil P. C. in a case such as that with which we are now dealing. I am not prepared to accept this contention. The question as to the validity of the execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of s. 47, Civil P. C. At the same time, when once an execution sale had been held there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. If the applicant is liable to discharge this onus, in my opinion, the Court would have no option but to set aside the sale even if it had received no notice under s. 34, Ben. Agri. Debtors Act. The result would therefore, be that even if the debt had been extinguished by the sale it would revive after the sale had been set aside and the provisions of the Ben. Agri. Debtors Act would apply thereto.

The question whether or not the application under s. 8, Ben. Agri. Debtors Act had actually been made by the appellant to the Debt Settlement Board and whether this application included the decree which he sought to execute in Execution Case No. 54/C of 1938 has not been considered by the Courts below. This being the case, the decisions of both the Courts be set aside and this case is remanded to the trial Court for further consideration in the light of the above observations. The appeal is accordingly allowed. Costs will abide the final result. The hearing fee in this Court is assessed at three gold *mohurs*. This order will however not have the effect of disturbing the findings of the trial Court with regard to the maintainability of the application and the further finding to the effect that no notice under s. 34, Ben. Agri. Debtors Act, was actually issued by the Board.

D. *Appeal allowed.*

SIND CHIEF COURT

Criminal Appeals Nos. 63 and 64 of 1940
September 25, 1940
DAVIS, C. J.

MANSHARAM GIANCHAND AND ANOTHER —APPELLANTS
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 383, 385, 347, 342—Extortion includes offence under s. 385—S. 347 includes offence under s. 342—"Corruptly and maliciously" in s. 220 covers confinement for extortion under s. 347—Police Sub-Inspector wrongfully confining person on charge of gambling and extorting money from them by putting them under fear of prosecution—Offence falls under s. 220 and not under s. 347 or 342—It is triable by Court of Sessions—Magistrate usurping jurisdiction—His duty—Whether mere irregularity—Committal by Appellate Court to Court of Sessions—Inquiry and committal order, if should be repeated—Conviction of accused under s. 220 and confederate under s. 384 read with s. 114, Penal Code—High Court quashing proceedings and committing case to Sessions Court—Proceedings against confederate, if should be ordered to be dropped merely because he has served part of sentence—Proper procedure—Criminal trial —Jurisdiction—Objection to, taken at late stage —Court, if gets jurisdiction.

Extortion as defined in s. 383, I. P. C., includes putting any person in fear of injury and covers s. 385, I P. C., which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under s. 384. [p 455, col. 1.]

The offence under s. 342, I. P. C., is included in the offence under s. 347. [*ibid*]

The words "corruptly and maliciously" in s. 220, I. P. C., are wide enough to cover confinement for the purpose of extortion. Where a Police Sub-Inspector wrongfully confines certain persons on charges of gambling in futures and extorts money from them by putting them in fear of being challaned in Court upon offences which he knew to be false, the offence falls under s. 220 and not s. 347 or s. 342 and is triable only by Court of Sessions. [p. 456, col. 1.]

Where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a First Class Magistrate, however proper be his motives, should not himself remove that case, as it were from its proper Court, the Court of Session, and try it himself by merely altering the numbers of the sections, for, after all the numbers of the sections are mere lables, and what is to be looked at is the allegation of the facts. Where serious offences, such as one under s. 220 against the Sub-Inspector, are to be tried, it is desirable from all points of view, from the point of view of the public, from the point of view of the Police force, from the point of view of the officer concerned, from the point of view of justice, that these most serious cases, and they are most serious cases, should, so far as the law permits, be committed to the Court of Session even if a First Class Magistrate had power to try them. [p. 455, col. 2.]

The Magistrate has no jurisdiction to try an offence under s. 220. It is not a case of irregularity such as is referred to in s. 531, Criminal P. C., but is an illegality comparable to those irregularities under s. 530, Criminal P. C., which make proceedings void. [p. 456, col. 2.]

An Appellate Court under s. 423 (1) (*b*), Criminal P. C., has power to commit the accused for trial to the Court of Session, though it is not necessary for it to repeat the inquiry or write a long commital order, where the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very fully upon the record. [p. 456, col. 1.]

Where the Magistrate by usurping jurisdiction convicts an accused for an offence falling under s. 220, I P. C., and his confederate under s. 348 read with s. 114, I. P. C., the High Court while quashing the proceedings and committing the case to the Court of Sessions, cannot order that no further proceedings be taken against the confederate merely because he has served a part of his sentence. It is in the interests of all concerned that the confederate and the accused should be tried together for offences which are all part of the same transaction. [p. 456, col. 2.]

A Court does not get a jurisdiction it does not possess, merely because objection to it is taken by the accused at a late stage. [*ibid.*]

Cr. As. against convictions and sentences passed by the City Magistrate, Karachi, dated June 17, 1940.

Messrs. *Partabsingh S. Shahani* and *Balkrishna H. Lulla*, for the Appellants. (Mansharam and Shanker, respectively).

Kazi *Khuda Baksh*, Public Prosecutor, for the Crown.

Judgment.—I have before me two appeals: (1) by one Mansharam Gianchand, at one time a Sub-Inspector of Police, and (2) by his alleged confederate Shanker Kashiram, a clerk in the accounts branch of the Karachi Municipal Corporation. So far as Mansharam is concerned he has been convicted by the City Magistrate of Karachi of offences of wrongful confinement and extortion, and so far as Shanker is concerned, he has been convicted of abetment of the offence of extortion. The sections under which the appellants have been convicted are set out in the order of the learned Magistrate. So far as Mansharam is concerned, the sections are 384, 385 and 347, I. P. C., and so far as Shanker is concerned, the sections are 384 read with s. 114, I. P. C., and 385 read with s. 114, I. P. C. For the offence under ss. 384 and 385, I. P. C., Mansharam was sentenced under each section to six months' rigorous imprisonment, and for the offence under s. 347, I. P. C., he was sentenced to six months' rigorous imprisonment, the punishment under s. 347, I. P. C., to run consecutively with the two sentences of six months each passed under ss. 384 and 385, I. P. C., which were to run concurrently. Mansharam was, therefore, to suffer one year's rigorous imprisonment

in all. The appellant Shanker was sentenced under s. 384 read with s. 114, I. P. C., and s. 385 read with s. 114, I. P. C. each to six months' rigorous imprisonment, the sentences to run concurrently.

The offences of which the appellants were convicted were alleged to have been committed by the Sub-Inspector on the night of May 27, 1939, when the wrongfully confined three Khojas, Bundehali, Kamarudin and Husseini, on charges of gambling in futures, put them in fear of being challaned to the Court upon offences which he knew to be fictitious and extorted from them sums of money in their possession, namely Rs. 55, Rs. 86, Rs. 2 and a further sum of Rs. 200 through his go-between and confederate Shanker Kashiram. The charges, as set out at p. 103 of the paper book, referred to an offence under s. 409, I. P. C., but of this offence the appellants were acquitted. The charge also refers to ss. 384 and 385, I. P. C. But, as Mr. P. S. Shahani points out extortion as defined in s. 383, I. P. C., includes putting any person in fear of injury and covers s. 385, I. P. C., which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under s. 384, I. P. C. Mr. Shahani also points out that the offence under s. 342, I. P. C., is included in the offence under s. 347, I. P. C., for s. 347, I. P. C., refers to wrongful confinement for the purpose of extortion. Section 342, I. P. C., refers to wrongful confinement simply and is punishable with imprisonment only for one year as against three years which may be imposed under s. 347, I. P. C.

But Mr. Shahani at the outset of the proceedings raised a much more important point. This was that so far as the charge of wrongful confinement was concerned, the appropriate section was not s. 342 or s. 347, I. P. C. at all, but s. 220, I. P. C., for if the Sub-Inspector was charged as a Sub-Inspector, as he was alleged, with wrongfully keeping these three Khojas in confinement corruptly for the purpose of extortion, he knew well, if the evidence is to be believed and the inferences are correctly drawn, that he was acting contrary to law when he so exercised authority. His offence then is an offence under s. 220, I. P. C. and is triable solely by the Court of Sessions; the Magistrate cannot therefore usurp a jurisdiction to himself he did not possess by placing an offence, which rightly falls under s. 220, I. P. C. under s. 342 or s. 347, I. P. C., so as to give himself jurisdiction and trying it himself. It is true that in the complaint s. 220, I. P. C., is specified and the learned Public Prosecutor tells me that process was issued with respect to this offence also. The learned Public Prosecutor agrees that the case should be committed to the Court of Session. Mr. Shahani has referred me to three cases which deal with this question of usurpation by Magistrates of jurisdiction vested in Sessions Courts, namely *Shambooram* v. *Emperor*, 37 Cr. L. J. 80 (1) *Jamal Mahomad* v. *Moideen Sa*, 12, Cr. L. J. 20 (2) and *Moge Ali* v. *Emperor*, 21 Cr. L. J. 10 (3). But I do not think myself it is necessary to refer to any authority in respect of the argument that where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a first class Magistrate, however proper be his motives, should not himself remove that case, as it were from its proper Court, the Court of Session, and try it himself by merely altering the numbers of the sections, for after all the numbers of the sections are mere labels, and what is to be looked at is the allegation of facts. But even in this case the complaint, as I have said, refers to an offence under s. 220, I. P. C.

There is again, I think, another aspect to this matter. It is a matter merely of personal opinion, and I may be wrong, but where serious offences, such as are alleged in this case against the Sub-Inspector, are to be tried, it appears to me that it is desirable from all points of view, from the point of view of the public, from the point of view of the Police force, from the point of view of the officer concerned, from the point of view of justice, that these most serious cases, and they are most serious cases should, so far as the law permits, be committed to the Court of Session even if a first class Magistrate had power to try them, for it appears to me that for an offence of this nature, even though it involves the loss of appointment and of pension, a sentence of five years' rigorous imprisonment in the case of one man would be far more effective than six monts or a year in the case of more than one, in the cases, say of five or six Sub-Inspectors, who might

(1) 37 Cr. L J 80; 159 Ind. Cas. 271; A I R 1935 Sind 221; 8 R S 79; (1935) Cr. Cas. 1272; 29 S L R 428.

(2) 12 Cr. L J 20; 6 Ind. Cas. 1103; 9 M L T 71; (1910) M W N 852.

(3) 21 Cr. L J 10; 54 Ind. Cas, 58; A I R 1920 Cal 40; 30 C L J 132; 23 C W N 1031.

be convicted and sentenced to six months' imprisonment each. Corrupt men in the office of Sub-Inspector may still think it worth the risk, if the penalty is only six months' imprisonment, but they would not think it worth the risk if they saw before them on detection for such an offence a sentence of five years' rigorous imprisonment. But in a case under s. 220, I. P. C., if it is properly to be applied, any doubt as to the Court by which such an offender should be tried, is removed by the provisions of the Criminal P. C., itself which requires an offence under s. 220, I. P. C., to be tried by the Court of Session. It might, of course, be argued that an offence under s. 347, I. P C., is rather different from an offence under s. 220, I. P. C., that the words "corruptly or maliciously" mean something less than confinement for a specific purpose, such as extortion with which s. 347, I. P. C., deals. I think myself that these words "corruptly and maliciously" are wide enough to cover confinement for the purpose of extortion, and, in any case, if I should be wrong, the learned Sessions Judge who tries this case, can, if he thinks proper, amend the charge. In any case, I should think it desirable that an offence of this gravity—and it is a very grave offence indeed—should be tried by the Court of Session.

I have power under s. 423 (1) (*b*), Criminal P. C., to commit the accused for trial to the Court of Session, thought it is not necessary for me to repeat the inquiry or write a long committal order. The alleged facts are set out clearly in the judment of the City Magistrate and the evidence is very fully upon the record.

But it has been suggested to me that I should consider that the Sub-Inspector has been sufficiently punished by the period of imprisonment, namely three and half months which he has already undergone, while his confederate or alleged confederate Shanker has also suffered three and half months' imprisonment, and he has been acquitted of the offence of abetting wrongful confinement and convicted only of the offence of abetment of extortion. But it appears to me very difficult indeed to separate the case of one accused from another without prejudicing the whole trial. I need not, and do not, commit the accused for offences under s. 409, I. P. C., nor for an attempt to commit an offence under s. 511, I P. C. while the offence under s. 384, I. P. C. itself remains in the charge. Nor is it necessary for me to commit the accused for trial for an offence under s. 385, I. P. C. s. 364, I. P. C., covering also the offence under s. 385, I. P. C. Nor, in view of the fact that an offence under s. 220, I. P. C. is to be charged, is it necessary for me to refer in the charge to offences under ss. 342 and 347, I. P. C. So for as Shanker is concerned, he has to be charged only with an offence under s. 384 read with s. 114, I. P. C. with respect to the four sums of money, *viz.*, Rs. 55, Rs. 86, Rs. 2 and Rs. 200, alleged to have been extorted from the three Khojas, Bundehali, Kamarudin and Husseini, severally as regards the smaller sums and jointly as regards the larger sum. But I do not think that because he has already suffered three and half months' rigorous imprisonment, I can, while quashing the proceedings, order no further proceeding to be taken against him. It appears to me in the interests of all concerned that he and the Sub-Inspector should be tried together for offences which are all part of the same transaction.

Nor do I think it can be said that the exercise by the City Magistrate, Karachi, of jurisdiction which he did not possess with regard to the offence under s. 220, I. P. C. in view of the facts upon the record, does not vitiate the trial, that it is a mere irregularity which would not vitiate the trial. It seems to me we are dealing here with a question of jurisdiction which goes to the root of the trial, with something more than an irregularity within the meaning, say, of 531, Criminal P. C., or even s. 537 of the Code. It is, of course, unfortunate that this question with regard to s. 220, I. P. C., was not raised before but a Court does not get a jurisdiction it does not possess merely because objection to it is taken by the accused at a late stage. The offence or one of the offences for which the Sub-Inspector should have been tried was under s. 220, I. P. C. The Magistrate had no jurisdiction to try this offence. We have not here a case of irregularity such as is referred to in s. 531, Criminal P. C. We have rather an illegality comparable to those irregularities under s. 530, Criminal P. C., which make proceedings void. It appears to me therefore that I should quash the proceedings, set aside the conviction and order the committal under s. 423 (1) (*b*), Criminal P. C., to the Court of Session for the trial of offences, so far as the Sub-Inspector is concerned under ss. 220 and 384, I. P. C., and so far as Shanker, his confederate, is concerned, for an offence under s, 384, I. P. C. read with s. 114,

I. P. C., and I order accordingly. The charge will now read as under:

"*Charge.*—You (1) Mansharam, son of Gianchand, and (2) Shanker, son of Kashiram, are charged as follows:

That you Mansharam on or about the 27th day of May 1939, at Karachi, in your capacity as the Sub-Inspector of Police, Soldier Bazar Police Station, did in virtue of your office, corruptly or maliciously keep in confinement, in the exercise of your authority, knowing that in so doing you were acting contrary to law, Bandehali, Kamarudin, and Husseini, and further that you committed an offence of extortion against each of the aforesaid persons with respect to the sums of Rs. 55, Rs. 86 and Rs. 2, respectively, and with respect to a further sum of Rs. 200, against the the aforesaid persons jointly, and you thereby committed offences under ss. 220 and 384, I. P. C., triable by the Court of Session:

And that you Shanker, on or about the aforesaid date and at the aforesaid place intentionally abetted the commission of the aforesaid offences under s. 384, I. P. C., and thereby committed offences under the aforesaid s. 384 read with s. 114, I. P. C., and triable by, the Court of Session:

And I, the undersigned, do hereby direct that you both be committed to and tried by the aforesaid Court on the said charges."

D. *Proceedings quashed.*

CALCUTTA HIGH COURT

Appeal No. 185 of 1938
August 13, 1940
R. C. MITTER AND LODGE, JJ.

CORPORATION OF CALCUTTA—DEFENDANT—APPELLANT
versus
PROVINCE OF BENGAL—PLAINTIFF—RESPONDENT

Calcutta Municipal Act (III of 1923), s. 127—Tenant—Servants occupying house of master—Deductions made from pay for occupying house—Servant, if becomes tenant—Points material for decision.

The mere fact that a servant is paid less wages or some deductions are made from his pay for the benefit of being allowed to occupy a house of his master would not make him a tenant. In such a case the master would in law be taken to have possession. The relationship of master and servant is not however inconsistent with that of landlord and tenant. The question as to whether the master's house is a mere lodging provided for the servant or is left in occupation of the latter *qua* tenant must be answered by keeping in view not the form but the substance. If the servant's occupation of his master's house be ancillary to the performance of the duties which as servant he has engaged to perform, then his occupation would be considered as that of a servant, but if his occupation is not connected with his employment, he would be considered a tenant. [p. 458, col. 1.]

[English case-law relied on].

In deciding whether a person's occupation of certain premises is as a tenant or as a servant the material points for consideration are (*a*) whether a person is required to occupy the house in question for the performance of his services, or (*b*) did occupy it in order to their performance or (*c*) that it was conducive to that purpose more than any other house which he might have himself rented. [p. 458, col. 2.]

From the fact in the house the Commissioner sometimes holds meetings of public bodies of which he happens to be the chairman, though the meetings could have been as well held in his office it cannot be held that the case comes within the first head. It cannot be said that the Commissioner was required to occupy the house for the performance of his duties. He was not required to reside there, much less was his residence there ancillary and necessary to the performance of his duties *Smith* v. *Overseers of Seghill* (5), relied on. [p. 460, col. 2.]

In order that the case may fall within the propositions (*b*) and (*c*), the advantage must be shown to be decisive one and not merely slight. *Hughes* v. *Overseers of the Parish of Chatham* (2), relied on.

A. from an original order of the Chief Judge Small Cause Court, Calcutta, dated March 17, 1938.

Messrs. *N. C. Chatterji, Pashupati Ghose, Balaram Bose, Jnanendra Kumar Roy* and *Santosh Kumar Basu*, for the Appellant.

Messrs. *P. B. Mukherjee, Satyendranath Banerjee* and *Sudhir Banerjee*, for the Respondent.

Order.—The principal question in this appeal relates to the method of assessment of No. 4, Theatre Road. It was assessed by the municipality under s. 127, cl. (*b*), Cal. Municipal Act, but the Province of Bengal contends that it can only be assessed under cl. (*a*) of that section. This contention has been accepted by the Chief Judge of the Calcutta Small Cause Court in an appeal preferred by the assessee under s. 141 of the said Act. The annual value has been reduced from Rs. 16,837 to Rs. 9,720. The Province of Bengal is the owner of the said premises. It is occupied by the Commissioner of the Presidency Division. He has to pay for his occupation ten per cent. of his salary. The evidence is that that sum is deducted from his salary and credited by the Accountant General, Bengal, to the Local Govt. under the denomination of rent. The evidence also establishes the fact fact that a Govt. officer occupies it and is entitled to occupy it so long as he is the Commissioner of the said division. The

learned Chief Judge has held that the Commissioner of the Division must be taken to occupy the same in the character of a tenant and not of a servant for two reasons, namely (*a*) because the sum deducted from his salary is credited to the Local Govt. as rent and (*b*) because it is immaterial whether he actually resides there or sublets it.

The last mentioned finding is not only not supported by evidence but is against the case as set up by the respondent. The sole basis of the finding of the learned Chief Judge accordingly rests on the fact that the Govt. deducts a fixed sum from the Commissioner's salary as rent. We do not however consider the said fact as of unequivocal import. The mere fact that a servant is paid less wages or some deductions are made from his pay for the benefit of being allowed to occupy a house of his master would not make him a tenant. *Bertie* v. *Baumont* (1). A master may provide a lodging for his servant, may be in a separate house, pay him less wages, or deduct from his pay a fixed sum of money for such benefit, still the servant would not be his master's tenant, though he has to pay for his residence in his master's house. In such a case the master would in law be taken to have possession. The relationship of master and servant is not however inconsistent with that of landlord and tenant. In our judgment the question as to whether the master's house is a mere lodging provided for the servant or is left in occupation of the latter *qua* tenant must be answered by keeping in view not the form but the substance.

The cases establish the principle that if the servant's occupation of his master's house be ancillary to the performance of the duties which as servant he has engaged to perform, then his occupation would be considered as that of a servant, but if his occupation is not connected with his employment, he would be considered a tenant. The cases we have in mind are *Hughes* v. *Overseers of the Parish of Chatham* (2), *Dobson* v. *Jones* (3), *Reg* v. *Spurrell* (4), *Smith* v. *Overseers of Saghill* (5) and *Bent* v. *Roberts* (6). The case has not been approached in the Court below from this point of view and there is no evidence on this material point. The onus is on the Province of Bengal to prove the conditions of service of the Commissioner of the Division on the ground of special knowledge. As the case is of importance we do not think it right to allow the appeal, as urged by Mr. Chatterjee, on the ground that the onus has not been discharged by the respondent. For the ends of justice we direct the learned Chief Judge to allow the parties to lead additional evidence directed on the following points : (*a*) Whether the Commissioner of the Presidency Division is required to occupy the house in question for the performance of his services, or (*b*) did occupy it in order to their performance or (*c*) that it was conducive to that purpose more than any other house which he might have himself rented. The respondent must first lead evidence und the appellant will have the right to give rebutting evidence. The learned Chief Judge is requested to record his findings and send the same together with the additional evidence, to be recorded in full, within six weeks of the arrival of our order. We keep the appeal in our file, which is to be treated as part heard. Eight typed copies of the additional evidence and of the findings of the Court below must be prepared as expeditiously as possible by the appellants for their use and for the use of the respondent and of the Court. (After receiving the findings their Lordships delivered the following judgment.)

Judgment.—The question involved in this appeal is whether premises No. 4, Theatre Road, which is known as the "Commissioner's house" is to be assessed to rates under cls. (*a*) or (*b*), s. 127, Cal. Municipal Act. It has been assessed under cl (*b*) but the Province of Bengal contends that it ought to be assessed under cl. (*a*). This question depends upon the question as to whether the occupation of the premises by the Commissioner of the Presidency Division is that of a tenant or of a servant. On appeal by the Province of Bengal the learned Chief Judge of the Calcutta Small Cause Court held by his order dated March 17, 1938, that the Commissioner of the Presidency Division was a tenant. He further held that the rent at which the premises could reasonably be let out is Rs. 900 per month. On that basis he fixed the annual value at Rs. 9,720. When the

(1) (1801-12) 16 East 33; 104 E R 1001.
(2) (1840-44) 5 M & G 54; 7 Scott (N R) 581; 13 L J C P 44; 7 Jour. 1136; 134 E R 479.
(3) (1840-44) 5 M & G 112; 134 E R 502.
(4) (1865) 1 Q B 72; 35 L J M C 74; 12 Jour. (N S) 208; 13 L T 364; 14 W R 81.
(5) (1875) 10 Q B 422; 44 L J M C 114; 32 L T 859; 23 W R 745.
(6) (1878) 3 Ex. D 66; 47 L J Ex. 112; 37 L T 673; 26 W R 128.

appeal against the said decision preferred by the Corporation of Calcutta came up for hearing before us in November of the last year we passed an order by which we directed the learned Chief Judge to afford opportunity to the parties to lead further evidence and to record his findings on the following points which have been formulated as material in such cases by Tindal, C. J., in *Hughes* v. *Overseers of the Parish of Chatham* (2), at p. 488* and analogous cases:

(*a*) whether the Commissioner of the Presidency Division is required to occupy the house in question for the performance of his services, or (*b*) did he occupy it in order to their performance, or (c) that it was conducive to that purpose more than any other house which he might have himself rented.

After taking additional evidence the learned Chief Judge has answered all the three questions in the affirmative. We are to see whether his findings are correct. The relevant evidence bearing upon those points are the depositions of Mr. Graham, the Commissioner of the Presidency Division, of Mr. Manmohan Mukherjee and Exs. E E. (1), D.E. (2), D.E. (4), D.E. (5), P. E. A., P. E B. and P. E. C. The summary of this evidence is as follows: In 1905 a proposal was made by the Govt. of Bengal to the Govt. of India suggesting that the Commissioner of the Presidency Division should be provided with an official and permanent residence in Calcutta. The grounds given by the Bengal Govt. in support of its proposal are mentioned in its letter to the Govt. of India dated November 28, 1906 (Ex. D.E. 1); (1) that high rents prevalent in Calcutta had in the past dissuaded the Commissioner of the Presidency Division in renting a house suitable to his official position with the result that he had preferred to live in clubs, which was derogatory to his position and which had the effect of diminishing his influence, and (2) that public interest required that he should be easily found out by those who required to see him on business or by those who desired to pay him ceremonial visits. "Accessibility in his case was a matter of first importance".

The letter stated that for those reasons it was necessary for the Commissioner to reside in a fixed house suitable to his official position so that continuity of residence may be secured and his place of residence may be known to the public. The letter further suggested that it should be made obligatory on the Commissioner to reside in the house to be acquired at Govt. cost for his residence for which he would be required to pay "rent" at the rate of 10 per cent. of his salary. This proposal was accepted by the Govt. of India by its letter to the Ben. Govt. dated December 20, 1906 (Ex. D. E. 2). Premises No. 4, Theatre Road, was thereafter acquired and it has since its acquisition been the official residence of the Commissioner. A name plate has been fixed at the gate indicating the house as the house of the Commissioner of the Presidency Division. Although Ben Govt. suggested in its letter Ex. (D. E. 1) that residence of the Commissioner in the house to be acquired was to be made obligatory, that has not been done.

After the acquisition of the said premises no special rule was made for the Commissioner's residence but he continued to be governed by the general rules applicable to all Govt. servants relating to residence in localities where the Govt. has provided for residential houses for them. These rules are appended to the letter written on December 16, 1939 by the Secretary to the Govt. of Bengal, Department of Public Health and Local Self-Govt. to the Deputy Executive Officer, Corporation of Calcutta (Ex. P. E. C.). These rules do not make it obligatory on the part of Govt. servants to occupy the houses built by the Govt. for their residence. They make a Govt. servant responsible for the "rent" of the house built by the Govt. for his residence, unless exempted by the Local Govt. If he does not get the exemption, he can reside in a house of his choice, but must pay the "rent" of the Govt. house to the Govt. The rules leave him free to sublet the Govt quarters intended for his use. Although the word "rent" is used in these rules, we have already held in our previous order that a Govt. servant occupying a Govt. quarter would not necessarily be a tenant. We point out here the fact which is now relevant, that these rules do not, in express terms make it obligatory for a Govt. servant to reside in Govt. quarters provided for him. The letter of Mr. G. S. Dutt (Ex. D. E. 5) only expresses his own opinion which he subsequently modified in his letter Ex. P. E. C. Those rule may at best exert an indirect pressure on a Govt. servant to occupy the house intended by the Govt. for his residence. In the Commissioner's case there is besides the

*Page of (1840-44) 134 E. R.—[*Ed*].

natural inducement, for a house of the nature of No. 4, Theatre Road, cannot be rented at about Rs. 300 a month, which amount the Commissioner has to pay for his occupation. The finding of the Chief Judge is that a house of that description in that locality would fetch Rs. 900 a month.

Although it is not obligatory on the Commissioner to reside at No. 4, Theatre Road, the evidence establishes that since its acquisition by Govt. all the Commissioners have resided in that house except on two short terms. Those two cases were of exceptional character and must therefore be discarded from consideration. The house is at a distance of about two miles from the office of the Commissioner. In the house he sometimes holds meetings of public bodies of which he happens to be the chairman, though the meetings could have been as well held in his office and in fact some such meetings have been held in his office. On this evidence we cannot hold that the case comes within the first head on which we required a finding. It cannot be said that the Commissioner was required to occupy the house for the performance of his duties. He was not required to reside there, much less was his residence there ancillary and necessary to the performance of his duties: *Smith* v. *Overseers of Saghill* (5), at p. 428*. The evidence also does not justify an affirmative answer to the second and the third points on which we required findings. The evidence given by Mr. Graham is that he could perform his duties as well by residing in another house. The only material which requires special consideration in this respect is the Govt. of Bengal's letter of November 28, 1906 (Ex. D. E. 1). The reasons which induced the Govt. to provide a suitable house for the Commissioner at a reasonable sum payable for his occupation were mainly two, namely dignity of the office and easy accessibility to visitors coming on business or to pay respects.

For the purpose of judging whether the house in question was more conducive for the performance of his duties than any other house which he could have himself rented, we must have regard to his duties. Reception of ceremonial visits or other visits is no doubt one of the duties of the Commissioner but his other duties were more important and more responsible If the residence in that house be only slightly more advantageous to the performance of his official duties the case would not in our judgment come within the second or the third proposition laid down by Tindal, C. J. in *Hughes* v. *Overseers of the Parish of Chatham* (2). The advantage must be a decisive one. We accordingly hold that the Commissioner's occupation must be regarded as that of a tenant and the assessment has to be made under cl. (*a*) of s. 127, Calcutta Municipal Act. We are further of opinion that the fair rent would be Rs. 900 a month as found by the learned Chief Judge. We accordingly confirm the order of the learned Chief Judge dated March 17, 1938, though not for the reasons given therein. The annual value is fixed at Rs. 9,720. The appeal is accordingly dismissed with costs, hearing-fee five gold *mohurs*.

D. *Appeal dismissed.*

*Page of (1875) 10 Q. B.—[*Ed.*]

MADRAS HIGH COURT

Appeal No. 27 of 1940
September 12, 1940
LEACH, C. J. AND HORWILL, J.
D. D. ITALIA—APPELLANTS
versus
OFFICIAL ASSIGNEE OF MADRAS—RESPONDENTS

Presidency Towns Insolvency Act (III of 1909), ss. 108, 53—Construction — Proceedings under s. 108—Attaching creditor, position of — Attachment followed by sale — Attaching creditor, if entitled to proceeds.

The administration in insolvency of a deceased debtor's estate under s. 108, Presi. Towns Insol. Act, must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled irrespective of s. 53, to the money or so much of it as is necessary to meet his claim. *Krishnaswami Mudaliar* v. *Official Assignee of Madras* (4) and 174 Ind. Cas 423 (5), relied on. *Soobul Chundra Law* v. *Russick Lal Mitter* (7), approved.

Messrs. *R. Purushotama Iyengar* and *T. Aravamudha Iyengar*, for the Appellants.

Messrs. *T. V. Subramania Iyer*, *T. V. Srinivasam*, *C. R. Rajagopalachariar* and *King* and *Partridge*, for the Respondents.

Leach, C. J.—This appeal raises two questions of law with regard to the administration in insolvency of the estate of a deceased person. On July 15, 1938 one S. V. Kannabhiran Pillai died, and

by an order of the original side of this Court passed on April 18, 1939 it was directed that his estate should be administered in insolvency under the provisions of s. 108, Presi. Towns Insol. Act. The appellants are creditors. On August 9, 1938 they obtained a decree against the deceased's estate in O. S. No. 151 of 1938. In execution proceedings filed on January 26, 1939 they attached the deceased's interests in certain immovable property, which was the subject-matter of another suit, O. S. No. 189 of 1938, and in movable properties, which were in dispute in a third suit, O. S. No. 198 of 1939. The movable properties included a sum of Rs. 483-7-10 which was standing to the credit of the deceased in the books of the Egmore Benefit Society. A *garnishee* order was issued by the Court in respect of this sum on February 13, 1939, and the money was paid into Court on March 27, 1939.

The first question which arises is whether the order of this Court directing the estate to be administered in insolvency puts an end to the insolvency proceedings and relegates the appellants to the position of ordinary creditors. The second question is whether the appellants' claim to the sum of Rs. 483 7-10 paid into Court by the Egmore Benefit Society stands on a different footing from their claims in respect of the other attached properties. Section 108 (1), Presi. Towns Insol. Act, provides that a creditor of a deceased debtor, whose debt would have been sufficient to support an insolvency petition had the debtor been alive, may present a petition to the Court praying for an order for the administration of the estate of the deceased under the Presi. Towns Insol. Act. Sub-section (2) states that on the prescribed notice being given to the legal representative of the deceased debtor, the Court may, upon proof of the debt, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the estate. Sub-section (3) says that a petition of this nature shall not be presented after proceedings have been commenced for the administration of the deceased debtor's estate, but in that event, on proof that the estate is insufficient to pay its debts, the Court may transfer the proceedings to the Court exercising jurisdiction in insolvency under the Act. Section 109 (1) provides that, upon an order being made for the administration of a deceased debtor's estate under s. 108, the property of the debtor shall vest in the Official Assignee, who shall forthwith proceed to realize and distribute the assets in accordance with the provisions of the Act. Sub-s. (2) of this section says that with the modifications thereinafter mentioned, all the provisions of Part 3 of the Act, shall, so far as they are applicable, apply to the case of an administration order in like manner as to an order of adjudication under the Act. The only modification is in sub-cl. (3) which makes the proper funeral and testamentary expenses incurred by the legal representative of the deceased debtor a preferential claim payable in full in priority to all other debts. Part 3 of the Act contains the provisions with regard to the administration of the property of an insolvent and included in this part is s. 53, sub-s. (1) of which reads as follows:

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication, and before he had notice of the presentation of any insolvency petition by or against the debtor."

The learned Advocate for the appellants has conceded that, if s. 53 applies to an administration of a deceased debtor's estate under ss. 108 and 109 his clients are out of Court, except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society. This case was decided on the original side by Mockett, J., who held that s. 53 is not applicable to proceedings under ss. 108 and 109 and in this connection relied on the judgment in *Hasluck* v. *Clark* (1). The learned Judge, however, decided against the appellants on the ground that in this country an attachment confers no title and creates no charge, relying here upon the decision in *In re Prem Lal Dhar* (2) and *Nicholson Town Bank Ltd*, *Tanjore* v. *Varadarajulu Naidu* (3). In *In re Prem Lal Dhar* (2), the Calcutta High Court also held that s. 53 is not applicable to cases of administration under ss. 108 and 109 and discussed *Hasluck* v. *Clark* (1). In *Hasluck* v. *Clark* (1), the Court of Appeal said that an order for the administration of the estate of a deceased debtor under s. 125, Bankruptcy Act, 1883

(1) (1899) 1 Q B D 699; 68 L J Q B 486; 80 L T 451; 47 W R 471; 6 Manson 146; 15 T L R 277.

(2) 44 C 1016; 43 Ind. Cas. 348; A I R 1918 Cal. 351.

(3) (1938) M W N 1127; 182 Ind. Cas. 254; A I R 1939 Mad. 204; 48 L W 849; 12 R M 29.

which corresponds to s. 108, Presi. Towns Insol. Acts is not equivalent to a receiving order for the purposes of s. 45 of the Act which corresponds to s. 53, Presi. Towns Insol. Act and that a creditor who had proceeded in execution was entitled to retain as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the administration order. In that case a writ of *fieri facias* had issued. By s. 26, Sales of Goods Act, 1893, it was enacted that a writ of *fieri facias* should bind the property in the goods of the execution debtor as from the time when the writ was delivered to the sheriff to be executed. Therefore, s. 45 of the Act could not apply. The Calcutta High Court in following *Hasluck* v. *Clark* (1) on the question of the applicability of s. 53 (1), Presi. Towns Insol. Act, held that an attachment in India only prevents alienation and does not confer any title or create any charge or lien on the property such as attaches in England upon seizure under the writ of *fieri facias*. In these circumstances the attaching creditor in India has merely the right of sharing rateably with the other creditors of the estate.

For the purpose of this appeal it is not necessary to decide whether s. 53, Presi. Towns Insol. Act, applies to the administration in insolvency of deceased debtor's estate, because it is manifest that in any event the appellants are not entitled to succeed, except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society. There are two decisions of this Court, each by a Full Bench, which lay down that in this country an order of attachment does not create any charge. The first decision was in *Krishnaswami Mudaliar* v. *Official Assignee of Madras* (4), where it was said that the effect of an attachment under the Civil P. C. was to prevent alienation and not to confer title. The second decision was in *Manickam Chettiar* v. *Income-tax Officer, Madras* (5), where it was again contended that inasmuch as an attachment had taken place the petitioner was in the position of a secured creditor. It was pointed out that this question had been decided by this Court in *Krishnaswami Mudaliar* v. *Official Assignee of Madras* (4) and that the Privy Council in *Ananthapadnabhaswami* v. *Official Receiver, Secunderabad* (6) had not overruled it, as was suggested. The Judicial Committee had refused to go into the question and reserved their decision for a future occasion. The judgments in *Krishnaswami Mudaliar* v. *Official Assignee of Madras* (4) and *Manickam Chettiar* v. *Income tax Officer, Madras* (5), conclude the question so far as this Court is concerned. It may be mentioned, however, that the Calcutta High Court gave a similar decision in *Soobul Chundra Law* v. *Russick Lall Mitter* (7) which was also decided by a Full Bench.

As the result of decisions of this Court we must hold that in India no charge is created by an attachment and when the judgment-debtor becomes an insolvent the attachment falls to the ground, provided, of course, that the attachment has not resulted in a sale. There is no difference here between the administration of the estate of an insolvent who is alive and the administration of the estate of a person who dies insolvent, but was not adjudicated before his death. The administration in insolvency of a deceased debtor's estate under s. 108, Presi. Towns Insol. Act, must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If he were, there would be little virtue in the provisions of ss. 103 and 109 of the Act. The learned Official Assignee has conceded that, if the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled irrespective of s. 53, to the money or so much of it as is necessary to meet his claim. Except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society, the attachments have not resulted in the realization of any of the assets attached. With regard to Rs. 483-7-10 it has transpired that after the Egmore Benefit Society had paid the money into Court the Master passed an order giving the appellants the right to withdraw it from Court. The matter has gone beyond the *interim* order stage and in these circumstances the learned Official Assignee has rightly conceded that the appellants are entitled to this money. The result

(4) 26 M 673.

(5) I L R (1938) Mad. 744; 174 Ind. Cas. 423; A I R 1938 Mad. 360; (1938) 1 M L J 351; (1938) M W N 197; 47 L W 368; 10 R M 702 (F B).

(6) 56 M 405; 142 Ind. Cas. 552; A I R 1933 P C 134; 60 I A 167; Ind. Rul. (1933) P C 95; 37 L W 576; (1933) M W N 374; 37 C W N 553; 64 M L J 562; 35 Bom. L R 747; 57 C L J 418; (1933) A L J 692 (P C).

(7) 15 C 202.

is the appeal will be allowed to the extent of this sum of Rs. 483-7-10, but it will stand dismissed in all other respects. As the appellants have in the main failed there will be no order as to costs in the appeal.

N.-S. *Appeal partly allowed.*

PATNA HIGH COURT

Appeal from Original Decree No. 172 of 1939

January 30, 1941

VARMA AND MANOHAR LALL, JJ.

BULAKI MAHTON—APPLICANT—APPELLANT

versus

Mst. DULIA AND OTHERS—OBJECTORS—RESPONDENTS

Succession Act (XXXIX of 1925), s. 63—Will—Attestation—Will held not properly attested.

A will which was jointly executed by two persons who were illiterates was signed by one *P* on behalf of the executants against their thumb-impressions. One *K* signed the will as a scribe and merely said that he read over the contents of the document to the executants. *K* did not say under his signature that he attested the signatures of the executants. The signature of one *L* also appeared on the will But his signature was from the pen of *K* and there was a mark just below it. There was no evidence that this mark below *L's* name written by *K* was made by *L* himself. The only other signature, was that of, *P* but he was the person who also signed for the executants :

Held, that in the circumstances the signatures on the will were not properly attested as required by s. 63 of the Succession Act. *In the matter of the Petition of Hemlota Debee* (1), *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (2) and *D. Fernandez* v. *R. Alves* (3), referred to.

Held, further that even if the endorsement by the Registrar before whom the document was registered was taken to amount to attestation, yet as there was no other witness who could be said to have attested the will, the will was not properly attested.

A. from a decision of the Judicial Commissioner, Chota Nagpur, dated September 16, 1939.

Mr. *S. N. Banerji*, for the Appellant.

Mr. *K. K. Banerji*, for the Respondents.

Varma, J.—The learned Judicial Commissioner of Chota Nagpur by his order, dated September 16, 1939, has dismissed the application for probate of a will, preferred by one Bulaki Mahto (Sunri). The will is said to have been executed jointly by Lalchand Sunri and his brother's widow *Mst.* Bhukhli on May 21, 1917. The application for probate was made on April 25, 1938, after the testators' death which took place in 1936. Both Lalchand Sunri and *Mst.* Bhukhli were illiterate.

The Court below has found—a finding which is in favour of the appellant, that the executants intended to execute the will and that they were in a position to realize what they were doing. But probate of the will has been refused by the learned Judicial Commissioner on the ground that the will was not properly attested as required by law. I have looked into the will and it appears that one Wazir Pande signed on behalf of the two executants against their thumb-impressions. One Kishun Sahai signed the will as a scrile and merely says that he read over the contents of the document to the executants. Kishun Sahai does not say under his signature that he attested the signatures of the executants. The signature of Lato Hajam also appears on the will. Lato Hazam was, at the time of the proceedings in the Court below, dead and therefore could not be examined. But his signature on the will appears in a peculiar manner. The signature is from the pen of Kishun Sahai and there is a mark just below it. There is no evidence that this mark below Lato's name written by Kishun Sahai was made by Lato Hajam himself. The only other signature, is that of Wazir Pande, but the Court below has not accepted this as an act of attestation, because he was the person who also signed for the executants. The learned Judicial Commissioner has relied upon the decision in *In the matter of the Petition of Hemlota Debee* (1), *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (2) and *D. Fernandez* v. *R. Alves* (3). The evidence, therefore, does not show that the signatures on the will were properly attested as required by s. 63 of the Indian Succession Act.

Mr. S. N. Banerji on behalf of the appellant argues with his usual ability that even if it be held that the required number of two witnesses have not been proved to have attested the signatures of the executants, the endorsement by the Registrar before whom the document was registered should be taken to amount to attestation. In support of his argument Mr. S. N. Banerji relies upon the decision in *Sarada Prasad Tej* v. *Triguna Charan Ray* (4) and also refers to the decision in *Theresa* v. *Francis Misquita* (5). But it is not really a question of law that stands in the

(1) 9 C 226
(2) 11 C 429.
(3) 2 B 382.
(4) 1 Pat. 300; 70 Ind. Cas. 402; A I R 1922 Pat. 402; 1 Pat. L R 263.
(5) 45 B 989; 61 Ind. Cas. 587; 23 Bom. L R 399.

way of Mr. Banerji's client (the appellant), it is really a question of fact. Even assuming that the Registrar could be taken as an attesting witness, the evidence on the record does not show that there was any other witness who could be said to have attested the will. Wazir Pande no doubt speaks to what happened at the time of the execution of the will and also at the time of registration thereof, but his evidence falls short of the required proof that any witness attested the will at the time of its execution. In these circumstances there is no other alternative but to dismiss the appeal. The appeal is dismissed, but there will be no order as to costs of this Court.

Manohar Lall, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT
Full Bench

Civil Revision Application No. 208 of 1938
December 16, 1940

IQBAL AHMAD, ALLSOP AND VERMA, JJ.

ACHRAJ SINGH—APPLICANT

versus

HARDWAR NATH AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction under, if can be exercised with reference to order under s. 45 (2) or order under s. 46, U. P. Encumbered Estates Act (XXV of 1934).

The revisional jurisdiction vested in the High Court by s. 115, Civil P. C, can be exercised with reference to appellate orders, passed under sub-s. (2) of s 45, U. P. Encum. Estates Act or revisional orders, passed under s. 46 of the Act by a District Judge. 173 Ind. Cas. 136 (1), followed.

C. R. App against an order of the District Judge, Ghazipur, dated February 23, 1938.

Dr. *K. N. Malaviya*, for the Applicant.

Mr. *Chaturbhuj Sahai*, for the Opposite Party.

Opinion of the Full Bench.

The question referred for decision to this Full Bench is as follows :

"Whether the revisional jurisdiction vested in this Court by s. 115, Civil P. C, can be exercised with reference to appellate orders, passed under sub-s. (2) of s. 45 or revisional orders, passed under s. 46 of the Act, by a District Judge."

This question was considered by a Division Bench of this Court in *Ashraf* v. *Saith Mal* (1), and it was held in that case that, apart from the provisions contained in Ch. VI, U. P. Encum. Estates Act, this Court had the power to interfere in revision under s. 115, Civil P. C. In view of the somewhat involved provisions of ss. 45 and 46 of the Act the answer to the question referred to above was beset with difficulties of varying intensity and presumably because of those difficulties the Legislature stepped in and passed an Amending Act (Act No. XI of 1939) by which amendments of far-reaching importance were made in s. 45 of the Act. In accordance with s. 45, as it originally stood, only one right of appeal was given to an aggrieved party against the decisions, decrees, or orders of a special Judge, second grade, or of a special Judge, first grade. By that section the District Judge was authorized to hear appeals against "any decision, decree or order, of a special Judge of the second grade" and similarly the High Court was empowered to hear appeals against the decisions, decrees or orders of a special Judge of the first grade. But, by the Amending Act referred to above, a new sub-section, *viz.*, (2*a*), has been introduced in s. 45 and the newly added sub-section runs thus :

"An appeal shall lie to the High Court or Chief Court, as the case may be, from an appellate order or decree of a District Judge passed under sub-s. (2) on one or more of the grounds mentioned in s. 100, Civil P. C., 1908. The period of limitation for appeals under this sub-section shall be ninety days."

In view of this amendment the decrees or orders passed by a District Judge on appeals against decrees or orders of a special Judge of the second grade shall be appealable to the High Court. Thus, by the amendment an aggrieved party is entitled to invoke the appellate jurisdiction of this Court for testing the validity or otherwise of an appellate decree or order passed by a District Judge. This being so, ordinarily it would not be necessary for an aggrieved party to invoke the revisional jurisdiction of this Court in accordance with the provisions of s. 115, Civil P. C. The question referred to at the inception of this judgment is therefore of no practical importance so far as appellate decrees or orders of District Judges passed after the Amending Act came into force are concerned. The decision of the question one way or the other would therefore only affect the applications in revisions that have already been filed in this Court. In this state of facts, we, as at present advised, do not consider it expedient to depart from the view taken in the Division Bench case noted above. We follow that decision, at any rate, on the principle of *stare decisis* and accordingly answer the question in the affirmative.

S. *Answered in affirmative.*

(1) (1937) A L J 1101; 173 Ind. Cas. 136; A I R 1938 All. 47; I L R (1938) All. 110; 1938 R D 79; 10 R A 462; 1938 A L R 92.

MADRAS HIGH COURT

Referred Trial No. 78 and
Criminal Appeal No. 291 of 1940
July 18, 1940

BURN AND MOCKETT, JJ.

In re SINGAMPILLI YERRANNA AND OTHERS—ACCUSED

Evidence Act (I of 1872), ss. 27, 30 — Accused describing murder and part played by other accused and almost simultaneously producing deceased's earrings—Admissibility of statement under s. 27—Confession by accused that he killed deceased because other accused promised to give him certain amount — Admissibility under s. 30—Whether evidence against other accused —Criminal trial—Evidence — Sufficiency — Evidence held not sufficient to warrant conviction — Penal Code (Act XLV of 1860), ss. 302, 404—Accused in murder case charged with misappropriation of deceased's articles—Procedure, if good.

Under s. 27, Evi. Act, cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement must be distinguished.

Where an accused makes a statement to a Police Officer describing the murder and the part played by the other accused and almost simultaneously produces earrings identified as those worn by the deceased, the discovery of the earrings cannot be said to have been made in consequence of the information given by the accused and therefore the statement is inadmissible in evidence under s. 27.

A confession by an accused to a prosecution witness that he killed the deceased because the other accused had promised to give him a certain amount, is admissible under s. 30 but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. But it cannot be treated as against the other accused :

Held, on facts that the presence of the accused persons in the deceased's company shortly before his death, was no doubt suspicious but not enough to warrant their conviction, even though there was the only statement made by the co-accused that they took part in the murder, specially when the body of the deceased was in such a decomposed condition that it was not even possible to infer that more than one hand was responsible for the death of the deceased

In a case of murder, it is not a desirable procedure to charge the accused under s. 404 for misappropriating the articles of the deceased.

Refd. T. and Cr. A. referred by the Court of Session, Vizagapatam Division, in C. C. No. 7 of 1940.

Messrs. *Kasturi Seshagiri Rao* and *E. T. Chockammal*, for the Accused.

The Public Prosecutor, for the Crown.

Mockett, J.—The four appellants and one Killadi Dali Naidu who was accused No. 5 before the Sessions Court were charged in the case of accused Nos. 2, 3, and 4 with the murder of one Sriramulu on November 1, 1939; accused No. 1 was further charged with abetment of the murder by accused Nos. 2, 3 and 4, at the place of the murder, and accused No. 5 with abetment of accused No. 2 by waiting near by presumably with the object of co-operating. Accused Nos. 1 and 2 were further charged with dishonest misappropriation of property of the accused. Accused No. 1 is the wife of the deceased and there can be little doubt that—to put it no higher—the married life of accused No. 1 and the deceased was not happy. The father of Sriramulu deposes that the deceased and his wife had not slept together after their marriage until actually the night of the occurrence. It is not necessary to investigate the relations between these two further than that. The prosecution relied on the ill-feeling alleged to exist between them as being at least the motive for the murder owing to the part said to have been taken in the murder by accused No. 1. Accused Nos. 3 and 4 are the brothers of accused No. 1. Accused No. 2 is a farm servant employed by a person who did not give evidence in this case. The conviction of these persons has rested almost entirely on a statement made by accused No. 2 to the Police which statement the learned Sessions Judge held admissible as coming within the provisions of s. 27, Evi. Act. That statement combine with other evidence in the case satisfied the learned Sessions Judge of the guilt of accused Nos. 1 to 4. It is convenient, however to observe here that for reasons which will later appear, if that statement should be inadmissible, there is virtually no evidence whatever against accused Nos. 1, 3 and 4. Naturally the position of accused No. 2 will be different because apart from the statement, his actions accompanying that statement may be very relevant in considering whether the evidence as a whole is sufficient to establish the case against him.

Now the story is easy to relate because it depends on one or two witnesses and one or two facts. The learned Sessions Judge has set out the history of the case fully. On the night of November 1, 1939 there was quarrel between accused No. 1 and the deceased because accused No. 1 shut the deceased's room and it is stated that the deceased slapped his wife. On the night when he was last seen, *i. e.*, on the night of November 1, 1939 the deceased was wearing ear-rings M. O. No. 2 in this case. On that night he went out and apparently went out for the purpose which will later appear of getting leaves for the purpose of treating the mother of accused No. 3 who suffered from boils. That at least is said to be the reason why he went out although

the real reason may never be satisfactorily proved. He went out and never returned. All that is known of his movements appears from the evidence of P. Ws. Nos. 7, 8 and 10 in this case. P. W. No. 7 states that he saw accused Nos. 1, 2, 3 and 4 and the deceased going towards the Golukonda road which is apparently in the north of the plan some time after midnight. He was quite near to them and claims to be able to identify them. Later, this witness communicated this fact to P. Ws. Nos. 4 and 5, because it came to his knowledge that the deceased had met a violent death. In fact he was told that accused Nos. 1 to 4 had murdered him. P. W. No. 8 had been to a festival and was returning to his village which is Pappuchettipalem. He says that at a point identified by him on the plan he sat down for the purpose of easing himself. One Pothirzu was sitting near. This witness (P. W. No. 8) almost saw four men and a woman passing near by and one of the men called out "Sriramulu, come quickly." The man replied, "I am coming." Now this witness knows the deceased Sriramulu and he was the man who was there and he asked him where he was going and Sriramulu replied he was going to get Gatcha leaves as a relation of his wanted them. The witness says that he spoke to Sriramulu and he knew his wife but he did not know the four people who were with Sriramulu.

The next who knows of the movements of the deceased was one P. W. No. 10. P. W. No. 10 had also gone to the festival and he was driving home with his bulls late at night and coming to the main road, according to him, the bulls turned to go as they were accustomed to do towards the paddy fields whereas their owner (P. W. No. 10) wanted them to go in the opposite direction. It was necessary therefore for him to dismount from the *bandy* and turn the bulls round. He says he saw the deceased, accused Nos. 1 and 2 and the deceased's two brothers-in-law, that is to say, accused No. 3 and 4, near the culvert. He asked the deceased what they were doing there. The deceased replied they were going to get Gatcha leaves for his mother-in-law. The witness got on to his *bandy* and saying—as no doubt correctly translated by the learned Sessions Judge —"Very well, you get your leaves. I am going off" and he went away to Pappanapeta returning to Jagampeta on the following Saturday. He there heard of the death of Sriramulu and reported in the village what he had seen. He identified accused Nos. 3 and 4 before the Tahsildar. That is the evidence as regards the movements of the deceased.

The deceased was found on the 3rd in a water-course near where he had been seen by the witnesses. His head was under water but the water was not deep enough to cover the body. A *post mortem* was held and the Medical Officier (P. W. No. 1) was unable to say how the deceased met his death because of the advanced stage of decomposition. He could not find signs of drowning and he found no signs of violence. It was not possible for him to say that the lobes of the ears which were missing had disappeared naturally or had been turned out. It is important because certain ear-rings (M. Os. No. 2) in this case were identified as having been worn on the ears of the deceased. But some light is thrown—if it is to be accepted—by a statement made by accused No. 2 to P. W. No. 5. P. W. No. 5 is a cousin of the deceased. He heard of Sriramulu being missing and he looked for him. He states that he questioned accused No. 2 as he and accused No. 1 were on very friendly terms. Accused told him a long and detailed story about the death of the deceased. He said that after the festival he went and slept and that the deceased had waken him up and asked him to follow him as his brothers-in-law were waiting under a *peepal* tree; that he and the deceased went to the *peepal* tree and there saw accused Nos 3 and 4. Accused No. 3 asked him (accused No. 2) to show him where he could get a Gatcha leaf as his mother was ill. All of them, *i. e.*, the deceased, accused No. 2 himself, accused Nos. 4 and 1 then proceeded to the road where they found accused No. 5 sitting on a culvert holding a cycle. Accused Nos. 3, 4 and 5 talked together. Then accused No. 5 went with them for some distance and stopped. He, *i. e.*, accused No. 2, accused Nos. 1, and 4 then took the deceased to Dara Gedda which is the water-course and there killed him after striking him. Accused Nos. 2, 1, 3 and 4 after killing Sriramulu got on to the road and met accused No. 5 there. Then accused Nos. 3, 4 and 5 went along the road which leads to Mallampeta, while accused Nos. 2 and 1 returned to Jagampeta. When asked by P. W. No. 5 why he had killed Sriramulu accused No. 2 replied that accused No. 5 had promissed to give him Rs. 50.

It will be observed that that statement implicates the other accused but it would naturally require the strongest independant

evidence if any reliance can be placed upon it at all. Under s. 30, Evi. Act, such a confession can be taken into consideration; it is not evidence against the other accused. A statement on which the prosecution rely under s. 27 was made by this witness in the presence of P. Ws. Nos. 14 and 15 and P. W. No. 20, the Sub-Inspector. According to the Sub-Inspector of Police, a statement (Ex. E) was made, part of which has been admitted in evidence by the learned Sessions Judge. That statement describes the murder of the deceased and the part played in it by the other accused. But there is no doubt from the evidence that what happened was the following. The accused made this statement and almost simultaneously—if not actually simultaneously—produced M. O. No. 2, the two earrings. That that is so is quite clear from the evidence of P Ws. Nos 14 and 15 who witnessed (Ex. E). P. W. No. 14 states:

"Accussed No. 2 made a statement before the Sub-Inspector. It was reduced to writing. I signed it. It is Ex. E. Accused No. 2 then took the earrings M. O. No. 2, from his waist cloth and handed them over to the Sub-Inspector.

P. W. No. 15 stated:

"He made a statement. It was written down, I signed it. Ex. E. is that statement. He handed over the jewels to the Sub-Inspector taking them, from his waist cloth."

The Sub Inspector who, we feel, was conscious of the difficulty surrounding the admissibility of the statement, stated before the lower Court: "I recovered the earrings from accused No. 2 as a result of the statement which he made." No doubt, bearing in mind the precise wording of s. 27, Evi. Act, which provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The learned Judge has considered this aspect but we think that he has overlooked the actual facts. We are satisfied that these ear-rings were not discovered in consequence of any information given by accused No. 2. They were discovered by accused No. 2 himself combined with a statement. They were not found by the Police upon him after he made this statement which is the nearest approach to a compliance with this section which might be possible under the circumstances before us. This topic is dealt with in the latest edition of Amir Ali's Evi. Act at p. 282 and this Court has on numerous occasions distinguished between cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. In this particular case, we are quite satisfied that the statement is inadmissible—is not admissible under s. 27, Evi. Act, and should not have been allowed to appear on the record. But, quite apart from this question, it is obvious that the convictions of accused Nos. 1, 3 and 4 cannot stand. Even if it could be taken into account it is obvious that there is virtually no adequate evidence on which a conviction could be based. Had accused No. 2 been examined as an approver, his evidence would have required corroboration implicating the other accused in material particulars. There is no doubt evidence that accused Nos. 1, 3 and 4 were in the deceased's company shortly before his death but the only statement that they took part in the murder comes from accused No. 2 who, be it remembered, was soon after in possession of the deceased's property. Moreover, owing to the condition of the body, it is not even possible to infer that more than one hand was responsible for the deceased's death. Their presence is no doubt suspicious but suspicion is not enough. Consequently, their convictions must be set aside and they will be set at liberty.

But the position with regard to accused No. 2 is different. We have his association on the night in question with the deceased clearly proved. There is no reason to disbelieve the evidence of P. Ws. Nos. 7, 8 and 10. Neither do we disbelieve the evidence of P. W. No. 5. We consider that the confession made to P. W. No. 5 by accused No. 2 was made as stated. The conduct of P. W. No. 5 and P. W. No. 4 immediately after accused No. 2 made his confession is consistent with the fact: *vide* Ex. C. There is furthermore the all-important fact that, as we believe, the accused did produce from his person, on November 3, that is to say, within two days of the death of the deceased his articles of jewellery. His explanation of his possession of these articles was not considered satisfactory by the trial Judge, with which view we agree. There is not the slightest ground in this case for doubting that the deceased met his death by violence and that accused No. 2 took part in that violence. No one suggests that the deceased was not a healthy man. Accused No. 2 told P. W. No. 5 that he assisted to murder him for a reward of Rs. 50 and we are satisfied—corroborated by other evidence

—that he at least is guilty. Consequently, we see no reason to interfere with the conviction of accused No. 2. His conviction for murder and the sentence of death are confirmed. It may be that accused Nos. 1,3 and 4 have been fortunate, but a Court can only act upon evidence as it affects the individual. A somewhat unusual procedure was followed in this case—a case of murder—charging accused Nos. 1 and 2 with misappropriation of articles of the deceased (s. 404). In a case of murder, it is not a desirable procedure and one not within the experience of this Court. In any case, there is no evidence of misappropriation and these convictions are also set aside in the case of accused Nos. 1 and 2.

N.-D. *Order accordingly.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 329 of 1940
November 8, 1940
ALMOND, J, C.
GOKAL CHAND—PETITIONER
versus
SAID ALI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250—Applicability to warrant cases.

Section 250, Criminal P. C., applies to trial of warrant cases as well as summons cases. 91 Ind Cas. 38 (1), dissented from. 101 Ind. Cas. 482 (2), relied on.

Cr. Ref. from an order of the Magistrate, First Class, Hazara District, dated June 11, 1940.

The Advocate-General, for the Crown.

Order.—The petitioner Gokal Chand was ordered to pay compensation of Rs. 50 to Said Ali, respondent, under s. 250, Criminal P. C. He applied for revision of the order to the Sessions Judge, Hazara, who, without going into the merits of the case, has recommended that the order be set aside on the basis of a ruling of a Single Judge of the Allahabad High Court reported in *Harihar Dat* v. *Maksud Ali* (1). In that case the learned Judge made a remark that the provisions of s. 250, Criminal P. C., occurring as they do in Chap. XX of the Code apply only in the case of cases tried as summons cases. The remarks were however in the nature of *obiter dicta* for the question for decision in that case was whether compensation can be awarded in a case where some of the charges were triable by the Sessions Court and some by a Magistrate. The dictum was definitely dissented from in a subsequent judgment of the Oudh Chief Court reported in *Paighambar* v. *Emperor* (2) and is in my opinion not a correct statement of law. The marginal note to s. 250, Criminal P. C., is "False, frivolous or vexatious accusation" without restriction to summons cases and the body of the section does not give any indication that it applies to summons cases only. In fact there are clear indications to the contrary, for, it refers to the award of compensation in a case in which an accused person is discharged. No person who is tried for an offence which is trible as a summons case can be discharged: he must either be acquitted or released without an order of conviction or acquittal. In my opinion, s. 250, Criminal P. C., clearly applies to trial of warrant cases as well as summons cases.

On the merits, I am of opinion that there are no grounds for interfering with the findings of the trial Magistrate. The facts briefly were that the complainant had delivered to the accused who is a lorry driver a consignment of salt to take from Havelian to Srinagar. The salt was not delivered. The accused's defence was that at Srinagar owing to the breach of the road he could not proceed beyond Bararkot which is the last village in British territory, that he delivered the goods there to one Sitaram and some days later took the *munshi* of the complainant, Sohan Lal, with him to Bararkot and there handed over a receipt which he had taken from Sitaram. He produced Sitaram as his defence witness and Sitaram admitted that these consignments of salt had been deposited with him by the accused though he makes no mention of Sohan Lal having gone there. He said that the salt was still with him and could be handed over to the accused if he produced the receipt therefor. The learned Magistrate was of opinion that the complainant knew throughout that the salt was deposited in Bararkot and he also referred to the fact that this complaint had been brought a year after the salt had been lying at Bararkot. In my opinion, there are grounds on which the trial Court could conclude that the prosecution was false and vexatious and I am not prepared to interfere with its order.

D. *Order accordingly.*

(1) A I R 1926 All. 159; 91 Ind. Cas. 38; 27 Cr. L J 6; 48 A 186; 23 A L J 1056.

(2) A I R 1927 Oudh 175; 101 Ind. Cas. 482; 28 Cr. L J 450; 4 O W N 392.

LAHORE HIGH COURT

First Appeal No. 414 of 1938
January 22, 1940
DALIP SINGH AND SALE, JJ.
GHULAM RASUL AND OTHERS—
DEFENDANTS—APPELLANTS
versus
KAFAIL AHMAD SHAH AND OTHERS,
PLAINTIFFS AND OTHERS, DEFENDANTS—
RESPONDENTS

Custom (Punjab)—Alienation—Sayyeds of Gurdaspur District are governed by Customary Law.

The Sayyeds of Gurdaspur District are governed by what is called the usual Customary Law in the matter of alienations and ancestral immovable property cannot be alienated by the holders without necessity.

F. A. from the decree of the Senior Sub-Judge, Lyallpur, dated August 23, 1938.

Messrs. *Shamair Chand* and *Parkash Chandar Jain*, for the Appellants.

Mr. *Mohsin Shah*, for the Respondents.

Dalip Singh, J.—In this case the sons of one Sayyed Ahmed Shah, ex-Police Sub-Inspector, brought the usual declaratory suit contesting an alienation made by their father by way of mortgage in favour of two mortgagees, Basant Singh and Alla Ditta. The mortgage is printed at p. 159 of the paper book. The issues material to the appeals are at p. 29. The learned trial Court held that the parties were governed by custom and as the land was ancestral the sons had a right to control the alienation of their father, and, therefore, unless the alienation was for consideration and necessity, the alienation could not stand. On the question of consideration, it held that the consideration was proved; on the question of necessity, it held that the last two items mentioned in the mortgage-deed, namely Rs. 800 paid in cash before the Sub-Registrar and a pronote written by Allah Ditta mortgagee in favour of the alienor Sayyed Ahmed Shah for Rs. 1,186 were not proved to be for necessity. It, therefore, decreed the plaintiffs' suit holding that the mortgage was only proved to be for necessity to the extent of Rs. 3,264 and except for this sum would not affect the reversionary rights of the plaintiffs. It left the parties to bear their own costs. From this decree the mortgagee Allah Ditta has brought an appeal contending that these two items are proved to be for necessity and, secondly, that the parties are not governed by custom and, therefore, the consideration being proved, the sons have no right to control the alienation. There is a cross-appeal by the sons of Sayyed Ahmed Shah, the plaintiffs, where they contend that the sum found to be legally due, namely Rs. 3,264, is also not for necessity and therefore could not bind them.

As regards the first appeal by Allah Ditta, two points have been argued by the learned Counsel appearing for him: firstly, that the parties are not proved to be governed by custom in the matter of alienations. He contends that the *riwaj-i-am* of the district is altogether silent on the subject of the control of these alienations and that this is a strong point showing that all tribes whatsoever in this district, even those following agricultural occupations are not controlled in the matter of alienations by reversioners. Secondly, he contends that at any rate these Sayyeds, who are high class Muhammadans and whose main occupation is service, are not shown to be following custom on the subject of control of alienations of ancestral property by reversioners. As a matter of fact, however, we find on the record that there is oral evidence that the Sayyeds of the district and of this family in particular follow agriculture as their main occupation, though they also have at various times gone in for military service, or as the alienor himself did, for service, in the Police; but this would not by itself prove that the family does not follow agriculture as its main occupation. On the whole I see no reason to doubt the oral evidence on this point and I agree with the finding of the trial Court that this family's main occupation is agriculture. The absence of any mention in the *riwaj-i-am* of control of alienations is due to the simple fact that the question of alienations was not asked from the tribesmen for some reason which is not very clear. The oral evidence again is all one way as to the power of control of alienations and there are two judicial instances to support this oral evidence. There is not any evidence at all in rebuttal. There is plenty of evidence to show that the Sayyeds do not in other matters, *e. g.*, succession or gift, follow Muhammadan Law. In these circumstances, it appears to me that the only deduction possible is that the Sayyeds of Gurdaspur District are governed by what is called the usual Customary Law in the matter of alienations and that ancestral immovable property cannot be alienated by the holders without necessity.

Next the learned Counsel wished to show that necessity was proved for the

two items disallowed by the trial Court. But there is nothing whatsoever to show what the necessity was for these two items. It is not mentioned in the mortgage-deed and there is really no proof on the record as to how this money was spent. There is some vague evidence that the alienor was involved in litigation at the time. His statements on the subject are contradictory and I do not think any great importance can be attached to them. I, therefore, do not think that there is proof that these two items excluded by the trial Court were for necessity. I would, therefore, dismiss the appeal of the mortgagee Allah Dita. As regards the cross-appeal by the sons it is contended that Basant Singh knew of the reckless extravangence of the alienor Sayyed Ahmed Shah. The only proof on the record to which our attention has been drawn is that Basant Singh lived in chak No. 69 in Lyallpur and that the alienor first made a mortgage transaction in 1921 of certain lands situated in chak No. 37.

It is contended that Basant Singh must have come to know of this alienation and that therefore when subsequently he advanced Rs. 1,000 to the alienor for the purchase of a mare and for household expenses, he must be taken to have had knowledge that the alienor was recklessly extravagant. There is, however, nothing to show that Basant Singh had any notice of the first transaction of mortgage of the alienor in 1929. The distance between chak No. 37 and chak 69 is not proved on the record. A map has been shown from which it would appear that the distance is at least 3 to 4 miles, but be that as it may, as the alienor was not a resident of this chak No. 37 but at the time was stationed as a Sub-Inspector of Police elsewhere, there is little reason to suppose that Basant Singh's attention could have been attracted to this transaction. The other transactions of the mortgagor were after the date of the advance by Basant Singh. Therefore, all we have on this record is that Basant Singh advanced a thousand rupees to a Police Sub-Inspector, for the purchase of a mare and for household expenses. Both these items would be quite justifiable in an ordinary case and there being nothing to show that Basant Singh had any reason to suspect the *bona fides* of the would-be borrower. I do not see that his debt arising from this transaction could be called other than a just debt. This debt was followed by a decree obtained *ex parte* by Basant Singh, But it is clear from the written statement that the main item was not even denied by the alienor. He only denied a small item of Rs. 360 for which he alleged he had a receipt, not produced. This decretal debt formed the first item of the mortgage transaction and in the circumstances it must be considered to be a just debt. Items Nos. 2 and 3 follow with this and, therefore, I am of opinion that there is no force in the appeal of the sons. I would, therefore, dismiss the appeal. By consent of parties, the parties will bear their own costs of both appeals in this Court.

Sale, J.—I agree.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Revision Petitions Nos. 1115 and 1106 of 1939

April 10, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

N. KRISHNASWAMY IYER—DEFENDANT No. 2—PETITIONER

versus

T. N. NAGALINGA MUDALIAR—PLAINTIFF—RESPONDENT

Madras Agriculturist's Relief Act (IV of 1938), s. 9—For applicability of s. 9 both prior debt and debt sued on must be debts due from agriculturist.

Both the debt sued on and the prior debt which it is found to have been superseded must, if s. 9, Mad. Agri. Relief Act is to have any application fall within the definition of the term "debt" in s. 3; that is to say, both the prior debt and the debt sued on, must be debts due from an agriculturist.

Where therefore *A* and his brother *B* executed a promissory note in supersession of an earlier promissory note executed by *A* alone who was not an agriculturist within the purview of the Act, it is not open to *B* to call in aid s. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt.

C. R. P. under s. 115 of Act V of 1908 and s. 224 of the Government of India Act praying the High Court to revise the orders of Court of Small Causes, Madras, dated September 24, 1938, and February 13, 1939, respectively and made in M. P. No. 1581 of 1938 in Suit No. 1104 of 1937 and N. T. A. No. 421 of 1938 respectively,

Mr. *S. Ramachandra Iyer*, for the Petitioner.

Messrs. *N. Muthuswami Iyer* and *N. Ramanatha Iyer*, for the Respondent.

Wadsworth, J.—This petition raises a question under the Mad. Agri. Relief Act. The petitioner was the second defendant in a suit on a promissory note dated October 8, 1934, executed by himself and by his brother the 1st defendant. This promissory note was in supersession of an earlier promissory note executed by the first defendant alone on May 28, 1930. The 1st defendant is admittedly not an agriculturist within the purview of the Act. The second defendant claims to be entitled to the benefit of s. 9 of the Act on the basis that the debt upon which he has been sued is in renewal of a prior debt so far as he is concerned.

It seems to us unnecessary to decide the question whether, when there is a debt incurred by *A*, superseded by another debt incurred by *A* and *B*, *B* can contend that his liability is in renewal of a prior debt? So far as the facts of this case go, it is clear to us that the original debt is not a debt as defined by s. 3 (*iii*) of the Act which defines a debt as "any liability in cash or kind, whether secured or unsecured due from an agriculturist". The proviso to s. 9 deals with any part of a debt which is found to be a renewal of a prior debt. Both the debt sued on and the prior debt which it is found to have been superseded must, if this section is to have any application, fall within the definition of the term "debt" in s. 3; that is to say, both the prior debt and the debt sued on must be debts due from an agriculturist. In the present case, admittedly, the original debt was not due from an agriculturist and it is therefore not open to the petitioner to call in aid s. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt.

This petition is therefore dismissed with costs.

C. R. P. No. 1106 of 1939.

This petition need not be decided on the merits in view of our decision in C. R. P. No. 1115, for it only seeks to canvass by means of a new trial application the question upon which we have given a finding adverse to the petitioner. The petition is therefore dismissed but there will be no order as to costs.

N.-S. *Petitions dismissed.*

SIND CHIEF COURT

Criminal Revision Application No. 120 and Criminal Reference No. 79 of 1940

July 3, 1940

DAVIS, C. J. AND LOBO, J.

MURADALI MUHAMMAD IBRAHIM —APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 499, 514—Surety bond — Forfeiture—Surety undertaking to produce accused on certain date and thereafter as directed by Court —Accused produced on date—With Court's permission accused leaving Court house to say prayers but absconding—Surety, if liable.

The liability of the surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in the custody of the Court only when his bail bond is cancelled.

In his bond the accused bound himself to appear in the Court on a certain date and thereafter as directed by the Court and the surety bound himself that the accused shall so attend and in default of his so attending he bound himself to forfeit Rs. 1,000. The accused was produced on the fixed date. During the course of the proceedings the accused with the Court's permission left the Court house to say his prayers and absconded. The bail bond was not cancelled nor was the surety discharged;

Held, that the surety's liability continued even after the production of the accused in the Court. The forfeiture of the bond therefore was justified.

Held, however that inasmuch as the surety was taken off his guard, it was a mitigating circumstance in the case whereby the penalty for forfeiture could be reduced to something nominal.

Cr. R. App. and Cr. Ref. to revise the order of the District Magistrate, Dadu, dated March 3, 1940.

Mr. *Fatechand Asudamal*, for the Applicant.

The Advocate-General, for the Crown.

Davis, C. J.—This is an application in revision by a surety who has been ordered by the District Magistrate of Dadu to pay a penalty of Rs. 500 upon proof that his bond for Rs. 1,000 for the attendance of one Dilawar son of Abdul Rehman Brohi in the Court of the first class Magistrate Kotri was forfeited. We have in addition to this revision application a reference by the learned District Magistrate himself who asks us to give for the guidance of Magistrates a ruling on the question which arises in this case the facts of which are unusual. It appears that in accordance with his bond the applicant-surety secured the attendance in Court on September 14, 1939, at Kotri of Dilawar against whom an inquiry for offences under ss. 366 and 367, I. P. C. was proceeding and it appears that while the question as to whether the bail

bond should be cancelled and the accused remanded to custody was being argued, the accused left the Court on the excuse that he wished to say his prayers. After more than sufficient time for these pious exercises had passed, it was noticed the accused had not returned. Consequently a search was made and it was found that he had absconded. The accused had left the Court with the permission of the Magistrate and his surety the applicant contended, when called upon by the Magistrate to show cause why the bond should not be forfeited and a penalty enforced, that he had satisfied the terms of his bond and had secured the attendance of the accused. and that if he, the accused, had absconded, it was not due to any fault of his but due to the fact that permission had been given by the Magistrate of the Court in whose custody the accused then was. But we do not think that in this case or in cases like this there can be any confusion between the case of an accused who was on bail and whose bail bond has not been concelled and the case of an accused who is in custody. An accused does not cease to be on bail and his surety does not cease to be liable for his attendance merely because during the course of the day the Court has adjourned or the Court should have given the accused permission to leave the Court for some purpose. An accused person, for instance, would have reasonable ground for complaint if when attending Court on bail and the Court adjourned, the Court ordered him to be watched by a Policeman, for, he might well say he was on bail, that he was not in custody and so long as the bail bond was not cancelled or the surety discharged, he was entitled to come and go freely and be at liberty subject of course to the orders of the Court as to his attendance in Court.

We have had the bond in this case translated and it is the usual form of bond taken from the surety for the attendance of an accused in Court. There is nothing in the bond about the production of the accused. The applicant has argued that he bound himself to produce the accused before the Court; he did produce him before the Court the accused was then in the custody of the Court and his liability under the bond had ceased. But there is nothing in the bond of the surety about production. In his bond the accused binds himself to appear in the Court on January 29, and thereafter as directed by the Court and the surety binds himself that the accused shall so attend and in default of his so attending he binds himself to forfeit Rs. 1,000

We think, therefore, that the liability of the surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in the custody of the Court only when his bail bond is cancelled. The bail bond was not cancelled in this case and although the Magistrate did upon that day decide to cancel the bail bond and remand the accused to custody, it was during the discussion as to whether this should be done that the accused left the Court. He was therefore on bail when he left the Court and he was not in custody and the surety was by the terms of his bond bound to see that the accused should return to and attend the Court as the Court directed, which in this case was after he had finished his prayers.

We think, therefore, that the learned Magistrate was right when under s. 514, Criminal P. C., he held that the bond must be forfeited and ordered a penalty for such forfeiture to be paid by the surety. But we think there are in this case mitigating circumstances, whereby the penalty can be reduced to something nominal, such as Rs. 50. In this case the surety was taken off his guard. He had secured the attendance of the accused in the Court, the accused had left the Court for a temporary purpose with the permission of the Court and the surety might well think that as the Court had allowed the accused to leave the Court for this purpose, the accused would obey the order of the Court and return; otherwise, the surety might have accompained the accused to his prayers or taken some measure to secure his return and attendance. This is, as the learned District Magistrate says, an unusual case, but we think the principle on which it should be decided is plain, that is to say, that an accused is either on bail or in the custody of the Court. There is no half-way house between or any combination of these two conditions, and until the bail bond is cancelled and the accused has been taken into custody, we do not think that merely because he attends the Court one day, the surety ceases to be liable for that day and the Court has custody of the accused. We therefore allow this revision application only on the question of the amount of the penalty for, we think in principle the order of the learned Magistrate forfeiting the bond was right. We will, for the reasons

we have given in the exceptional circumstances of this case, reduce the penalty to Rs. 50. We order a copy of this order to be sent to the learned District Magistrate, Dadu, in answer to his reference.

D. *Revision allowed.*

NAGPUR HIGH COURT

Second Appeal No. 492 of 1937
December 21, 1939
GRILLE AND NIYOGI, JJ.

ONKARSA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
THE MUNICIPAL COMMITTEE OF NANDURA—DEFENDANT—RESPONDENT

C. P. Municipalities Act (II of 1922), ss. 31 (2), 23, 16 (3), 67, 66 (1)(b)—"Convene", meaning of—President assenting to call meeting— Whether deemed to have convened it—Assent, if can be inferred from his presence — Irregularity in convening, if cured by s. 23—Failure to summon member whether invalidates meeting — Invalidity, if cured by his attendance—Period of nominated members extended till new body elected and began to function — New body only constituted subsequent to meeting in question—Failure to summon old nominated members qualified to act as corporators and summoning of new elected members not then so qualified, if renders meeting invalid—When intention of resolution is clear, it is futile to stress its inelegance — Non-mention of s 67 (7) in notification, if material — Omission in notification to specify date from which tax is to come into effect, whether invalidates it—Tax must be deemed to come into force from date of notification — Presumptive force under s. 67 (8)—Tax on ginning and pressing of cotton, whether tax on income derived from trade and ultra vires *—Evidence Act (I of 1872), s. 114—Adverse inference—Omission to examine witness—Effect.*

To convene means to call together or to assemble. When notices are sent to every member or circulated among the members by the Secretary, it must be presumed that it was with the consent of the Chairman, particularly when he attends the meeting. There is no law, rule or bye-law laying down any special procedure to regulate the exercise of the President's power to convene meetings. If there is evidence of the President's assent to the calling of any meeting, he must be deemed to have convened the meeting His assent is inferable from his presence at the meeting. Every meeting that is held must be presumed to have been convened by order of the President. Even on the assumption that there was any irregularity it cannot, in its nature, affect the validity of the meeting itself and is cured by s. 23 of the C. P. Municipalities Act. Strictly speaking, it is nothing more than an informality *Abaji Sitaram* v. *Trimbak Municipality* (2) and 46 Ind. Cas. 682 (3), distinguished. [p. 476, cols. 1 & 2.]

Failure of the President to summon or non-receipt of summons does not invalidate a meeting but is capable of being regularized by the member's attendance at the meeting 147 Ind. Cas. 894 (1), relied on. *Smyth* v. *Darley* (4), *In re Portuguese Consolidated Copper Mines Ltd.* (5) and *Merchants of the Staple of England* v. *Bank of England* (6), referred to.

There is a close connection between sub-ss. (1) and (2) of s. 67, C. P. Municipal Act. The integral part of a resolution contemplated in sub-s. (1) is not only the proposal to impose the tax which is implicit in the resolution but defining the class of persons or description of property proposed to be taxed, amount of tax to be imposed and the system of assessment to be adopted. When the intention is clearly apparent from the wording of the resolution it is futile to stress the mere inelegance of expression. 147 Ind. Cas. 894 (1), distinguished. [p. 478, col. 1]

The omission to mention sub-s. 7 of s. 67, is not material because the Local Govt. cannot publish a Notification under any other provision except that one. [p. 479, col. 1.]

The order of the Local Govt. sanctioning the proposal to impose a tax is not a mere executive order but an order having the force of law from which the Municipality concerned derives its authority to impose the tax of a particular nature. It is in its nature a legislative order with all the force of law. The Notification itself is nothing but publication of the order. The rule of interpretation bearing on the question of commencement of statutes is that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation. On this principle the order sanctioning the proposal to impose the tax and the rules relating to its assessment and collection would be deemed to come into force on the day on which they were notified in the *Gazette*. In any case the omission to specify the date cannot deprive the Notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax. Under sub-s. 8 of s. 67 the Notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. That serves to validate the entire proceeding relating to the imposition of the tax and precludes any objection to its regularity or legality. *Rex* v. *Smith* (7), relied on. [p. 479, col. 2.]

The tax on ginning and pressing of cotton is not a tax on income derived from the trade but on the process of ginning and pressing. This tax does not seek to take anything out of the income and consequently is not *ultra vires*. 106 Ind. Cas. 882 (8), distinguished. [p 480, col. 1.]

The period of office of the nominated members of the Municipal Committee was extended till a new body was elected and began to function. The new elected body was to consist of nine elected, two nominated and two selected members. The nine elected members could not displace any nominated members of the old body for the reason that it was not possible to determine which elected member was a successor of which nominated member so as to attract the application of sub-s. 3 of s. 16. That new body was fully constituted subsequent to the meeting in question:

Held, that the failure to summon the old members who were qualified to act as corporators and summoning the new elected members who were then not so qualified rendered the proceedings of that meeting invalid and of no effect.

The omission of a party on whom the onus lay, t examine a particular witness gives rise to a presump tion adverse to him.

S. A. from the appellate decree of th Court of the Additional District Judge Khamgaon, dated July 15, 1937.

Mr. *M. R. Bobde*, for the Appellants.
Mr. *V. K. Rajwade*, for the Respondent.

Judgment.—This appeal and Second Appeal No. 497 of 1937 are two allied plaintiffs' appeals from the judgments of the Additional District Judge, Khamgaon, reversing the decrees of the Additional Subordinate Judge, 2nd Class, Malkapur, passed in their favour in two suits instituted for a declaration that the tax levied by the Municipal Committee, Nandura, on persons carrying on the trade of ginning and pressing cotton, was illegal and *ultra vires* and for a permanent injunction restraining the defendant Committee from recovering the said tax from the plaintiffs. In one of the suits, there was added a claim for refund of the amount recovered by the Committee. This judgment governs the disposal of both.

The town of Nandura was declared to be a Municipality with effect from April 1, 1930 by the Local Govts'. Notification No. 756/27-VIII, dated February 4, 1930 issued under s. 5 (2) (*a*) of the C. P. Municipalities Act, 1920 as applied to Berar. The Nandura Municipality so formed was by Notification No. 757/27-VIII, dated February 4, 1930, excepted from the operation of ss. 10 (2) and (3), 16 (2), 67 (2), (3) and (4), 175 (3), 86 (3) and 178 (4) of the aforesaid Municipalities Act. By Notification No. 759/27-VIII of the same date, the Local Govt. appointed a Committee of 13 named members in accordance with rules made by the Local Govt. under s. 9 (2) of that Act. By another Notification the Municipal Committee, Nandura was excepted from the operation of s. 14 of the Municipalities Act and it was declared that the provisions of the said section with regard to the residence did not apply to candidate for election as a member of that Committee at the time of the fresh elections.

On May 18, 1931, the Local Govt. by Notification under 2576/848-M-VIII extended the period of office of the nominated members of the Municipal Committee "till a new body is elected and begins to function". The Local Govt. notified the election of 9 named persons as members of the Committee in the *C. P. Gazette* dated August 15, 1931, nomination of 2 named persons as members in the *C. P. Gazette*, dated October 3, 1931 and the selection of 2 named persons as members in the *C. P. Gazette*, dated November 28, 1931 and the election of President and two Vice-Presidents in the *C. P. Gazette*, dated January 9, 1932. Lastly, the Local Govt. published for general information the complete list of President, two Vice-Presidents and members of the Municipal Committee of Nandura, in the *C. P. Gazette* of the same date.

On September 20, 1931, there was a special meeting of the Committee for proposing imposition of a tax on persons carrying on the trade of ginning and pressing cotton within the limits of the Nandura town under s. 66 (1) (*b*) of the Municipalities Act. It was unanimously resolved that the tax should be imposed on the bales and *bojas* in the ginning and pressing factories on the terms provided in the rules of the Jalgaon Municipality and that the rules for collection of the tax should be made on the lines of those in force in that Municipality.

The notices of the proposal to impose the aforesaid tax at specified rates and that to make rules for the assessment and collection of it, as therein set out, were published in the *C. P. Gazette*, dated March 11, 1933. The former was published over the signature of the Secretary, Nandura Municipal Committee and the latter over that of of the Secretary to the Local Govt.

At a subsequent special meeting held on January 15, 1933 the original proposal was somewhat varied in respect of the rates and at the 1st special meeting held on Decem- 5, 1933, certain objections to the proposed tax received from the public were considered and disposed of.

The proposal to impose the tax at the modified rates was duly forwarded to the Local Govt. for sanction as required by s. 67 (5) of the Municipalities Act. The Local Govt. sanctioned the imposition of the tax and the rules relating to assessment and collection and published two Notifications announcing the imposition of the tax and the enforcement of the rules in the *C. P. Gazette*, dated February 2, 1934. In view of the discussion that is to follow, it is desirable to reproduce textually the Notification regarding imposition of the tax :—

"No. 399-130-M-VIII. In exercise of the powers conferred by sub-s. (5) of s. 67 of the Central Prov. Municipalities Act, 1922, (C. P. Act II of 1922), as applied to Berar, the Local Govt is pleased to confirm the following rule made by the Nandura Municipal Committee, in the Buldana district, under s. 66, sub-s. (1), cl (*b*) of the said Act, for imposing a tax on persons carrying on the trade of ginning and pressing cotton by means of steam or mechanical process within the limits of the Nandura Municipality :—

The Committee shall levy from all persons carrying on within the limits of the Municipality the trade of ginning cotton or pressing the same into bales by means of steam or mechancial process a tax at

the following rates :—

	Rs.	a.	p.
(*a*) For each *boja* of 392 lbs. ginned	0	1	0
(*b*) For each bale of 392 lbs. pressed	0	2	0"

The Committee sought to recover the tax for some period preceding the date of the Notification (*viz* February 2, 1934) on the view that it had a retorspective effect on account of the omission to specify the date from which the tax was to come into effect.

The appellants contend that the tax was not validly imposed and therefore could not be lawfully recovered, on the following grounds :—

(1) That the special meetings which were held to consider the proposal to impose the tax were not convened by the President as required by s. 31 (2) of the Municipalities Act.

(2) That notices of no material meeting were served on the members in accordance with the requirements of the Act and the bye-laws framed there-under.

(3) That the first meeting held on September 20, 1931 was not in point of law a meeting of the Municipal Committee, Nandura, for the reason that no notices were sent to the 8 out of 13 persons nominated as members by the Local Govt. by Notification published on February 4, 1930, but that on the other hand the persons whose election was notified on August 15, 1931 were illegally summoned to attend the meeting. In other words, the argument is that the meeting was not a meeting of the Committee having power to levy the tax, or at any rate that it was not duly constituted to be competent to perform a corporate act.

(4) That the Local Govt's. Notification published in the *Gazette*, dated February 2, 1934, was invalid for the reason that it did not specify the date from which the tax was to come into effect as required by s. 67 (7) of the Municipalities Act and that it did not purport to be one published under that sub-section.

(5) And lastly that the tax, though intended to be levied on persons carrying on a trade in terms of s. 66 (1) (*b*) of the Municipalities Act, was in fact levied on commodities and that this is *ultra vires* of the Committee and illegal.

Before examining these contentions, it is desirable to advert to a ruling of their Lordships of the Privy Council on which considerable stress was laid on behalf of the appellants. That is reported in *Radha Kishan Jai Kishen* v. *Municipal Committee, Khandwa* (1). In that case the Municipal Committee of Khandwa had resolved at a special meeting held on July 16, 1922, to propose the imposition of a tax on the trade of ginning and pressing cotton by means of steam or mechanical process, in compliance with sub-s. 1 of s. 39 of the C. P. Municipalities Act of 1903 which was repealed by the C. P. Municipalities Act of 1922. That resolution (proposing imposition of the tax) contained no mention of the amount or the rate of the tax to be imposed, although there was a reference to the "bye-laws adopted by Murtizapur and other Municipalities in Berar" as having been read at the meeting. The terms of the operative part of the resolution were

"Resolved that the proposed bye-laws drafted by the President be passed and they be published locally as well as in two successive issues of the *C. P. Gazette* for inviting objections or suggestions ....."

It is clear that the terms were too vague to enable any one to understand the nature, incidence and other necessary features of the proposed tax. The proposal was published consonant to the resolution, objections received were considered and disposed of and the final proposal was sanctioned by the Local Govt. followed by a Notification published in the *C. P. Gazette* of November 25, 1922, announcing the sanctioning of the imposition of the tax with effect from the date of the Notification. The validity of the tax was challenged on two grounds:

(1) that the special meeting of July 16, was not duly constituted in the absence of the receipt of notice by one member of the Committee;

(2) that the resolution proposing the imposition of the tax was not in accordence with the provision of s. 39 (1) of the Act of 1903 for the reason that it did not fix the amount or rate of the proposed tax.

Their Lordships of the Privy Council decided the controversy on principles which may be formulated as follows:—

"(*i*) that an attack on the validity of the proceedings of a statutory body must be 'clearly defined and clearly proved' *i. e.* to say that it should be supported by definite plea and convincing proof;

(*ii*) that it is imperative to summon every person entitled to take part in the intended meeting, but that the want of notice is an irregularity which is

(1) 30 N L R 121; 147 Ind. Cas. 894; A I R 1934 P C 62; 61 I A 125; 9 R P C 90; (1934) M W N 546; 66 M L J 551; 39 L W 739 (P C.)

capable of being cured by the attendance of the member who has not been duly notified;

(iii) that when a corporate body is called upon to consider and decide such questions as the imposition of a tax, the motion in that behalf must be couched in terms which would clearly show such necessary particulars as the amount or the rate of the tax intended to be imposed."

It may be pertinent here to refer to the opinion expressed by their Lordships on the plea of law raised by the Municipal Committee. The committee contended that the Notification published by the Local Govt. on November 25, 1922, though under the repealed Act of 1903, should be deemed to have been issued under the Act of 1922. The object of this contention was to invoke the protection of the presumption of law embodied in sub-s. 8 of s. 67 of the Act of 1922. Their Lordships overruled the contention on the ground that neither the invalid proceedings of the Committee nor the Notification of the Local Govt. were or was the proceedings or a Notification under the Act of 1903; in other words, the proceedings and the Notification which followed, being intrinsically invalid could not be validated under the new Act of 1922.

On the issue of fact as to whether or not a member was summoned, their Lordships found that the testimony of the member concerned to say that he had not received notice was not sufficient to sustain the challenge to the proceedings of the Committee. Their Lordships' observations made in that behalf clearly go to show that what is vital is the failure to summon *i. e.* to send notice and not the failure to receive the notice.

Their Lordships, while holding that the resolution imposing the tax was invalid, remanded the case to the trial Court to give the Committee an opportunity of adducing evidence to identify the "bye-laws drafted by the President" which were placed for consideration of the special meeting held on July 16, 1922.

Reverting to the points in controversy, the first question is whether the special meetings held in connection with the imposition of the tax were invalid for the alleged reason that they were not convened by the President as required by s. 31 (2) of the Municipalities Act. It is true that the notice of the earlier meetings and the notices of the later ones were issued by the Secretary, but convening does not mean issuing notices. To convene means to call together or to assemble. When notices are sent to every member or circulated among the members by the Secretary, it must be presumed that it was with the consent of the Chairman, particularly when he attends the meeting. Raghunath (P. W. No. 1) who was then the Secretary affirms that although he was not expressly asked to issue notices of the meetings, he used to consult the President and Vice-President in the matter of convening the meetings. Excepting the first meeting of the nominated body, he consulted the President and Vice-President in regard to all other meetings. There is no law, rule or bye-law laying down any special procedure to regulate the exercise of the President's power to convene meetings. If there is evidence of the President's assent to the calling of any meeting, he must be deemed to have convened the meeting. His assent is inferable from his presence at the meeting.

Both ordinary and special meetings are distinguishable from the extraordinary meetings which the President is required to convene on a requisition from the members. The initiative to call extraordinary meetings comes from the members, whereas the initiative to call any other meeting lies with the President who has necessarily to depend on his Secretary for guidance as to when to call any particular kind of meeting. Consequently, every meeting that is held must be presumed to have been convened by order of the President. Even on the assumption that there was any irregularity it could not, in its nature, affect the validity of the meeting itself and is cured by s. 23 of the Municipalities Act. Strictly speaking, it is nothing more than an informality. Reliance is placed on *Abaji Sitaram* v. *Trimbak Municipality* (2) in support of the proposition that the failure of the President to convene a meeting is an incurable irregularity. That case no doubt ostensibly supports the appellants but it must be understood in the light of its peculiar facts. The question there was whether a special general Committee meeting held on June 17, 1897 was validly constituted. It was found that neither the President nor any official member was present at the meeting and in the circumstances of that case it was held that the meeting was not called by the President and that the omission by him to convene the meeting was a defect which could not be treated as a mere informality. There might well be a divergence of opinion on the question whether the omission in the circumstances by the President to call a meeting was or was not a mere informality. In *Taher Ali* v.

(2) 28 B 66: 5 Bom. L R 689.

The Municipal Committee of Khamgaon (3) the Bombay case was considered but it was not followed by Kotval, A. J. C., as in his view the omission was a mere informality. In any case it is clear that the learned Judges who decided the Bombay case were fully inclined to condone the defect, if the President had been present at the meeting. In the present case the Pesident was present at the critical meetings as would be shown in the sequel and that circumstance renders the Bombay case inapposite.

The next question is whether the failure to serve some members invalidates the meetings. In the argument presented on behalf of the appellants it is assumed that non-receipt of notice is equivalent to failure to summon. In the leading case of *Smyth* v. *Darley* (4) it was held that the omission to summon a person entitled to be present at a special meeting of a corporation renders the acts done at the meeting in his absence invalid. In *In re Portuguese Consolidated Copper Mines Ltd.* (5), also it was held that the failure to give notice of the meeting when the member is within reach was a defect vital to the validity of the meeting. In *Mayor & Co. Merchant of the Staple of England* v. *Governor and Company of the Bank of England* (6), it was pointed out that giving of notice meant that there must be such knowledge or such means of knowledge as to give each corporator the opportunity of attending. It is in view of these decisions that their Lordships of the Privy Council in *Radha Kishan Jaikishan* v. *Municipal Committee, Khandwa* (1), laid down that failure to summon or non-receipt of summons is capable of being regularised by the member's attendance at the meeting.

Turning to the facts of this case it would appear that the crucial meetings were three, that is to say, those held on September 20, 1931, January 15, 1933, and December 5, 1933. Excluding the first meeting which will be considered separately in the sequel it would appear that Tukaram Totaram, the President, attended the last two meetings although he did not sign the notice in token of its receipt: see Ex. D-41 and Ex. D-44, which are not translated. The trial Court found that as regards the meeting held on January 15, 1933 the only person that was not served was Tukaram Totaram and as regards the last meeting dated December 5, 1933 Tukaram Totaram and Gulam Zilani were not served. The objection in regard to Tukaram loses all its cogency on account of his attendance at the meetings. At the last meeting Ghulam Zilani was not present but the point whether his non-attendance was due to failure to summon him is left in obscurity as he was not summoned as a witness. The omission of the plaintiff, on whom the onus lay, to examine him gives rise to a presumption adverse to him and that is reinforced by the clear evidence of Deshpande the Secretary that he tried his best to inform all members resident in the station and by post all those who were living outside Nandura. Shamrao (P. W. No. 2) was the peon who was charged with the duty of circulating the notice among the members. He affirms that occasionally the members read the notice and orally promised to attend the meeting but did not choose to sign. In case of a corporate body every presumption must be made in favour of the regularity of its proceedings and that presumption was left unrebutted by the plaintiffs who challenged the validity of the proceedings.

The next question is whether the meeting held on September 20, 1931 was a properly constituted meeting. The appellants' argument so far as it affects this meeting has great force. By Notification, No. 2576/848-M-VIII, dated May 28, 1931 the period of office of the nominated members of the Municipal Committee, Nandura, was extended till a new body was elected and began to function. The new elected body was to consist of 9 elected, 2 nominated and 2 selected members. 9 elected members could not displace any nominated member of the old body for the reason that it was not possible to determine which elected member was a successor of which nominated member so as to attract the application of sub-s. 3 of s. 16 of the Municipalities Act, 1922. Moreover, the Local Govt. had by the Notification aforesaid fixed the term of office of the nominated members up to the time that the new body would be formed and begin to function. That new body was fully constituted subsequent to that meeting of September 20, 1931 by Notification No. 273-/M-VIII, dated January 2, 1932. Consequently, the failure to summon the old nominated members

(3) 15 N L R 42 (46); 46 Ind. Cas. 682, A I R 1919 Nag. 156.
(4) (1849) 81 R R 392; 2 H L C 789.
(5) (1859) 42 Ch. D 160; 58 L J Ch. 813; 1 Meg. 246.
(6) (1888) 21 Q B D 160; 57 L J Q B 418; 36 W R 880; 52 J P 580.

who were qualified to act as corporators and summoning the new elected members who were then not so qualified rendered the proceedings of that meeting invalid and of no effect. Moreover, the proposal to impose the tax which was embodied in resolution No. 9; see Ex. D 45, suffered from the same defect of vagueness, as was held to be fatal in *Radha Kishen Jai Kishen* v. *Municipal Committee, Khandwa* (1).

If the meeting, dated September 20, 1931, were the sole meeting to consider the proposal to impose the tax the appellants must succeed. There is, however, another important aspect of the question which should not be lost sight of. The subject came up again for consideration of the new elected body at a subsequent special meeting on January 15, 1933, which must, therefore, claim our attention now. That meeting was held on the instructions conveyed by the Deputy Commissioner in his letter No. 697-AIII, dated November 2, 1932, in which it was pointed out that the proposal sent by the Municipal Committee was not in conformity with the rules. They were, therefore, asked to send a fresh proposal in a form sample of which was annexed to the letter. After this letter the Committee got a fresh opportunity of considering the subject *de novo* and to decide on the advisability or otherwise of imposing the tax. The notice of this meeting is Ex. D 12 and it gives intimation of the subject in these words: as Item No. 8 of the agenda, "to consider the imposition of tax on bales and *bojas*". The Committee passed a resolution in these term:

"The proceeding in respect of the imposition of the tax on ginned bales and *boja* within the limits of the Nandura Municipal Committee was received back from the Deputy Commissioner. (Thereupon) it is resolved unanimously that tax on a *bojas* be fixed at 1 anna and on a bale at 2 annas according to the rates of the Chikhali Municipality and the rules for the collection of the tax should be like that of the Jalgaon Municipal Committee."

The appellants are not prepared to admit that this resolution was in terms of s. 67 (1) of the Municipalities Act. They apparently overlook the close connection between sub-ss. (1) and (2) of s. 67. The integral part of a resolution contemplated in sub-s. (1) is not only the proposal to impose the tax which is implicit in the resolution but defining the class of persons or description of property proposed to be taxed, amount of tax to be imposed and the system of assessment to be adopted. It was because these vital particulars of the proposed tax were not embodied in the resolution passed by the Khandwa Municipal Committee that their Lordships of the Privy Council in *Radha Kishen Jai Kishen* v. *Municipal Committee, Khandwa* (1), remanded the case for further enquiry. The resolution reproduced above contained unlike the one in the *Khandwa case* particulars pronounced by their Lordships of the Privy Council as vital. The wording of the resolution may be inelegant but it leaves no manner of doubt that it embodies the intention of the Committee to impose the tax on *bojas* and bales at the rate of 1 anna and 2 annas respectively. That the resolution meant to impose the tax on persons carrying on the business of ginning and pressing is clear from the notice dated January 15, 1933 published in the *C. P. Gazette*, dated March 11, 1933. When the intention is clearly apparent from the wording of a resolution it is futile to stress the mere inelegance of expression.

The resolution which was passed on January 15, 1933, was the one duly passed in terms of s. 66 (1) and (2) of the Municipalities Act. The meeting also was duly constituted as the President was present even though he had not signed the notice. The various steps of the procedure regulating the imposition of a tax are these; (1) passing of a resolution embodying a proposal for the imposition of a tax and the framing of draft rules of assessment and collection, (2) publication of the proposal and the draft rules in the *official Gazette* inviting objections, (3) consideration and disposal of objections and forwarding the proposal in its final form to the Local Govt. (4) the Local Govt's order sanctioning the imposition of the tax confirming the rules, and (5) Notification by the Local Govt. of the imposition of the tax and the rules related thereto in the *official Gazette*.

When the subject came up for consideration before the meeting of January 15, 1933, it was in its initial stage and the notice. Ex. D-12, rightly described the subject as being "to consider the imposition of tax on bales and *bojas*." At that meeting it was open to the Committee to throw out the proposal for the imposition of the tax but they decided to adopt the proposal. The previous resolution proposing the imposition of the tax passed on September 20, 1931, was void and consequently the subject must be deemed to have come for the first time before the meeting, dated January 15, 1933, as required by s. 67 (1) and (2) of the Muncipalities Act. In terms of this resolu-

tion, dated January 15, 1933, was published the notice over the signature of the Secretary in the *official Gazette* of March 11, 1933. That notice clearly intimated that the proposal would be "taken into consideration" after the expiry of 30 days from the date of the publication of that notice and that any objection and suggestion in respect thereof must be forwarded to the President before the expiry of that period. The publication of this notice marked the second stage in the development of the proposal to levy the tax.

The last meeting, dated December 5, 1933, was held to consider the objections. The notice Ex. P-3 dated December 3, 1933, described the subject as being "to consider the bye-laws in respect of the ginning and pressing factories." This is quite in accordance with the notice published in the *Gazette* of March 11, 1933. At this meeting the objections were considered and disposed of. The decision was embodied in the resolution No. 1, dated December 5, 1933. This meeting was a special meeting which was duly constituted. The trial Court finds that Tukaram Totaram and Gulam Zilani were not served with notice of this meeting. The defect in respect of Tukaram was cured by his attendance: see Ex. D-44 in the original. Ghulam Zilani was no doubt absent but he was not examined to show that his non-attendance was due to failure to summon him.

It is clear that the new body constituted by election duly passed the proposal to impose a tax and after disposal of objections sent up the proposal with the rules of assessment and collection, to the Local Govt. for sanction. There is no doubt on the point that the Local Govt. sanctioned the proposal as well as the rules. An attack is made on the validity of the Notification published by the Local Govt. in the *Gazette* dated February 2, 1934. The Notification itself was dated January 25, 1934, showing that on that day the Local Govt. had sanctioned the proposal and confirmed the rules. That Notification is apparently defective in two respects, namely, the non-mention of sub-s. 7 of s. 67 of the Municipalities Act and the omission to specify the date from which the tax was to come into effect. The omission to mention sub-s. 7 is not material because the Local Govt. could not publish a Notification under any other provision except that one. The question is whether the omission to specify the date invalidates the Notification. Before applying the law one has to be clear about the real nature of the Notification under sub-s. 7 of s. 67 of the Municipalities Act. The Notification follows the sanction of the proposals by the Local Govt. and it directs the imposition of the tax as sanctioned. The order of the Local Govt. sanctioning the proposal to impose a tax is not a mere executive order but an order having the force of law from which the Municipality concerned derives its authority to impose the tax of a particular nature. It is in its nature a legislative order with all the force of law. In the General Clauses Act X of 1897 Indian Law is described as comprising any law, ordinance, order, bye-law, rule, regulation passed or made at any time by any competent legislature, authority or person in British India. The canons of construction of statutes must, therefore, apply to the Local Govt.'s order sanctioning the proposal and the rules. The Notification itself is nothing but publication of the order. The rule of interpretation bearing on the question of commencement of statutes is that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation. Maxwell's Interpretation of Statutes, 6th Edn. p. 739. In *Rex* v. *Smith* (7), Lord Alverstone, C. J., observed:

"At the present time there are two well-known dates in many Acts of Parliament, the date of the Act passing, and the date of its coming into operation. If, therefore, an Act is silent as to the date of its coming into operation, it comes into operation at the date of its passing."

On this principle the order sanctioning the proposal to impose the tax and the rules relating to its assessment and collection would be deemed to come into force on the day on which they were notified in the *Gazette*, that is on February 2, 1934.

In any case the omission to specify the date cannot deprive the Notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax. Under sub-s. 8 of s. 67 the Notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of this Act. That serves to validate the entire proceeding relating to the imposition of the tax and precludes any objection to its regularity or legality.

Now there survives the last point, *viz.*, whether the tax was illegal as being levied on commodities and not on persons carrying

(7) (1910) 1 K B 17 (24); 79 L J K B 1; 101 L T 816; 74 J P 13; 26 T L R 23; 54 S J 137; 22 Cox. C C 219.

on the trade of ginning and pressing. The Notification is quite clear in its terms that the tax was imposed on persons and not on commodities. Much reliance is placed on *District Board, Sialkot* v. *Sultan Muhammad Khan* (8), and it is urged that the tax is *ultra vires* of the Municipal Committee. In the cited case the tax was levied on the total annual income derived by the assessee from any trade, profession or calling and consequently, it was held that it was a sort of disguised income-tax. Nothing that is said in that decision has any bearing on the facts of this case. The tax on ginning and pressing of cotton is not a tax on income derived from the trade but on the process of ginning and pressing. This tax does not seek to take anything out of the income.

An additional ground was sought to be raised here, *viz.*, that the tax is in the nature of an excise tax and as such could not be enforced by the Municipal Committee in view of the recent decision of the Federal Court of India raported in *In re Central Provinces Motor Spirit Act* (9). This plea was not raised in the lower Court and we do not see our way to permit it at this late stage.

The result is that Radhakisan's appeal (second appeal No. 497 of 1937) stands dismissed with costs. In the other appeal (second appeal No. 492 of 1937) the plaintiffs claimed refund of Rs. 158-12-0 besides interest on the ground that this amount was recovered on March 9, 1935, in respect of some period prior to the imposition of the tax. We have held above that the tax would be deemed to have been imposed with effect from the date of the Notification, namely, February 2, 1934. It is not clear from the record whether any part of the amount recovered from the plaintiffs relates to a period anterior to the date of the Notification. If it does, the Municipal Committee would have no right to recover it and would be bound to refund the same to the plaintiffs. This case will go back to the trial Court for enquiry into this issue. With this reservation, the appeal is dismissed with costs except in regard to the claim for Rs. 158-12-0. Costs will abide the event.

Order accordingly.

(8) 9 L 340; 106 Ind. Cas. 882; A I R 1928 Lah. 53; 29 P L R 177.

(9) 180 Ind. Cas. 161; A I R 1939 F C 1; (1939) M W N 25; 49 L W 36; 5 B R 405 (2); 11 R F C 1; 20 P L T 197; 1939 O L R 144; 43 C W N 1 (F C).

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision Petition No. 20 of 1940
November 29, 1940

ALMOND J. C. AND MIR AHMAD, J.

AMIR FAHIM—PETITIONER

versus

AJUN IASA AND OTHERS—RESPONDENTS

N.-W. F. P. Muslim Personal Law (Shariat) Application Act (VI of 1935), s. 2 — Reversioner's suit for declaration that alienation by woman holding life estate is not binding on them, is not maintainable after the passing of the Act.

In all suits instituted after the passing of the N.-W. F. P. Muslim Personal Law (Shariat) Application Act the Courts must determine the rights of the parties under Muhammadan Law and not according to custom. A reversioner is unknown to Muhammadan Law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate His right under custom is based on a *spes successionis*, which is also unknown to Muhammadan Law.

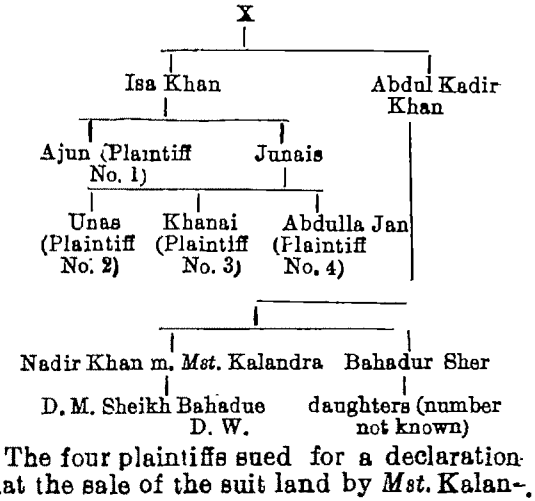
Consequently, after the passing of the aforesaid Act, the reversioners have no *locus standi* to sue for declaration that alienation by woman holding life estate is not binding on them. 192 Ind. Cas. 343 (1), relied on.

C. R. P. from an order of the Additional Judge, Peshawar, dated November 4, 1939.

Mian *Ziauddin*, for the Petitioner.

Lala *Basheshar Nath*, for Respondents Nos. 1 to 4. Respondent No. 5 in person.

Almond, J. C.—This is an application for revision of the order of the Additional Judge, Peshawar, dismissing the petitioner's appeal against the decree of the Sub-Judge, 4th Class, Peshawar, dated December 23, 1937. The pedigree-table below shows all the parties to the suit with the exception of Amir, defendant No. 2, who is the petitioner before us :



The four plaintiffs sued for a declaration that the sale of the suit land by *Mst.* Kalan-

dara, defendant No. 1, to Amir was invalid under custom and would not affect the plaintiff's reversionary rights. They alleged that *Mst.* Kalandara had only a life estate in the suit land which had been the property of her husband Nadir. Both the Courts below found that the alienation by *Mst.* Kalandara was not for legal necessity and was therefore invalid under the custom by which the parties were bound. The petition has been argued before us solely on the ground that in view of the enactment of the Muslim Personal Law (Shariat) Application Act. VI of 1935, the question must be decided according to Muhammadan Law and not according to custom. In a recent judgment of this Court in Civil Appeal No. 94/24 of 1938 *Fazal Haq Dilzada* v. *Dawar Shah* (1), it was explicitly laid down by a Bench that in all suits instituted after the passing of that Act the Courts must determine the rights of the parties under Muhammadan Law and not according to custom whether the inheritance had opened up either before or after the passing of the Act. A reversioner is unknown to Muhammadan Law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate. His right under custom is based on a *spes successionis*, which is also unknown to Muhammadan Law. We are therefore of opinion, that the plaintiffs have no *locus standi* to sue under Muhammadan Law for the relief which they now claim. We therefore accept the petition and setting aside the decrees of the Courts below dismiss the plaintiff's suit. As this petitioner has succeeded on a point raised for the first time, we direct that the parties bear their own costs in all the Courts.

D. *Petition allowed.*

(1) A I R 1940 Pesh. 52; 192 Ind. Cas. 313; 13 R Pesh. 37.

OUDH CHIEF COURT

Full Bench

Civil Revision Application No. 26 of 1937

January 15, 1941

THOMAS, C. J., YORKE AND GHULAM HASAN, JJ.

RAGHUNANDAN TEWARI—PLAINTIFF—APPLICANT

versus

Mst. SHEORAJI—DEFENDANT—OPPOSITE PARTY

Limitation Act (IX of 1908), Arts. 66, 80—Bond—Bond providing for payment of loan within seven years—Further stipulation that interest due would be paid at end of each year and that in default of such payment creditor would be entitled to recover entire amount of bond with interest—No interest paid in any year—Bond held single bond—Limitation for suit on bond held ran from date specified for payment as prescribed by Art. 66 and not from date of first default in payment of interest — Whole amount held did not become due on default so as to induce application of Art 80—Practice — High Court —Full Bench when satisfied that view previously taken in High Court about law of limitation is wrong, can declare correct law especially when its effect is to enlarge period.

The plaintiff instituted a suit on September 1, 1936, for recovery of money on foot of a bond dated September 2, 1926. The bond provided that the loan would be repaid within seven years from the date of execution of the bond. There was also a stipulation that interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for the recovery of the entire debt with interest. No interest was paid by the defendant in any year:

Held, that the bond such as one in question was a single bond notwithstanding the fact that there was what is called a default clause. Nor was it an instalment bond. The option given to the creditor was purely for the benefit of the creditor and did not make the money become payable. It merely gave the creditor a right, if he chose to exercise it, to have the money made payable Neither of the Arts. 68, 74 and 75, Lim. Act, were applicable to such a case. In such a case the period of limitation for instituting a suit for the amount due under the bond, ran from the date specified for payment as prescribed by Art. 66 of the Lim. Act and that it did not run from the date of the first default in payment of interest, nor did the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80. 162 Ind. Cas. 459 (1), not approved. [p. 489, col. 2; p. 490, cols. 1 & 2.]

[Case-law discussed.]

If on a consideration of the decisions on the point in question the High Court is satisfied that the view previously taken is the wrong view, there is no reason why it should not accept and declare what is the correct view; more particularly is this the case where the effect is not to deprive persons who have lent money under a bond, of an extended period of limitation to which formerly they had been held entitled but rather to enlarge the period of limitation, by doing which there can be no deprivation of rights. [p. 490, col. 1.]

C. R. App. of the order of the Civil Judge (as Judge of Small Cause Court), Fyzabad, dated November 4, 1936.

Mr. *K. P. Misra*, for the Applicant.

Mr. *Hyder Husain*, for the Opposite Party.

Order of reference to a Bench

Radhakrishna, J.—(*November* 30, 1939) —This is a revision under s. 25 of the Small Cause Courts Act against a decree of the Civil Judge, sitting as Small Cause Court Judge, Fyzabad, dismissing the plaintiff's suit.

The plaintiff brought a suit on foot of a bond dated September 2, 1926. This bond

provided for payment of the loan within seven years from the date of the bond. It was further stipulated that interest due would be paid at the end of each year and if it was not so paid the creditor would be entitled to sue for the recovery of the entire amount of the bond with interest.

The lower Court on the authority of *Shiva Narain* v. *Badal* (1936 Oudh Weekly Notes, 518) (1) held that the suit was barred by time.

The learned Counsel for the applicant has among other points raised by him, contended that Art. 66 of the Indian Lim. Act was applicable to his suit and it was within time. Article 66 of the Indian Lim. Act runs as follows :

On a single bond, where a day is specified for payment.	Three years.	The day so specified.

According to him, the bond fixed the period for payment, and the fact that there is another stipulation in the bond by which the creditor has been given an option to sue earlier, does not make Art. 66 of the Indian Lim. Act inapplicable.

The same contention as is raised by the learned Counsel before me was raised in the case reported in *Shiva Narain* v. *Badal* (1936 O. W. N. 518) (1). The learned Judges at p. 522* observed as follows :

"It was also argued that the suit was governed by Art. 66 of the First Schedule of the Indian Lim. Act. This Article provides for the case of a single bond where a day is specified for payment. The provision contained in the bond in suit about payment of interest month by month and entitling the creditor to recover his money in case of default of payment of interest for every month are such as to exclude the application of Art. 66 to the case. It is hardly possible to say that such a bond is one where a day is specified for payment."

The learned Counsel contends that the view expressed above is not sound and is open to question. He has in support of his contention relied upon the following cases among others : *Narain Babu* v. *Gouri Persad Bias* (I. L. R. 5 Calcutta 21), (2), *The Collector of Etawah* v. *Bati Maharani* (I. L. R. 14 Allahabad, 162), (3), *Gaya Prasad* v. *Sher Lal* (15 Allahabad Law Journal, 313) (4) and *L. Narain Das* v. *Mannoo Lal* (A. I. R. 1935 Allahabad, 405) (5).

These cases no doubt support his contention on the whole length. The point argued is a very important question of law, and in view of the fact that these cases were not referred to before the Bench which decided the case reported in 1936 Oudh Weekly Notes, 518, (1) I think it proper that the present case be decided by a Bench of two Hon'ble Judges.

I, therefore, refer this case for decision by a Bench of two Judges of this Court under s. 14 (2) of the Oudh Courts Act.

Order of reference to a Full Bench

Ziaul-Hasan and Yorke, JJ.—(*May* 8, 1940).—This is an application under s. 25 of the Provincial Small Cause Courts Act for revision of a decree of the learned Judge, Small Cause Court, Fyzabad and it has been referred to a Bench by a Single Judge of this Court under s. 14 (2) of the Oudh Courts Act.

The suit of the plaintiff applicant was for recovery of money on foot of a bond dated September 2, 1926. The bond provided that the loan would be repaid within seven years from the date of execution of the bond. There was also a stipulation that interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for the recovery of the entire debt with interest.

On a plea of limitation being raised on behalf of the defendant the learned Judge of the trial Court accepted that plea in view of the decision in *Shiva Narain* v. *Badal* (1936 O. W. N. 518) (1) and dismissed the suit. The plaintiff thereupon filed this application for revision of the lower Court's decree. When the case came up before a learned Judge of this Court, the learned Counsel for the applicant referred to various decisions of the Calcutta and Allahabad High Courts which were in conflict with the case mentioned above. The learned Judge therefore feeling doubt as to the correctness of the decision in *Shiva Narain's case* (1) referred the case for decision by a Bench.

The bond in *Shiva Narain's case* (1) was executed on July 18, 1929, and contained a promise to repay the loan in two years. It further provided that interest would be paid month by month and in case of non-payment of interest monthly, the creditor would have a right to sue for his money within or after the stipulated period. It

(1) 1936 O W N 518; 162 Ind. Cas 459; 1936 O L R 285; 8 R O 385; A I R 1936 Oudh 279.
(2) 5 C 21.
(3) 14 A 162.
(4) 15 A L J 313; 39 Ind. Cas. 574; A I R 1917 All. 402.
(5) A I R 1935 All. 405; 157 Ind. Cas. 409; (1935) A L J 341; 1935 A L R 786; 8 R A 183.

*Page of 1936-O. W. N.—[*Ed.*]

will thus be seen that the terms of the bond in that case were similar to those of the bond before us. A Bench of this Court held in that case that Art. 66 of the Lim. Act did not apply as the bond could not be said to be one in which a day was specified for payment. We have a number of cases in which it was held by Courts, other than this Court, including the Court of the Judicial Commissioner of Oudh, that a suit on a bond similar in terms to the one now before us is governed by Art. 66 of the Lim. Act.

In the case of *Durga* v. *Tota Ram* (16 O. C.,45) (6) the bond provided that the money would be repaid with interest within three years, that interest would have to be paid monthly and that if default were made in the payment of interest for six months the creditor would be at liberty to realize the principal and interest due on the bond without waiting for the expiry of the said term or after the expiry of the said term whichever be thought proper. It was held that the plaintiff's claim could not be regarded as time barred if he brought his suit within limitation from the date fixed for re-payment.

The bond in *Hari Lal* v. *Thamman Lal* (26 O. C., 121) (7), provided for repayment in seven years and for payment of interest year by year and there was a stipulation that if default was made in the payment of interest for two consecutive years, the entire amount due on the bond would be realizable. It was held that the creditor had an option to recover the amount due either when two consecutive defaults were made or at the end of the seven years' period as laid down in the bond. The learned Additional Judicial Commissioner who decided the case was personally of opinion that Art. 66 of the Lim. Act was not applicable to the case but inspite of that view decided the case, owing to various previous decisions of the Court, contrary to that view.

In *Narain Babu* v. *Gouri Persad* (I. L. R. 5 Cal. 21) (2) the loan was repayable within six months from the date of execution of the bond and there was a provision for recovery of the entire amount in case interest was not paid monthly. It was held that the suit was governed by Art. 75 of the Indian Lim. Act (IX of 1871) which exactly corresponds to Art. 66 of the present Act. In *The Collector of Etawah* v. *Beti Maharani* (I. L. R. 14 All., 162) (3) also, it was held that Art. 66 of the Lim. Act is applicable to a suit on a bond similar in terms to those of the bond before us.

In *Lalta Prasad* v. *Gajadhar Shukul* (I. L. R. 56 All., 283) (8) it was held that a stipulation in a bond entitling a creditor, on the occurrence of default in payment of six monthly interest, to sue for the entire amount although the period fixed for repayment of the principal had not expired, is a stipulation for the benefit of the creditor, which it is open to him to waive at his option and that if the creditor waives such option, the bond does not become payable until the expiry of the period fixed for payment and limitation begins to run from such expiry.

A similar view was taken in the case of *L Narain Das* v. *Mannoo Lal* (A. I. R. 1935 All., 405) (5).

In view of the above decision, we ourselves doubt the correctness of the law as laid down in 1936 O. W. N. 518; (1), but as that decision was by a Bench of this Court, we refer the present case to a Full Bench for decision.

Opinion of the Full Bench

Yorke, J.—(*December* 18, 1940).—This Full Bench reference under s. 14 (1) of the Oudh Courts Act arises out of a suit to recover a sum of Rs. 200 with interest at two annas per rupee per year due on an unregistered bond for Rs. 200 executed by the defendant on September 2, 1926, whereby the original amount was made payable with interest within seven years. The bond further provided that interest would be paid at the end of each year, and if it was not so paid, the creditor will be entitled to sue for the recovery of the entire amount with interest without waiting for the expiry of the period of seven years stipulated in the bond.

The case came before the Civil Judge of Fyzabad, exercising the powers of a Small Cause Court, and he held that the cause of action for the suit arose on September 2, 1927, when interest for the first year was not paid. He therefore held that limitation began to run, presumably under Art. 80 of the Indian Lim. Act from that date, and therefore, the suit which was instituted on September 1, 1936, that is within three years from the expiry of

(6) 16 O C 45; 19 Ind. Cas. 738.
(7) 26 O C 121; 70 Ind. Cas. 85; 9 O L J 416; 4 U P L R (O) 103; A I R 1923 Oudh 19.
(8) 55 A 283; 149 Ind. Cas. 181; (1933) A L J 550; 6 R A 852; A I R 1933 All. 235.

the period of seven years specified in the bond, was barred by limitation, and he dismissed the suit relying on the decision of a Bench of this Court in *Shiva Narain* v. *Badal* (1936 O. W. N. p. 518) (1).

The matter came on an application in revision under s. 25 of the Prov. Small Cause Courts Act before the late Mr. Justice Radha Krishna Srivastava. It was argued before him that the decision in *Shiva Narain's case* (1) was unsound and a number of cases were quoted before him which led him to consider it desirable to refer the case for decision to a Bench of two Judges under s. 14 (2) of the Oudh Courts Act.

On the case coming before a Bench of this Court, of which I was a member, the Bench felt a doubt as to the correctness of the law as laid down in *Shiva Narain's case* (1) and referred the case to a Full Bench for decision. The Division Bench lost sight of the fact that this reference was one falling under the provisions of s. 14 (1) of the Oudh Courts Act and referred the whole case, whereas it could under that section only refer a question of law or custom having the force of law or of the construction of any document, or of the admissibility of any evidence, arising before it. It appears to me that the question which the Bench really sought to refer to this Bench should be framed in the following form :

Whether in the circumstances described limitation for a suit to recover the amount due under the bond ran from the date fixed for payment under Art. 66 of the Indian Lim. Act or it ran from the date of the first default in payment of interest on the view that the whole amount of the bond became payable on that date and Art. 80 of the Lim. Act was applicable.

The matter is of general importance because bonds are frequently drafted in this particular form and such bonds do not fall within the purview of instalment bonds to which Art. 74 or Art. 75 is applicable, but the question whether Art. 66 or Art. 80 is applicable is by no means free from difficulty and has been the subject of difference of opinion in the High Courts. Learned Counsel for the applicant and the opposite party have however taken us through the cases only of this Court and of the other High Court of this province, the Allahabad High Court.

For the applicant the case which is put forward is that a bond of this type, despite the presence of the option given to the creditor on a default in the payment of interest to sue for the whole amount, is a "single" bond within the meaning of Art. 66. The first question for consideration is whether this is a sound view.

Learned Counsel for the opposite party argues that such a bond is not a single bond. For the definition of "a "single bond" he has referred us to Halsbury's Laws of England and to various commentaries on the Lim. Act. In Halsbury's Laws of England (2nd Edition) Vol. III, para. 162 at p. 92 it is stated that

"a bond merely for the payment of a certain sum of money without any condition in or annexed to it, is called a simple or single bond. Such instruments are rarely, if ever, met with at the present day, and the term 'single bond' is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more."

Referring to this definition Rustomji in his Law of Limitation (5th Edition), Vol. I, at p. 763 remarks, presumably quoting from a case

"The expression 'single bond' is undoubtedly a term of art borrowed from English Law, but even in England a bond of this nature is rarely, if ever, met with at the present day, and it is therefore difficult to understand why these articles are still retained on the Indian statute book."

We have also been referred to U. N. Mitra's Limitation and Prescription, Tagore Law Lectures, (6th Edition Vol. II, p. 1241), where the learned Commentator dealing with Art. 66, remarks on the absence of an exhaustive definition of what a bond is and defines a 'single bond' as "a written engagement for the payment of money without a penalty." This definition necessarily gives rise to the question what is a penalty, and the obvious question in the present case would be whether the grant of an option to the creditor to sue for the whole amount can be construed as a penalty. It is, of course, obvious that if for example it is provided that in case of a default interest will be calculated 'compound' instead of 'simple' or it will be calculated at a higher rate, the bond provides for a penalty and in terms of this definition is not a single bond.

The learned Commentator at p. 1252 under Art. 75, deals with this point and remarks :

"A provision in a note or bond for the immediate payment of the whole, on any default in the payment of instalment, is often spoken of as a penalty or a condition of forfeiture, but it has been held in equity that a debt being presently due, such stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The Court cannot relieve the debtor against the consequence of a default in the punctual payment of any instalment, or compel the creditor to waive the default."

I am clearly of opinion, that such a provision is not a penalty, and that view has been taken by the Allahabad High Court in one of the cases quoted to us *vide Gaya Prasad* v. *Sher Ali*, (15 A. L. J. R. 313), (4), in which a Bench of that Court held Art. 66, applicable to such a bond. This same view was taken in cases of the Judicial Commissioner's Court, of which *Durga* v. *Tota Ram*, (16 O. C., 45), (6), is a sample. In that case it was held that

"as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for re-payment, whether the interest for the first six months was paid or not, the plaintiff's claim could not be regarded as barred by time because he chose to stick to the longer term."

The learned Judicial Commissioner held that where there was a condition permitting the creditor to wait for the expiry of the longer term or to sue before its expiry as he thought proper, the question was not one of waiver but of a pure contract and the creditor was entitled to adopt either of the two alternatives expressly contemplated by the bond, Art. 65 (now Art. 66) or 80 of the Lim. Act applied to such cases, and the debtor had no right to compel the creditor to stick to the shorter term. In that case a reference was made to *Narain Babu* v. *Gouri Persad Bias*, (I L. R. 5 Cal., 21) (2). That was a case in which the defendant executed a bond which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond contained a clause to the effect that if the interest should not be paid according to the terms of the bond, or if the creditor should feel any doubts as to his being able to realise the principal he should not be bound to wait until the expiry of the six months in order to bring a suit, should be at liberty to realize the principal and interest in any manner he might choose. It was held, that a suit on the bond brought within three years from the date of the day specified therein for payment was not barred by limitation, as the case fell under Art. 65 and not under Art. 75 of Sch. II of the Lim. Act, IX of 1871. The learned Judges in effect held that such a bond was a single bond falling within the mischief of the present Art. 66.

The decision in *Durga's case* (6) was followed most unwillingly by Mr. Wazir Hasan as Additional Judicial Commissioner in *Hari Lal* v. *Thamman Lal*, (26 O. C., 121) (7). He was of opinion that such a bond was not a "single" bond and that a bond which merely fixes a long period within which the whole amount is to be repaid does not specify a day for payment. He greatly preferred the view taken by Mr. Chamier, Additional Judicial Commissioner, in *Har Narain* v. *Beni Pershad* (8 O. C., 77) (9) that

"such a bond is not to be regarded as a single bond because it contains something more than an undertaking to pay a certain sum of money on a day specified."

Mr. Chamier had gone on in that case to hold that Art. 80, was applicable and the suit was barred by limitation, since limitation began to run from the default which took place in November 1900, and the suit was not instituted until March 1904.

After the decision in *Hari Lal's case*, (26 O. C., 121) (7), the same question came before a Bench of the Judicial Commissioner's Court, of which Mr. Wazir Hasan was one of the members, in *Pherai* v. *Pudai Ram*, (27 O. C. 318) (10). The Bench discussed the previous cases, including those which we have mentioned above and took the view that it was not open to the parties to an agreement to contract themselves out of the law of limitation by inserting in their agreement two alternative starting points for limitation. They held that on the date of the first default the creditor had a good cause of action, and therefore limitation began to run, that Art. 80 of the Lim. Act was applicable and a suit instituted within three years from the date specified for payment, but outside three years from the date of the first default, was barred by limitation. The view which was taken in *Pherai's case* (10), is the view which was followed in *Shiva Narain's case* in 1936 O. W. N., 518 (1), the learned Judges saying in terms,

"we are not therefore prepared to agree with the applicants' contention that the ruling in *Pherai* v. *Pudai Ram* (10), has ceased to be good law because of the decision in *Lasa Din's case* (11)."

This brings us to a consideration of *Lasa Din's case* (11). *Lasa Din's case* (11), was a case of a mortgage to which Art. 132 of the Lim. Act was applicable. That article provides a period of 12 years for a suit to enforce payment of money charged upon immovable property, the period of limitation begins to run from the date when the money sued for becomes due, that is ordinarily the due date stated in the mortgage

(9) 8 O C 77.

(10) 27 O C 318; 85 Ind. Cas. 280; 10 O & A L R 1087; 1 O W N 647; A I R 1925 Oudh 502.

(11) 7 Luck 442; 178 Ind. Cas. 779; Ind Rul. (1939) P C 251; 63 M L J 187; (1932) M W N 942; A I R 1932 P C 207; 36 C W N 1017; 36 L W 248; 56 C L J 237; (1932) A L J 913; 34 Bom. L R 1600 (P C).

deed. *Lasa Din's case* (11), came in second appeal before a Bench of this Court which held that

"where a mortgage deed fixes a term of six years, which would mean that the money thereon is to become due at the end of this period and further contains a clause giving the mortgagee the right to sue within six years in case of default in the payment of interest, the money must be considered to become due at the earliest date when it is possible for the mortgagee to enforce paymant of it, and the starting point for limitation of 12 years prescribed by Art. 132 of the First Schedule of the Indian Lim. Act woold be the date of the first default in the payment and a suit not brought within that period is time-barred."

That case went to the Privy Council and the decision of their Lordships is reported in *Lasa Din* v. *Gulab Kunwar*, (I. L. R. 7 Lucknow, 442) (11).

Their Lordships held that

"under the Indian Lim. Act, 1908, Sch. I, Art. 132, suit to enforce a mortgage for a stipulated period can be instituted within 12 years of the expiry of the period although a default by the mortgagor has occurred during the period and by the terms of the mortgage the mortgagee thereupon had an immediate right to enforce the mortgage. The money become due within the meaning of the above article only when either the stipulated period has expired, or, a default having occurred, the mortgagee has exercised his option to enforce the mortgage."

Their Lordships had in a previous case, *Pancham* v. *Ansar Husain* (L. R. 53 I. A, 187 (12), expressed doubts as to the soundness of the view that limitation began to run against the mortgagee from the date of a default by the mortgagor which gave to the mortgagee an option to sue for the mortgage money. In *Lasa Din's case* (11) their Lordships held that "a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees'." Their Lordships went on to say,

"It purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words by the breach of his contract—the mortgage money becomes immediately 'due', it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagee is, in effect, converted into an option in the mortgagor.'

Their Lordships said further on that they were not prepared to hold that the mortgagor could in this way take advantage of his own default; they did not think that upon such default he would have the right to redeem, and in their opinion the mortgage money did not "become due" within the meaning of Art. 132 of the Lim. Act until both the mortgagor's right to redeem and the mortgagees' right to enforce his security had accrued. Towards the end of their judgment their Lordships remarked,

"If in the Indian cases the question were 'When did the mortgagee's cause of action arise?'—i. e., When did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions."

That is those which had been followed by the Chief Court in *Lasa Din's case* (11). "Judged by the Indian criterion," (that is, the starting point of limitation mentioned in the article of the Lim. Act itself)

"'when the money sued for' became due', upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time."

Lasa Din's case (11) settled a vexed question for all mortgage cases following that decision, but the question arose whether the principle of that decision was applicable to bond suits to which Art. 132 is not applicable but Art. 80 or 66 is applicable. Prior to the decision in *Pherai's case* (10) the Allahabad High Court had been inclined to the view that the stipulation for an option to sue on default of payment of interest during the period of the currency of a bond did not operate to take the bond out of the description of a single bond to which Art. 66 was applicable. The first case of the Allahabad High Court quoted to us was *Gaya Prasad's case* (4) referred to above (15 A. L. J. R., 313), (4). There the learned Judges said that the instrument sued upon was a single bond which specified a day for payment, namely three years from the date of the bond. They considered that the provision in the bond which provided that the creditor had the option of suing at once or waiting until the prescribed period to be immaterial for the purpose of computing the period of limitation and that the creditor must be presumed to have exercised the option which was clearly given to him by the terms of the bond.

This view was followed in *Makrand Singh* v. *Kallu Singh* (17 A. L. J. R., 647), (13) a case of a mortgage bond in which money was payable in 7 years but the mortgagee was given the option of suing for his money in default of payment of interest in any year. The mortgagee had obtained a decree and got the mortgaged property sold and then applied for a personal decree, and it was held that as the mortgage bond was a registered bond

(12) 53 I A 187; 99 Ind. Cas. 650; A I R 1926 P C 85; 24 A L J 736; (1926) M W N 520; 24 L W 241; 48 A 457; 31 C W N 324 (P C).

(13) 17 A L J 647; 50 Ind. Cas. 640; A I R 1919 All 226.

he could claim a period of limitation of six years from the date specified in the bond and not merely six years from the first default in payment of interest.

The principle of these two cases was applied by another Bench of the same Court in *Sham Lal* v. *Tehariya Lakhmi Chand* (18 A. L. J. R., 476) (14). In this case a mortgage deed provided that the money was to be repaid in five years, that interest was to be paid every six months and that in case of non-payment of interest for four six monthly periods the creditor would have power to realise the whole of the amount due to him in a lump sum within the fixed period (that is without waiting for its expiry), and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason, then the same conditions and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full.

On a suit to enforce this bond the mortgage as such was held to be invalid, but a simple money decree was passed in the plaintiff's favour. The suit was instituted within six years of the expiry of the period fixed for payment, but beyond six years of the non-payment of two years' interest. It was held that the suit was not time-barred, and the argument that Art. 80 read with Art. 116 of the Lim. Act was applicable and that the suit ought to have been brought within six years from the failure to pay two years' interest was repelled.

We have not been shown any of the cases between this case and *Lasa Din's case* (11). The first case of the Allahabad High Court after *Lasa Din's case* (11) to which we have been referred in *Lalta Prasad* v. *Gajadhar Shukul*, (A. I. R. 1933 All., 235) (8). In that case it was provided in a simple bond that the debt was to be paid in four years and that interest must be paid on the amount every six months. It was further provided that in case of default in payment of interest of any six monthly period or of the amount of principal, the creditor had power to realise in any way he liked his entire amount. Default was made in the payment of interest from the very outset. It was held that

"the covenant in the bond, entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years, was for the benefit of the creditor, and it was open to him to waive that option, and to wait for the full period of four years before putting the bond into suit, and that the time for recovery of the debt did not begin to run from the date of the first default."

The learned Judges referred to *Lasa Din's case* (11) and remarked that the reasons contained in the judgment of their Lordships applied with full force to the case of a simple money debt. In the headnote the Editors have referred to this portion of the judgment as having reference to Art. 75, but it is quite clear that Art. 75 had no application whatever, and Art. 75 was not referred to in the judgment. Clearly the learned Judges treated the case as one to which Art. 66 was applicable.

Following this decision a single Judge of the same Court in *L. Narain Das* v. *Mannoo Lal* (A. I. R. 1935 All., 405) (5) held that

"Where in a simple bond it is provided, that, if the monthly interest is not paid or if the principal money lent is not paid at the end of a specified period, the creditor may sue, even though there is a breach of the condition for payment of interest, still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. In such cases the clause regarding right to sue on breach of condition regarding interest is exclusively for the benefit of the creditor. The two Arts. 66 and 68 must be read together in the case of such bonds; and limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together are tantamount to Art. 132 and the expression 'when the money sued for becomes due' would apply to either Art. 66 or Art. 69."

The learned Judge who decided this case referred to *Lasa Din's case* (11) and discussed the question whether the principle laid down in that case was applicable to cases of simple bonds, and he considered that the reasoning would apply also to the latter class of cases. Dealing with an argument about the applicability of Art. 80 the learned Judge remarked that even if that article were taken, limitation would run from the time when the bond became payable, and he was evidently inclined to the view that the bond did not become payable merely because the creditor had an option to institute a suit at that date which he might or might not exercise, that is he interpreted the word "payable" as having the same meaning as the word "due" in Art. 132, with the necessary implication that both these words imply not only that the creditor has a right to recover the money but that is bound to exercise that right and has not merely an option either to exercise it or not to exercise it.

The same view has been taken in a Single

(14) 18 A L J 476; 58 Ind. Cas. 278; 2 U P L R (A) 102.

Judge case of the Lahore High Court, *Mool Chand* v. *Chhittar*, (A I R 1935 Lah. 948) (15). The learned Judge said summarising the decisions briefly,

"it has been held that a clause, such as that attached to the bond now in suit, gives an option exclusively in favour of the creditor, who is entitled to the benefit of the investment for the full term originally provided, and need not sue until that term expired even if there is a default in the payment of interest."

Another case in which there is definite support for this view is *Muhammad Husian* v. *Sanwal Das*, (I L R 56 All. 954) (16). It is stated in the headnote,

"the Privy Council decision in *Lasa Din* v. *Gulab Kunwar* (11), has definitely overruled the ruling in *Shib Dayal* v. *Mehrban* (I L R 45 All. 27) (17), on the question of the commencement of limitation for a suit for sale on a mortgage, and has by necessary implication overruled it also on the question of commencement of limitation for a claim for a personal decree. The question in the present case being one of a personal decree was governed by Art. 80 read with Art. 116 of the Lim. Act, and not by Art. 132, applicable to a suit for sale on a mortgage, as in the case of *Lasa Din* v. *Gulab Kunwar* (11). But there was no distinction between the expression "money becomes due" in Art. 132 and the expression 'money becomes payable' in Art. 80, if in either case the creditor had an option to disregard the stipulated period and he did not exercise that option, and the same reasoning applied to both classes of suits on the question of the starting point of limitation."

King, J. in his judgment in this case remarked that in *Lasa Din's case* (11), their Lordships laid stress upon the point that the provisions enabling the mortgagees to sue before the expiry of stipulated period is inserted "exclusively for the benefit of the mortgagees", giving them an option either to enforce their security or to stand by their investment for the full term. He said that he took this to mean that the mortgagee had an option of treating the money as having become due by demanding or suing for it, and that it did not become due unless he exercised his option, even though the mortgagor might already have a right to redeem in accordance with the terms of the mortgage contract. Further on he remarked that the time did not begin to run against the mortgagee before the expiry of the stipulated period unless he availed himself of the option inserted exclusively for his benefit.

As against this case reference was made on behalf of the opposite party to the Full Bench case of *Jawahar Lal* v. *Mathura Prasad*, (I L R 57 All. 108) (18), but this was a case under Art. 75, and therefore *prima facie* inapplicable in the passage relied upon. Suleman, Chief Jusice, said :

"The principle laid down by the Privy Council in *Lasa Din* v. *Gulab Kunwar*, (I L R 7 Luck. 143) (11), regarding the necessity of the mortgagee choosing to exercise his option under the default clause in order to make the mortgage money due and the limitation to start, should not be extended to cases of money bonds falling under Art. 75. The case of a mortgage is peculiar and stands on a different footing; and the reasoning in *Lasa Din's case* (11), is applicable only to cases of mortgage and inapplicable to money bonds. Further each article of the Lim. Act, has to be interpreted according to the particular language employed in that article, and the starting point of limitation under Art. 75, is definitely laid down to be the date of default, and not, as in Art. 132, the date 'when the money becomes due.'

Even supposing, however, that on the principle in *Lasa Din's case* (11), on the occurrence of the default it would depend on the choice of the creditor whether the whole amount would become due or not, in the present case the creditor exercised that option by giving notice enforcing the default clause and demanding payment of the whole amount. The whole amount became immediately due and time began to run against him and he could not thereafter fall back upon Art. 74."

This case is clearly distinguishable from cases of the type of the present case in a number of different ways.

Coming now to consider *Shiva Narain's case* (1936 O W N 518) (1), in the light of these decisions, it seems to me, with great respect, that the view taken in that case is not satisfactory or convincing. The learned Judges, as I have remarked earlier, referred back to *Pherai's case* (10) and they distinguished *Lasa Din's case* (11), on the ground that that was a case of a mortgage, and a mortgagor and a mortgagee had reciprocal rights which they did not consider to be the case between the executant of a bond and the obligor, (a point dealt with by Bennet, J. in the Allahabad case of *Narain Das* v. *Mannoo Lal*) (5). They further went on to refer to *Jawahar Lal* v. *Mathura Prasad*, (I L R 57 All. 108) (18), on the question of the effect of the option, and in this connection they referred to a remark of King, J. where he said (with reference to an instalment bond to which Art. 75 applied) that when the statute laid down that in certain circumstances time would begin to run from the date when the default was made, it was not open to the parties to agree that the creditor might simply ignore the default and that if he did so, limitation would

(15) A I R 1935 Lah. 948; 160 Ind. Cas. 1068; 8 R L 659 (1).

(16) 56 A 954; 148 Ind. Cas. 951; 6 R A 795; (1934) A L J 231; A I R 1934 All. 397 (F B).

(17) 45 A 27; 69 Ind. Cas. 981; 20 A L J 819; A I R 1923 All. 1 (F B).

(18) 57 A 108; 151 Ind. Cas. 585; 7 R A 169; A I R 1934 All. 661; (1934) A L J 1035; 1934 A L R 873 (F B).

not begin to run until the expiry of the stipulated period. They remarked with reference to the bond in suit, "It is clear from the terms of the bond that it became payable as soon as a default is made in the payment of interest." Doubtless the bond could be described as having become payable in the sense that the creditor was entitled to have it made payable. They went on to say,

"when once the amount becomes payable limitation must begin to run and it cannot be stopped because the bond provides an alternative starting point for limitation. The creditor cannot be allowed to ignore the earlier starting point of limitation because, as soon as the money once becomes payable limitation must begin to run irrespective of the wishes and convenience of the creditor. The matter is one the determination of which rests on the terms of the statute and not on the wishes or option of the creditor,"

that is to say they interpreted the option given to the creditor to institute a suit on this default as a clause which made the amount then due payable in the sense that that word is used in Art. 80 of the Lim. Act.

What the learned Judges really did was I think to apply arguments based on the wording of Art. 75 (which makes time run from the date of default) to a case to which they held Art. 80 to be applicable, by taking the view that the money became "payable" on the default in payment of interest. It seems to me that on this point the reasoning of *Lasa Din's case* (11) is clearly applicable and that the option given to the creditor on such default does not make the whole amount payable but only gives the creditor a right which he may or may not exercise to have it made payable. Such an option does not bring in the application of Art. 75 or by itself make time begin to run under Art. 80.

As pointed out by Sulaiman, C. J. in *Jawahar Lal's case* (18):

"The Lim. Act, is in a sense a purely arbitrary enactment and the various starting points for purposes of limitation laid down in the third column of the First Schedule are equally aribitrary. It is not absolutely necessary that there should be a consistency or a uniformity of any definite principle in fixing the various starting points It is a mere matter of choice dependent on public policy. In some cases the starting point is fixed as the date of the execution of the bond. In other cases the starting point is the date fixed for payment. In some other cases it is the date of the first default Each article has therefore to be interpreted according to the particular language employed in that article and, ordinarily, irrespective of somewhat similar language employed in other articles."

He went on to point out the contrast between the wording in the third column of Art. 132 and Art. 80 from that in the third column of Art. 75, under which article the starting point is when the default is made, and in case the obligee waives the benefit of the provision, then the date of the fresh default. On the reasoning adopted by the learned Chief Justice *Lasa Din's case* (11) clearly could not be made applicable to a case under Art. 75 where under the statute itself time began to run from the date of default. On the other hand, as it appears to me, the refusal to apply the principle stated in *Lasa Din's case* (11) to cases of the present type involves straining the effect of the option to sue so as to make it lead inevitably to the result that the money has become payable. In this connection I may refer to another remark of Sulaiman, C. J. at p. 127 * of *Jawahar Lal's case* (18) where he remarks.

"I would guard myself against holding that the case of every bond with a default clause the whole amount would necessarily become due (thati upon the occurrence of a default). The answer would depend on the particular language of the document employed, but I would certainly hold that even if it be held that the money does not become due immediately on the occurrence of a default, it would certainly become due if the creditor exercises his option by demanding the amount and by serving notice on the debtor to pay the whole sum."

To sum up my conclusions, in the first place I am of opinion that a bond such as that with which we have to deal in the present case is a single bond, notwithstanding the fact that there is what is called a default clause. The fact that bonds of the single bond type are now rare in England seems to me to be irrelevant, as this type of bond is far from being rare in this country.

The next point I would make is with reference to Art. 68. Personally I feel some doubt about Art. 68 being applicable to cases of this kind. It is true that the bond contains a condition but the condition is not one which relates to the whole sum due on the bond. It seems from the notes in the various commentaries on the Lim. Act that Art. 68 has been interpreted as a plying rather to bonds of the nature of security bonds, where the executant is only liable to make a payment on breach of the condition and is not otherwise liable under the bond.

Next it seems to me that Art. 74 and Art. 75 and the various rulings under those articles have no application. By no stretch of imagination could the present bond or bonds of this type be called instalment bonds, and it is only in the case of an instalment bond to which Art. 75 applies that

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time begins to run from the date when the default is made.

The only other article which can be contrued as applicable is Art. 80. The only line of reasoning on which Art. 80 can be made applicable is first to accept the view that on a default occurring the money immediately becomes payable. To meet such an agreement it appears to me that the reasoning and the general principles laid down in *Lasa Din's case* (11) are fully applicable. The option which is given to the creditor is purely for the benefit of the creditor and does not make the money become payable. It merely gives the creditor a right, if he chooses to exercise it, to have the money made payable. Whether therefore Art. 66 or Art. 80 is applied, limitation begins to run from the date fixed for payment or the date when the money becomes payable, and that is the date stated in the document itself, or the expiry of the period stated in the document.

Learned Counsel for the opposite party has suggested that even if doubt is felt about the view of the law in 1936 O. W. N., (1) the Court should not readily modify the view of the law taken in that case because the law of limitation is adjectival or procedural law. I do not feel much force in this argument. It seems to me that if on a consideration of the decisions on the point we are satisfied that the view previously taken is the wrong view, there is no reason why we should not accept and declare what is the correct view; more particularly is this the case where the effect is not to deprive persons who have lent money under such a bond of an extended period of limitation to which formely they had been held entitled but rather to enlarge the period of limitation, by doing which there can be no deprivation of rights.

On this view I would answer the question which I consider to be the question that should have been put by the Division Bench by saying that in the circumstances described the period of limitation for instituting a suit for the amount of the bond runs from the date specified for payment as prescribed by Art. 66 of the Indian Lim. Act and that it does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80 of the Lim. Act.

Thomas, C. J. (*December* 19, 1940)—I have nothing useful to add to this exhaustive judgment and concur.

Ghulam Hasan, J. (*December* 20, 1940)—I concur and have nothing to add.

Thomas, C J., Yorke and Ghulam Hasan, JJ.—(*January* 3, 1940)—Our answer to the question which has been formulated is that in the circumstances described, the period of limitation for instituting a suit for the amount due under the bond, runs from the date specified for payment as prescribed by Art. 66 of the Indian Lim. Act and that it does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80 of the Lim. Act.

Final order

Yorke and Ghulam Hasan, JJ.—In view of the decision of the Full Bench this application must succeed. The decision of the Judge, Small Cause Court is therefore set aside and the suit decreed for Rs. 417 with *pendente lite* and future interest at six per cent. per annum from the date of suit till realisation. The plaintiff will get his costs throughout from the defendant.

S. *Order accordingly.*

MADRAS HIGH COURT

Appeal No. 251 of 1939.
November 21, 1939.
LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.
In re CHIDAMBARAM CHETTIAR—
PLAINTIFF—APPELLANT

Court Fees Act (VII of 1870), *Sch. II, Art.* 17-*A, s.* 12 (ii)—*Suit filed in District Munsif's Court transferred to Subordinate Judge for being tried along with other suit filed there—Both suits decided by same judgment—Appeal from decree in suit originally filed in District Munsif's Court—Court-fee payable—Power of Appellate Court to correct mistake made by lower Court in respect of court-fees.*

Where a suit for declaration which was originally filed in the Court of the District Munsif is transferred subsequently to the Court of the Subordinate Judge for being tried along with the other similar suit filed in that Court and both the suits are decided by one judgment, the decree passed by the Subordinate Judge in respect of the suit originally filed in the District Munsif's Court is one passed by that Court and not by the Court of the District Munsif and the memorandum of appeal from such decree when the value for the purposes of jurisdiction is less than Rs. 10,000 must bear a court-fee stamp of Rs. 100 and not of Rs. 15.

Where a Court accepts a plaint or memorandum of appeal bearing a stamp of certain value, it must be deemed to have decided that that was the proper court-fee. Section 12 (*ii*) Court Fees Act gives an Appellate Court power when an appeal comes before it to correct a mistake made below in respect of court-fees.

A. against the decree of the Court of the Subordinate Judge of Coimbatore dated November 22, 1937 in O. S. No. 176 of 1937.

Mr. *K. V. Ramachandra Ayyar*, for the Appellant.

Mr. *T. Krishna Rao*, for the Govt. Pleader.

Leach, C. J.—This appeal has been placed before us to-day on a question raised with regard to the court-fee payable. The memorandum of appeal bears a court-fee stamp of Rs. 15 and the Deputy Registrar has called upon the appellant to pay an additional fee of Rs. 85 on the ground that the memorandum should be stamped with a fee of Rs. 100 under the provisions of Art. 17-A of the Second Schedule of the Court Fees Act. As the appellant questioned the validity of the Deputy Registrar's decision a notice was issued to the Govt. Pleader. The facts are these. The appellant filed a suit in the Court of the District Munsif of Dharapuram for a declaration that a certain alienation was a fraud on creditors. He filed a similar suit in respect of another alienation in the Court of the Subordinate Judge of Coimbatore. The suit filed in the Court of the District Munsif was subsequently transferred to the Court of the Subordinate Judge and tried along with the suit which the appellant had filed in that Court. By a common judgment the two suits were dismissed. The appellant then filed an appeal to this Court against the decision in the suit which he had filed in the Court of the Subordinate Judge and filed an appeal to the Court of the District Judge of Coimbatore in respect of the decree of the Subordinate Judge in the suit which was originally filed in the Court of the District Munsif. This is the appeal which has given rise to the question of stamping.

The memorandum of appeal was stamped with a fee of Rs. 15 when it was presented to the Court of the District Judge and the District Judge accepted it as being correct. Article 17-A provides that the court-fee on a memorandum of appeal in a suit for a declaration with consequential relief in a District Munsif's Court shall be Rs. 15. The District Court, however, erred in accepting the memorandum as having been properly stamped. The decree which was challenged was a decree of the Court of the Subordinate Judge and not of the Court of the District Munsif and Art. 17-A clearly states that in the case of a Memorandum of Appeal against a decree of a District Court or a Sub-Court the fee shall be Rs. 100 if the value for the purpose of jurisdiction is less than Rs. 10,000, as in this case. The argument of the appellant that the fact that the suit was originally filed in the Court of the District Munsif makes it a decree of that Court cannot be accepted. The decree was passed by the Court of the Subordinate Judge and is rightly declared to be a decree of that Court.

The learned Advocate for the appellant has suggested that this Court has no jurisdiction to require payment of the difference between Rs. 15 and Rs. 100 by reason of s. 12 of the Court Fees Act. He says that there was no question raised when the appeal was filed in the Court of the District Judge and not having been raised there it cannot be raised here. This argument ingores the facts and the wording of the section. The District Court in accepting the memorandum of appeal at Rs. 15 did decide that that was the proper fee. Section 12 (*ii*) gives an Appellate Court power when an appeal comes before it to correct a mistake made below, and this mistake was corrected by the direction of the Deputy Registrar. There is no substance in the appellant's objections and they must be overruled. As he has insisted on these questions being argued and as the Govt. Pleader has been served the appellant must pay costs which we fix at Rs. 50. The appeal will not be accepted until both the court-fee and the costs which we have now awarded have been paid.

N.-S.

PATNA HIGH COURT

Criminal Revision Application No. 600 of 1940

September 30, 1940

AGARWALA, J.

GONI MAHTON AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 435—High Court, if can revise proceedings of Panchayat—Bihar and Orissa Village Administration Act (III of 1922), ss. 53 (2) (b), 76—Sub-Divisional Magistrate, if can stay proceedings of Panchayat—

S. 345 (6), Criminal Procedure Code (Act V of 1898), applicability of, to Panchayat—Panchayat, whether bound to accept compromise entered into by parties.

A Panchayat constituted under the Bihar and Orissa Village Administration Act is a Court and it is in the exercise of its criminal jurisdiction, an inferior Criminal Court, and, therefore, its orders are revisable under s. 435 of the Criminal P. C. [p. 493, col. 2]

[Case-law reviewed]

The only provision in the Bihar and Orissa Village Administration Act enabling a Sub-Divisional Magistrate to interfere with the proceeding of a Panchayat in criminal case, while the case is pending, is s. 53 (2) (*b*), which enables either the Sub-Divisional Magistrate or the District Magistrate to transfer the case. There is no other provision in the Act which enables a Sub-Divisional Magistrate to interfere with the proceedings of a Panchayat either by stay or otherwise. [p 494, col. 2.]

Section 345 (6), Criminal P. C., does not apply to a Panchayat. Section 76, Bihar and Orissa Village Administration Act is merely an enabling section and it does not mean that a Panchayat is bound to accept a compromise entered into by the parties. Where one of the parties resiles from the compromise it is clearly a proper case in which the Panchayat should not act on it. [p. 495, col. 1.]

C. R. App. against an order of the Sub-Divisional Officer, Hajipur, dated August 18, 1940.

Mr. *Harinandan Singh*, for the Petitioners.

The Govt. Pleader, for the Crown.

Order—The first question that arises on this application is whether this Court has power to revise the proceedings of a Panchayat under the Bihar and Orissa Village Administration Act, 1922. Under s. 435, Criminal P. C., this Court has power to call for the records of all inferior Criminal Courts situate within its local jurisdiction and to revise the orders of such Courts. Section 6 of the Code provides:

"Besides the High Courts and the Courts constituted under any other law than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely, Courts of Session, Presidency Magistrate and Magistrates of the first, second and third class."

The question is, whether a Panchayat is a Court constituted under any other law within the meaning of s. 6. Under s. 6, Village Administration Act, the Local Govt. is empowered, in any area in which a Union Board has been constituted, to direct the members of the Union Board to elect from among their own number three or more persons to be, during their term of office as members of such Union Board, a Panchayat. Under s. 7, the Local Govt. is empowered to direct that a Panchayat shall be established even where no Union has been constituted. By s. 53 (1) of the Act it is declared that a Panchayat constituted under s. 6 or s. 7 shall have jurisdiction with that of the Criminal Court within the local limits of whose jurisdiction the Panchayat circle is situated to take cognizance of and to try the offences specified in that sub-section. Sub-section (2) of the same section authorizes certain Magistrates to transfer to a Panchayat for trial certain offences not specified in sub-s. (1). Section 56 enables the Local Govt. to empower Panchayats with jurisdiction in certain other offences. Civil jurisdiction is conferred on Panchayats by s. 57 and the following sections. A case or suit before a Panchayat is required by s. 64 of the Act to be instituted by petition made orally or in writing.

Section 65 authorizes a Panchayat to dismiss petition if, on the face of it, it appears to be frivolous and vexatious. If it has no jurisdiction to try the particular case or suit it is required by sub-s. (2) to direct the petitioner to the proper Court. If the petitioner who initiated the case or suit fails to appear on the date fixed or shews negligence in prosecuting his case or suit, the Panchayat may dismiss the case or suit for default (s. 66). If the petition is not dismissed the Panchayat is required by s. 67 (1) to require the accused or the defendant to appear and answer the petition either orally or in writing. If the accused fails to appear or cannot be found, sub-s. (4) requires the Panchayat to report to the nearest Magistrate who is then authorized to issue a warrant with bail for the arrest of the accused, and forward him, when appearing for trial, to the Panchayat, or release him on bail to appear before it. If the accused appears to answer the petition and claims to be tried by a Magistrate, the Pachayat must direct the complainant to file a complaint before a proper Court (s 68). Section 74 requires the Panchayat to record in writing its sentence or decree and directs that such sentence or decree shall be pronounced on hearing the parties and their evidence and that it shall be just, equitable and according to good conscience; but, in arriving at that decision the Panchayat is declared to be not bound by any laws of evidence or procedure other than the procedure prescribed by or under this Act.

In the event of the members of the Panchayat disagreeing the decision of the majority is to prevail (s. 75). There is no right of appeal from a conviction by a Panchayat; but if the District Magistrate or Sub-Divisional Magistrate is satisfied that a failure of justice has occurred he may of

his own motion by an order in writing cancel or modify any order of conviction or compensation made by a Panchayat or direct the retrial of any case by a Court of competent jurisdiction subordinate to him. Section 90 requires the Local Govt. to prescribe the procedure to be followed by Panchayats and s. 96 (2) (*k*) authorizes the Local Govt. to make rules for regulating the procedure to be followed by Panchayats. Under the authorities thus conferred the Local Govt. have framed rules which are published in the the Bihar and Orissa Village Administration Manual of 1932. The rules with regard to criminal cases are Nos. 11 to 21 and the rules were published with Notificatien No 3649 of April 3, 1923, at p. 68 of the Manual. In ciriminal cases the Panchayat is required to examine the complaint on oath or solemn affirmation. If the accused does not admit his guilt, or claim to be tried by a Magistrate under s. 63, r. 15 requires that the Panchayat shall proceed to hear the complainant and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in defence. A summary of the evidence of each witness must be recorded in the appropriate place in the register of cases and the order of the Panchayat must be similarly recorded.

The question whether a Panchayat is an inferior Criminal Court within the meaning of s. 435, Criminal P. C., has not been considered hitherto. In *Ram Chandra Singh* v. *Baldeo Singh* (1) this Court revised an order passed by a Panchayat in exercise of its criminal jurisdiction but the question whether this Court had power to revise such an order was not agitated. I have been referred to cases under other Acts in which revisional power of the High Court has been discussed. In *Ram Gopal Goenka* v. *Corporation of Calcutta* (2) the position with regard to Magistrate appointed under the Calcutta Municipal Act, 1923, was under consideration. Section 531 of that Act empowers a Local Govt. to appoint Magistrates for the trial of offences against the Act and the rules or bye-laws made under the Act. It was held that a Magistrate so appointed would be a Criminal Court within the meaning of s. 6, Criminal P. C., and that his orders would be revisable by a High Court. In *Nga E* v. *Emperor* (3) the question was whether a village headman appointed under the Burma Village Act was a Court within the meaning of s. 6 of the Code, It was held that he was. In *Sat Narain* v. *Sarju* (4) the question was whether the High Court has power under s. 526, Criminal P. C., to transfer a case pending before a Panchayat under the United Provinces Village Panchayats Act of 1920. This case is similar in its scope and general outline to the provisions of the Act now under consideration; but the learned Judges who constituted the Bench which heard that case differed.

In *Emperor* v. *Kamlapati Panth* (5) the question arose whether the High Court has power to revise an order under the U. P. Act and it was held that the Court had such power. In *Basdeo Misra* v. *Badal Misra* (6), a single Judge held that the High Court had power to transfer a criminal case pending before a Panchayat under s. 526, Criminal P. C. There are two provisions of the Act I am considering which appear to me to be a clear indication that a Panchayat is a Court. Under s. 53 (2) proviso (*b*), Bihar and Orissa Village Administration Act, the District Magistrate or Sub-Divisional Magistrate may transfer any case "from one Panchayat to another or to any other Court subordinate to him." Unless the Legislature considered a Panchayat to be a Court the word 'other' in this proviso is redundant. Similarly, s. 57 (2) provides that "no Court other than a Panchayat shall take cognizance of any suit" of the class specified in the sub-section. Here again, the use of the word 'other' by the Legislature appears to connote that a Panchayat is also a Court. In my opinion, therefore, a Panchayat constituted under the Bihar and Orissa Village Administration Act is a Court and it is, in the exercise of its criminal jurisdiction, an inferior Criminal Court, and therefore its orders are revisable under s. 435 of the Code.

With respect to the merits the facts were as follows : On July 11, a complaint was made to the Panchayat charging the petitioner with theft. Summons was issued to the accused to appear on the 18th. On that

(1) A I R 1940 Pat. 184; 185 Ind. Cas. 748; 41 Cr. L J 232; 6 B R 247; 12 R P 446.

(2) 52 C 962; 90 Ind. Cas. 317; A I R 1925 Cal. 1251; 26 Cr. L J 1533; 29 C W N 898.

(3) 1 R 449; 76 Ind. Cas. 697; A I R 1924 Rang. 23; 26 Cr. L J 233.

(4) 46 A 167; 83 Ind. Cas. 350; A I R 1924 All. 265; 21 A L J 925.

(5) 48 A 23; 91 Ind. Cas. 51; A I R 1926 All. 27; 27 Cr. L J 19; 23 A L J 897.

(6) 48 A 188; 99 Ind. Cas. 126; A I R 1927 All. 199; 28 Cr. L J 94; 25 A L J 157.

day both the complainant and the accused appeared and applied for time for producing their evidence. This prayer was granted and the 22nd was fixed for the hearing. The parties also filed on the 18th a petition stating that they had compromised the case. This was also directed to be put up on the 22nd. On the latter date the Panchayat recorded on the petition of compromise that the accused (the present petitioner) had backed out of the compromise. The evidence of the complainant and his witnesses was then recorded. The petitioner alleges that on that date he asked the Panchayat to refer the case to a Mgistrate under s. 68 of the Act. There is nothing on the record of the Panchayat to support the petitioner in this respect and the petition which he filed in the Court of the Sub-Divisional Magistrate on that date suggests that what the petitioner did before the Panchayat on the 22nd was to ask the Panchayat to dismiss the complaint. The petition of the 22nd to the Sub-Divisional Magistrate stated that the petitioner appeared before the Panchayat and made "a verbal and written request to dismiss the case under s. 68 of the Act on the ground set out above." The ground set out above was that the charge was a false one and that the Sirpanch was a friend of the complainant. The Sub-Divisional Magistrate was asked "to dimiss the complaint under s. 68, of the Act and direct them not to proceed."

On this petition the Sub-Divisional Magistrate directed the record to be called for and the proceedings before the Panchayat to be stayed. The stay order did not reach the Panchayat although there is another petition filed by the petitioner on July 26, in the Court of the Sub-Divisional Magistrate stating that the petitioner had informed the Panchayat of the stay order. The Magistrate again directed the proceedings to be stayed and called for a report and the record from the Panchayat. It is not clear when this order reached the Panchayat; but on July 29, it passed an order convicting the petitioner. In the circumstances related above, the petitioner claims that his conviction is illegal. His first contention is that the Panchayat had no jurisdiction to try the case after he had applied for the matter to be referred to a Magistrate. Section 68 of the Act which confers upon an accused person a right to be tried by a Magistrate, instead of by a Panchayat, requires that the petitioner shall claim this right when he appears in answer to a summons. In the present case the summons directed the accused to appear on July 18. The accused appeared on that date but did not claim to be tried by a Magistrate. Instead, he made two prayers to the Panchayat, one requiring time to produce his evidence and the other the alleged petition of compromise. Even if the subsequent petition alleged to have been filed by the accused on the 22nd asking for the dismissal of the complaint be regarded as an application to have the case tried by a Magistrate, it was not made at the stage when s. 68 requires it to be made.

The next contention is that in view of the stay order which the Sub-Divisional Magistrate passed on the 22nd, the Panchayat had no jurisdiction to proceed with the trial even though this order failed to reach the Panchayat. The only provision in the Act enabling a Sub-Divisional Magistrate to interfere with the proceeding of a Panchayat in criminal case, while the case is pending, is s. 53 (2) (*b*), which enables either the Sub-Divisional Magistrate or the District Magistrate to transfer the case. There is no other provision in the Act which enables a Sub-Divisional Magistrate to interfere with the proceedings of a Panchayat either by stay or otherwise. The proviso to s. 77 which enables a District Magistrate or a Magistrate to cancel an order of conviction or compensation made by a Panchayat does not come into operation until after the conviction has been recorded. Under s. 435, Criminal P. C., a Sub-Divisional Magistrate has power to call for the record of an inferior Criminal Court constituted within his jurisdiction for the purpose of satisfying himself that the proceedings are irregular; but his power is limited to forwarding the record to the District Magistrate. In this case the Sub-Divisional Magistrate does not appear to have acted in exercise of the powers conferred upon him by s. 435 and there is, in my opinion, no power conferred upon him enabling him to interfere under the Act itself and, therefore his stay order must be regarded as one passed without jurisdiction.

The last point is that in view of the alleged compromise petition filed on July 18, the Panchayat had no option but to accept the Compromise and acquit the accused. There is, however, in the Act no provision similar to the provision of s. 345 (6), Criminal P. C, that the composition of an offence shall have the effect of the acquittal of the accused. By s. 74 of the Act it is declared that the Panchayat is not bound by laws.

of procedure other than those prescribed by or under the Act. Section 345 (6), therefore, does not apply to a Panchayat. Reference however was made to s. 76 of the Act. That section declares that it shall be lawful for a Panchayat to decide any case or suit within its jurisdiction in accordance with any compromise agreed to by the parties. This is merely an enabling section and it does not mean that a Panchayat is bound to accept a compromise entered into by the parties. In a case like the present, where one of the parties resiles from the compromise it is clearly a proper case in which the Panchayat exercised a wise discretion in not acting on it. There is no other point in this case. The Rule is discharged.

S. *Rule discharged.*

ALLAHABAD HIGH COURT

Second Appeal No. 780 of 1938
September 16, 1940
BRAUND, J.

KALYAN DAS—PLAINTIFF—APPELLANT
versus
BRIJ KESHORE AND OTHERS—
DEFENDANTS—RESPONDENTS

Execution sale—Houses Nos. 146 *and* 147 *put up for sale—House No.* 147 *first put up for sale but sale* amin *pointing out house No.* 146 *to bidders through* bona fide *mistake—X purchasing it under* bona fide *belief that he purchased house No.* 146*—House No.* 146 *subsequently put up for sale and again* amin *wrongly pointing out towards house No.* 147 *—Y purchasing it knowing that he was purchasing house No.* 147 *and not No.* 146*—Sale certificate describing houses correctly* i. e., *one purchased by* X *as house No.* 147 *and other purchased by* Y, *as house No.* 146*—X and* Y *obtaining possession of houses Nos.* 146 *and* 147 *respectively—X reconstructing house at great cost—Y suing* X *for possession of house No.* 146 *on strength of sale certificate, after lapse of about twelve years—Y held could not succeed—Practice—Precedent—Applicability of equitable principles—English authorities can be looked to—Appeal—Letters Patent—Principles governing grant of leave, stated.*

In execution of a mortgage decree two adjacent houses bearing Nos. 146 and 147 were put up for sale. At the time of the sale of house No. 147 the sale *amin* through a *bona fide* mistake pointed out to the bidders house No. 146 and described it as house No 147. *X* purchased this house No. 146 believing it to be house No. 147. House No. 146 was then put up for sale and was described by the *amin* under a *bona fide* mistake as house No. 147 and was purchased by *Y* under the belief that he purchased house No. 147 while the house actually sold was house No. 146. Both *X* and *Y* entered into possession of the houses Nos. 146 and 147 respectively. The sale certificates mentioned correct numbers of the houses purchased by *X* and *Y* as Nos. 147 and 146 respectively. *X* reconstructed house No. 147 at a great cost under a *bona fide* belief that he had purchased that house. After about twelve years *Y* sued *X* for possession on the basis of the sale certificate:

Held, that *Y* must have bid for, and intended to bid for, the house No. 147 and nothing else. And as he had been content to accept that position for almost twelve years he could not succeed in obtaining something which *ex hypothesi* he never bought. Even if, it was accepted that by virtue of the sale certificate he had become technically the owner of house No. 146, no Court in justice, equity or good conscience would assist him to obtain possession of something which he never bargained to have. At the most he could be held to be a trustee for the real owner *X*. *Leuty* v. *Hillas* (1) and *Craddock Bros* v. *Hunt* (2), relied on. [p 499, cols. 1 & 2.]

A High Court is entitled to apply principles of justice, equity and good conscience and to look for such priciples to English authorities. [p. 499, col. 2.]

There are, at any rate, four cases in which leave to appeal under the Letters Patent should be given. First, in a case in which a question has arisen which is of general importance. In such case as that it is manifestly, in the public interest that a more authoritative decision should be given than is possible at the hands of a single Judge. And to this head might be added a case in which the matter involved is of altogether unusual private importance, either by reason of the magnitude of the material issues involved or for some other reason. Secondly, there are cases in which a question arises of very frequent occurrence. Such a case might arise where, on some new statute a point arises which will govern the rights and liabilities of a large number of people. An authoritative decision in a case like that is necessary to serve as a precedent for future cases. And, thirdly, there are those cases in which the existing authorities by which the Court is to be guided are either obscure or conflicting. In such a case as that it is to the public interest that all doubts should be dissolved and for that reason it is obviously proper to grant leave to appeal under the Letters Patent. There is then a further case which arises and it is one in which greater difficulty arises. It is the case in which the Judge himself who decides the case feels a reasonable doubt as to the correctness of his own decision and thinks that for that reason it is just to the parties that a further appeal should be allowed. But it is a ground which should, be exercised with considerable care and in a proper case only and leave to appeal should not be granted too lightly. 138 Ind. Cas. 454 (3) and 151 Ind. Cas 921 (4), relied on. [p. 500, col 2; p. 501, col. 1.]

S. A. from a decision of the Additional Civil Judge, Benares, dated April 20, 1938.

Mr. *Gopi Nath Kunzru*, for the Appellant.

Messrs *B. Malik* and *Shiva Prasad Sinha*, for the Respondents.

Judgment.—This is a second appeal. The facts and the circumstances out of which it arises are a little curious. The suit which was instituted as long ago as August 9, 1935, was for possession of a half interest in a house at Benares which it is sufficient for me to describe as house No. 146. This house and its adjoining

house No. 147 have become the subject-matter of this and a good deal of this litigation in the following manner. The entirety of house No. 147 and a moiety of house No. 146 belonged to two persons, who are father and son named Nasir Husain and Nazeer Husain. The remaining moiety of house No. 146 belonged to a lady named *Mst.* Razia Begam, who was the wife, I think, of Nazir Hussain. At some date prior to 1922, which is not material, Nasir and his son Nazeer Husain mortgaged the whole of house No. 147 and their moiety of house No. 146 to Kalyan Das, the plaintiff in the proceedings out of which this appeal arises. In 1922 in a suit No. 50 of that year the plaintiff took steps to enforce his mortgage. He obtained a preliminary, and in due course a final decree and ultimately the mortgaged property came to be sold by the Court. The sale was proclaimed for October 5, 1923. It was to be held by the local *amin* and a sale proclamation was issued. With what can only have been great carelessness, the sale proclamation mentioned only a house No. 146.

The auction took place. At it there were present, among other persons, the plaintiff and the original defendant to these proceedings, Munshi Sundar Lal. It may be mentioned in passing that Munshi Sundar Lal died during the pendency of the proceedings which accounts for the fact that the present respondent are his heirs. Sundar Lal, as far as can be gathered, had no previous connection with this property and was not, as far as I can see, in any way connected with the mortgage. The auction took place on the spot and the *amin* first put up house No. 147. It is alleged and the lower Courts have found it to be true as a fact and I accept it that the *amin* in putting up house No. 147 for sale pointed out to the assembled bidders house No. 146 It is not suggested that this was anything but a *bona fide* mistake. But it was, as it seems to me, the origin of the whole trouble. Upon that footing the defendant, Munshi Sundar Lal, bid for a house described as No. 147, supposing it to be that house which the *amin* had pointed out, namely, house No. 146. In setting out the facts briefly I need say no more than this at this stage. that it has been conclusively found in the Courts below—and I again agree with it—that the defendant Munshi Sundar Lal too made a *bona fide* mistake. He intended to bid for, and did in fact bid for, what he believed to be house No. 146. Not only that he bid for the house which had actually been pointed out by the *amin*. Eventually the lot was knocked down to him for a sum of approximately Rs. 1,100 and he went away believing that in purchasing the house described as No. 147 he had actually purchased the house that had been pointed out by the *amin*. It would perhaps be easier to follow if I say at that stage that house No. 146 lies immediately to the west house No. 147. And the two houses respectively are referred to in the judgments of the lower Courts and will be referred to by me, as the "western house" and the "eastern house" respectively. The western house is No. 146 and the eastern house is No. 147. It was the western house that was pointed out to the defendant as the lot for which he was invited to bid and for which he did bid and which was wrongly described by the *amin* as No. 147.

Immediately after the sale to the defendant, lot No. 146 was put up. This, of course actually, was one moiety of the western house for which the defendant had already bid and of the whole of which he conceived himself to have become the purchaser. When this was put up, the plaintiff-mortgagee himself bid for it and purchased it. Now, it is necessary carefully to observe what followed. That auction sale was held on October 5, 1923. On November 5, 1923 the sales were confirmed, and subsequently sale certificates were granted and possession was given to the respective purchasers. It is perfectly true that the sale which was confimed to the defendant and the sale certificate which was given to the defendant were in respect of house No. 147. That is only natural and logical because, whatever it was that the defendant had purchased, he had purchased it as house No. 147. The significant thing, however, is that the defendant actually took possession of house No. 146, that is to say, the western house and the plaintiff actually took possession of house No. 147, that is, the eastern house. Put in other words, each of them took possession of a house which, if regard be had only to the strict numerical description of them, was the house purchased by the other. It appears that the defendant, Sundar Lal, as regards the western house took a number of steps, to which I shall refer more particularly in a moment, all of which point to the fact that he was under a genuine belief that the western house was the

house which he had purchased and ultimately he went so far as to pull down all the existing buildings on it and to build new buildings at a cost which, I am told, amounted to Rs. 11,000. Meanwhile, the plaintiff throughout this time remained in possession of the eastern house. And, as far as, I can see, took no steps to rectify any mistake that had been made, assuming that he knew of it.

Now, the position which had been created in this way was a very curious one. The plaintiff who had, ostensibly purchased a moiety only of No. 146, was actually in possession of the whole of No. 147, that is the eastern house. On the other hand, the defendant who "ostensibly" had purchased the whole of No. 147; that is to say, the eastern house, was in fact in possession of the whole of the western house, of which house a moiety, at any rate, was at the date of the auction outstanding in *Mst.* Razia Begam. When he went into possession, the defendant must necessarily have taken possession of not only that moiety of the western house which was subject to the mortgage but also of that other moiety of the western house which was never subject to the mortgage, but which was outstanding in *Mst.* Razia Begam. It is quite obvious that as against *Mst.* Razia Begam, the defendant could have had no answer had that lady immediately after the mortgage objected to his having taken possession of her share. But what actually happened was that throughout the period from 1923 to 1932, no one objected to what had happened and it was only in August 1932 that the muddle was appreciated and *Mst.* Razia Begam brought a suit against both Kalyan Das and Munshi Sundar Lal, claiming her share of the western house. As I have pointed out, if this suit had been brought at an earlier stage Munshi Sundar Lal could not possibly have had answer to it. But, as it was, the suit failed, not on the ground that Munshi Sundar Lal had obtained a title as against *Mst.* Razia Begam by virtue of the auction sale, but because it was held that *Mst.* Razia Begam by standing by and allowing Munshi Sundar Lal to spend a considerable sum of money on re-building the premises, had thereby estopped herself from asserting her rights. That suit went through the many processes of a suit and its latest stage is that it was settled in the way I have described by a judgment in second appeal by my learned brother Allsop, J., on November 1, 1939. The learned Judge, however, gave leave for a further appeal under the Letters Patent and so that suit is not even yet finally laid to rest.

The position, therefore, was altered by virtue of those proceedings. Munshi Sundar Lal who could have got no possible title to the whole of the western house under the auction sale under whatever description he bought the property did in fact get a title to the whole of it, subject to the result of the Letters Patent appeal, by his successful defence to the suit of *Mst.* Razia Begam. In this way, Munshi Sundar Lal remained in possession of the whole of the western house without danger of interference from anyone. And, as I have said, up to that point the plaintiff Kalyan Das had remained, without complaint, in possession of the eastern house. In those circumstances, on August 9, 1935 this suit was begun by the plaintiff alleging—and alleging for virtually the first time—that what he had purchased at the auction-sale nearly twelve years earlier had been in fact the property described as house No. 116, whereas what the defendant had purchased at that auction had been the property described as house No. 147. He ignored what may have been the intention of the parties and the muddle that may have been made and claimed upon this ground to turn the defendant out of possession of the western house together with the buildings which at great expense to himself the defendant had erected in the *bona fide* belief that the land belonged to him. That is the suit with which the Munsif and the learned Civil Judge had to deal and with which I now have to deal in second appeal. It is a claim by the plaintiff, after an interval of just short of twelve years, to take a technical advantage of a mistake which was made in 1923 at the auction-sale and to insist that he is now entitled to have the property of the exact description which he bought, irrespective of what the real intention of the parties may have been and of any equities between them.

Now, a number of technical defences have been raised to this suit, but I propose first to try to dispose of it upon the grounds of principle. It appears to me that the first thing to consider because it lies, I think, at the root of the whole matter is what it was that the parties, apart from any question of mere description, purchased at the auction in 1923. Put in another way, what I think we have first to consider is whether the defendant, when

he bid for house No. 147 and when it was knocked down to him, was really intending to purchase the western house and whether it was the western house which the *amin* really intended to sell to him? In the same way, when the plaintiff bid for what was described as house No. 146 was he really intending to purchase the eastern house and was it the eastern house which was knocked down to him? That seems to be the substance of the matter. If it is true that in substance and in reality the purchase by the defendant was the purchase of that house which is known as the western house, then it seems to me that its misdescription as house No. 147 is a mere *falsa demonstratio*. In the same way, if what the plaintiff intended to purchase was the eastern house, then I doubt if it matters in the least whether it was described as house No. 146. If upon the facts of this case, it should prove that the defendant genuinely believed he was buying, and intended to buy, and the *amin* intended to sell him the western house, then, as between himself and a co-purchaser at the same auction it is not easy to see upon what principles he could be deprived of his purchase. If, on the other hand, the plaintiff brought and intended to buy the eastern house, it is equally difficult to see upon what principle of law, equity or common sense he can be entitled to come to a Court after an interval of nearly twelve years and to insist upon having something he never intended to buy. I shall, therefore in the first place treat this as a pure question of fact. I have to see therefore what have been the conclusions of fact which have been arrived at in the Courts below. Turning first to the judgment of the Munsif I find that it contains a highly significant finding of fact. He says:

"I think the entire oral and documentary evidence of the parties conclusively establishes that the defendant really purchased the entire western house in suit on October 5, 1923. Within the knowledge of the plaintiff at the Court *amin's* assurance that the entire western house bore No 13/147....."

Now, that seems to me a finding of fact, not only that the defendant intended to buy the western house, but that the plaintiff knew he intended to buy the western house. And it seems to follow that, if the plaintiff knew that the defendant intended to buy the western house, then the plaintiff must equally have known, when he purchased the other house, that he was buying the eastern house and not the western house. Passing to the judgment of the learned Civil Judge I find that he comes to the same conclusion. He finds first, on the reverse of p. 2 of his judgment, that "the finding of the lower Court is perfectly, correct". He finds a little lower down:

"The statement of witnesses examined by the defence clearly establishes that the western house was actually purchased by the defendant and not by the plaintiff and the plaintiff's statement that he purchased the half of the western house is wrong in fact."

That means, if I understand it rightly, that the defendant purchased and was sold the western house (irrespective of its number) and that the plaintiff purchased and was sold and knew he was sold the eastern house. The learned Civil Judge on p. 3 of his judgment finds that the *amin* did in fact point out the western house as answering the description 147 and the eastern house as answering the description 146. The Civil Judge then goes on to consider and discuss the evidence upon which he bases these findings. He discusses first the *bona fides* of the defendant and he concludes that that has been clearly established. He says that there is no doubt whatever that the defendant when he took possession of the western house took it in the belief that its number was 147. I should perhaps have said at an earlier stage that neither of these houses bore any actual numbers. The Judge then finds from a series of steps taken by the defendant that he has proved up to the hilt his genuine belief that what he had been sold was the western house. For instance the defendant accepted rent from the tenant of the house. He made certain applications to the Municipal Board in respect of the house describing it as No. 147. He made arrangements for sewerage upon the footing that the house's proper number was 147. He even mortgaged it as house No. 147 to the Secretary of State and finally, he spent a sum on it amounting to nearly Rs. 15,000 in building the house. I agree with the learned Civil Judge in thinking that this evidence points conclusively to the fact that what offered to the defendant at the aution was the western house and that he bid for and purchased that house only. It is quite true that the *amin* by mistake described it as house No. 147, but that, to my mind, is a mere *false demonstration* and the substance of the matter is that the defendant purchased that house which physically was the western house. Then the Civil Judge proceeds carefully and well to consider the evidence which points to what I may describe as

a lack of *bona fides* in the plaintiff and he comes to a conclusion which he expresses in these words:

"The simple question of fact to be determined was whether the defendant purchased the western or the eastern house and on the materials discussed above I find that he purchased the western house ... .and I can safely say that the defendant Munshi Sundar Lal purchased the western house thinking that it actually bore the No. 12/147 and agree with the lower Court and hold that the defendant purchased the western house first and at the second and subsequent bidding the plaintiff purchased the eastern house."

That is as plain a finding of fact as there can be that what the plaintiff purchased was the eastern house. I may say that I agree with that conclusion of fact. Now that, to my mind, is alone sufficient to dispose of this suit. If it is true, as it must be taken to be, that the plaintiff was aware all the time that the defendant had purchased the western house, then it must follow that the plaintiff himself, when he purchased house No. 146 immediately afterwards, could have been under no delusion as to what he was getting. He must have bid for, and intended to bid for, the eastern house and nothing else. And all the evidence points that way. He has been content to accept that position for almost 12 years since. He has never complained until this suit that he did not get what he purchased. It is only now for the first time that he comes here and says "I did not purchase the eastern house at all, I purchased the western house." How upon this finding of fact, can the plaintiff possibly succeed in this Court in obtaining something which *ex hypothesi* he never bought. It appears to me that this affords a conclusive answer to the whole suit. It does not seem to me to be necessary to refer to any authority. But it may be contended (I am not sure that it has been in this suit that whatever the intention of the parties may have been the effect of the sale certificate was actually to vest in the respective parties Nos. 145 and 147 that is to say, that 147 was actually vested in the defendant and 146 in the plaintiff. It will be remembered that the sale certificate did accurately show the numbers and, therefore, if we look at the sale certificate the defendant actually got 147 and the plaintiff got 146. But that, in my judgment, would not, in the least, help the plaintiff in this suit. Even if I accept it was a fact that by virtue of the sale certificate he has become technically the owner of house No. 146, that is to say, the western house, ever so I am quite satisfied that no Court in justice, equity or good conscience would assist him to obtain possession of something which he never bargained to have.

Indeed, I think that the present case is covered by the well-known English case in *Leuty* v. *Hillas* (1). In many ways this case in principle is not unlike the well known comparatively recent case in *Craddock Bros.* v. *Hunt* (2). I feel free to refer to this case because after all I am entitled in this Court to apply principles of justice, equity and good conscience and I am entitled to look for such principles to English authorities. In *Craddock Bros.* v. *Hunt* (2), a situation arose which, in many respects, is not unlike the present one. I need not give the facts in full because they are very long and very complicated. In effect, what happened was that at an auction of adjoining properties one purchaser purchased one property and another purchaser purchased the other property in precisely the same way as in this case. The plaintiff bid for and thought he was getting as part of the lot which he bought, a property which included the whole of a certain courtyard. The defendant whose lot was put up immediately afterwards purchased the adjoining piece of land. It was found as a fact in that case, precisely as I have found as a fact in this appeal, that the subsequent purchaser was well aware what the previous purchaser had bought. At a later date the subsequent purchaser upon a technical ground sought to contend that part of the yard should be included in his purchase. Now, as I say it was found as a fact that the subsequent purchaser was well aware that the previous purchaser had purchased the whole of the yard. In those circumstances this is what is said by Lord Sterndale, M. R. at p. 155* of the report:

"It seems to me that the question is whether if on these facts the defendant ought to be in equity a trustee of the brown land for the plaintiffs. The learned Judge must, I think, on this branch of the case as on the former, have held that he ought but he has not given his reasons for so holding. It does not seem to me that the case is brought within the direct authority in *Leuty* v. *Hillas* (1), where the facts were quite different, but I think it comes within the principle which seems to me to underlie that case. I can see no conscience or honesty in the defendant's claim and I think he should be declared a trustee for the plaintiffs of land, to which he has by mistake got a title, which he knew had been knocked down to them, and which he never thought

(1) (1858) 2 De G & J 110; 27 L J Ch. 534; 4 Jur. (N S) 1166; 6 W R 217; 119 R R 46.
(2) (1923) 2 Ch. D 136; 92 L J Ch. 378; 129 L T 228, 67 S J 593.

*Page of (1923) 2 Ch. D.—[*Ed.*]

was intended to be sold to him or had been brought by him."

Those last words appear to me exactly to cover the present position. Equally clearly Warrington, L. J., at p. 158* of the report deals with the same question. He says:

"The defendant has accidentally got something which he has neither bought nor paid for, and he had notice that the vendor did not intend to sell to him, for he knew, as I have said, that so much of the property as was not included in what he intended to buy was knocked down to the plaintiffs. The principle applicable to *Leuty* v. *Hillas* (1), and to the present case is, in my opinion, that under which a man acquiring a legal estate with notice that another had a better claim thereto cannot in a Court of Equity be allowed to insist on his position at law, but will be treated as a trustee for the person rightfully entitled, and be if necessary, ordered to convey the estate to him....."

Even assuming, therefore, that, because of the form of the sale certificate, the plaintiff did obtain, as a conveyancing technicality, a title to the western house under the description No. 146, I should not have the least hesitation in holding even in India that a Court, in its application of principles of justice, equity and good conscience, would hold him to be, in circumstances such as these, a trustee for the real owner. For these reasons, in my view, this appeal must fail. There were other points argued in the Courts below and notably a question of estoppel. It was said that the plaintiff, having stood by all these years and having watched the defendant put up this expensive building cannnot now be heard to assert his interest in the land. It is precisely the same case as that with which *Mst.* Razia Begam was met at an earlier stage. It is suggested by the learned Advocate who has appeared for the respondents that it is incredible that Munshi Sundar Lal, can have remained in possession of the western house all these years without realising that he got a property which he never bought. I do not hold that view. In the first place, as I have already decided, it was the western house that he had bought. There is no reason, as far as I can see, why he should have supposed that the No. 147 was not an accurate description of it. The houses were not numbered. He had been led to believe from the beginning that the house did bear No. 147 and I am quite satisfied that he genuinely did believe it. Certainly nothing has been proved in these proceedings which shows that anything happened which could have undeceived him as to that. Had it been necessary for me so to decide I should have found very little difficulty in saying that the learned Munsif and the learned Judge were right in this matter of estoppel also. It is not necessary for me to discuss the other points that arise in this appeal because this, as I have said, is sufficient to dispose of it. For these reasons this appeal must be dismissed with costs.

I have been asked by the unsuccessful appellant for leave to appeal further under the Letters Patent of the Court. This matter of giving or withholding leave to appeal under the Letters Patent is always an embarrassing one for a single Judge and it is generally distasteful to him for obvious reason, to have to refuse a further appeal from his own decision. But, as I understand it, the policy of the law in this respect is, in cases such as these, that litigation should normally end with the second appeal to the single Judge and that only in what I may describe as special or exceptional cases is a further appeal to a second Bench of the High Court to be allowed. It is placed within the discretion of the Judge himself as to what cases a further appeal ought to be allowed in. And as it seems to me, that is a discretion which ought not to be exercised haphazard but on principles.

My attention has been called to no case of this Court in which these principles have been laid down. But, as it seems to me, there are, at any rate, for cases in which leave to appeal under the Letters Patent should be given. First in a case in which a question has arisen which is of general importance. In such case as that it is manifestly, in the public interest that a more authoritative decision should be given than is possible at the hands of a single Judge, And to this head I might possibly add a case in which the matter involved is of altogether unusual private importance, either by reason of the magnitude of the material issues involved or for some other reason. Secondly, there are cases in which a question arises of very frequent occurrence. Such a case might arise where, on some new statute a point arises which will govern the rights and liabilities of a large number of people. An authoritative decision in a case like that is necessary to serve as a precedent for future cases. And, thirdly, there are those cases in which the existing authorities by which the Court is to be guided are either obscure or conflicting. In such a case as that it is to the public interest that all doubts should be dissolved and for that reason it is obviously proper to grant leave to appeal

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under the Letters Patent. These principles have been set out in the judgment of the Bombay High Court in *Sadashiv Vishnu* v. *Sakharam Raghunath* (3) and I desire to say, with great respect, that I fully agree with what fell from the learned Judge in that case. There is then a further case which arises and it is one in which greater difficulty arises. It is the case in which the Judge himself who decides the case feels a reasonable doubt as to the correctness of his own decision and thinks that for that reason it is just to the parties that a further appeal should be allowed. This is the sort of case that is dealt with in the Patna case in *Asarfi Mander* v. *Karu Mander* (4) I should not desire to question that this, in a proper case, is a good ground upon which to grant a Letters Patent appeal. But it is a ground which should, in my judgment, be exercised with considerable care and in a proper case only. As the late Sir Courtney-Terrell, the Chief Justice of the Patna High Court, and the learned Judge who sat with him in the case to which I have referred, observe, "leave to appeal should not be granted too lightly."

In a great majority of cases which a single Judge is called upon to decide on second appeal, I venture to think he would hesitate to assert that he was 'certain' that the result at which he had arrived was correct. Speaking for myself. I have not sufficient confidence to say that I am certain that I necessarily decide nearly every case rightly But that does not mean that, in every case or nearly every case, a Letters Patent Appeal should be granted. In my view, in order to justify a Letters Patent Appeal it is necessary to go a good deal beyond those ordinary doubts which every modest Judge, however, capable he is, must often feel in respect of his own decisions. It is necessary that there should be some real and outstanding point of difficulty as to which the Judge feels there is every chance that another Judge or other Judges who bring to bear fresh and different minds on the question might take different view. Those are the principles which appear to me to be the right ones and which, until I am corrected by a more authoritive pronouncement as to what the proper principles are, I propose myself to apply. The present case is not, in my view, one which qualifies under any of these heads. I think I need say no more than that.

S. *Appeal dismissed.*

(3) A I R 1932 Bom. 218; 138 Ind. Cas. 454; 34 Bom. L R 398; Ind. Rul. (1932) Bom. 397.

(4) A I R 1934 Pat. 466; 151 Ind. Cas. 921; 13 Pat. 587; 15 P L T 456; 7 R P 141.

PATNA HIGH COURT

Appeal from Original Decree No. 46 of 1938

January 15, 1941

CHATTERJI, AND MEREDITH, JJ.

RAMPAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANSUKH RAI KHEMKA AND OTHERS PLAINTIFFS—RESPONDENTS

Limitation Act (IX of 1908), Art 47—"Final order in the case", meaning of—High Court's order in revision in proceedings under s. 145, Criminal Procedure Code (Act V of 1898)—Whether Magistrate's order or High Court's order is final—Appeal and revision, distinction between, made in Criminal Procedure Code—"Final order" in col. 3, Art. 47 refers to order contemplated by col. 1—High Court's order dismissing appeal for want of jurisdiction, if final—Whether High Court's order summarily dismissing revision is final.

The Criminal P. C., makes a clear distinction between an appeal and a revision, because in the case of an appeal the party has a right to be heard but there is no such right in the case of a revision. Revision is entirely in the discretion of the Court. But where the Court does exercise its power of revision under s. 435 of the Code. the order which is ultimately passed by the High Court under s. 439 of the Code is no less effective than an order passed on appeal. Section 439 itself provides that in revision the High Court may in its discretion exercise any of the powers of an Appellate Court. If, therefore, an order passed by an Appellate Court could be regarded as the final order, there is no reason why an order passed by the High Court in exercise of its power of revision under s. 439 of the Code could not be equally regarded as the final order. Whether the High Court ultimately interferes in revision or not, its order is none the less the final order. [p. 503, col. 2; p. 504, col. 1.]

Where the Sessions Judge in exercise of his power under s. 435 makes a reference to the High Court under s 438 with the recommendation that the order of the Magistrate be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order of the High Court passed under s. 439 will be the final order in the case. [p. 504, col. 1]

The Magistrate decided the case under s. 145, Criminal P. C. on August 4, 1932. An application was filed for revision before the Sessions Judge who made a reference to the High Court on September 29, 1932. But the High Court by its order dated November 11, 1932, discharged the reference and the suit was brought on November 13, 1935, 9th to 12th being holidays :

Held, that the order of the High Court and not the order of the Magistrate was 'final order' within the meaning of Art. 47, Lim. Act, and the period of limitation under Art. 47 must be computed from the date of the High Court's order. The suit was therefore within limitation. 43 Ind. Cas. 955 (1), *Jagannath Marwari* v. *Ondal Coal Co. Ltd.* (2) and *Kangali*

Churn Sah v. *Zomurrudonnissa Khatoon* (3), distinguished.

[Case-law referred to.]

The "final order" in col. 3 of Art. 47 of the Lim. Act must be understood to refer to the order contemplated by col. 1 of the same Article. [p. 504, col. 2.]

The order of the High Court dismissing an appeal for want of jurisdiction cannot be the final order. [p. 505, col. 1.]

Quære.—Where the High Court summarily dismisses an application for revision, whether its order would be the final order within the meaning of Art. 47 of the Lim. Act. [p. 505, col. 2.]

A. from a decision of the Subordinate Judge, Monghyr, dated December 21, 1937.

Messrs. *S. M. Mullick*, *S. N. Bose*, *P. Misra*, *K. K. Sinha* and *Prem Lall*, for the Appellants.

Dr. *D. N. Mitter*, Messrs. *Sundar Lal*, *S. Nath* and *R. N. Sinha*, for the Respondents.

Chatterji, J.—This is an appeal by the defendants which arises out of a suit for recovery of possession of 21·92 acres or 32 *bighas* 1 *katha* 15 *dhurs* of *bakasht* lands in village Barhee Pali Tajpur Taraf Ind. These lands are said to be comprised in a *patti* of 1*a* 1*d* and odd share which formerly belonged to *Rai Bahadur* Tukanath Singh. He mortgaged the *patti* with some other property to the plaintiffs' predecessor Ramkishun Ram under a simple mortgage bond dated September 17, 1891, for Rs. 15,001. On the basis of this mortgage Ramkishun Ram obtained a mortgage decree on April 30, 1908. In execution of that decree he purchased the mortgaged properties on September 15, 1914, and obtained delivery of possession over the same on June 1, 1915. The sale proceeds being insufficient, he obtained a decree under O. XXXIV, r. 6 of the Civil P. C. In execution of this decree he purchased another *patti* of 19 *dams* and odd share in the same village on August 27, 1918, and took delivery of possession on July 6, 1919.

The plaintiffs' case is that since the delivery of possession taken on June 1, 1915, Ramkishun Ram and after him the plaintiffs were all along in possession of the disputed lands. But in 1932 there was a proceeding under s. 145 of the Criminal P. C. with regard to these lands between the plaintiffs and defendants Nos. 1 and 2. In that case the defendants Nos. 1 and 2 alleged that the disputed lands appertained to the *patti* of 19 *dams* and odd share and were given in usufructuary mortgage by *Rai Bahadur* Tukanath Singh to Banshi Singh, Karu Singh and Bija Singh under a deed dated September 28, 1900, for Rs. 3,151 and that they (defendants Nos. 1 and 2), having purchased one *bigha* out of the disputed lands from *Rai Bahadur* Tukanath Singh's son Jhalak Kishore Singh by an unregistered sale deed dated March 5, 1916, redeem the said usufructuary mortgage and came into possession of the entire disputed lands. The Magistrate decided the case under s. 145 in favour of the defendants on August 4, 1932 The plaintiffs filed an application for revision before the Sessions Judge of Monghyr who made a reference to the High Court on September 29, 1932. But the High Court by its order dated November 11, 1932, discharged the reference.

The present suit was brought on November 13, 1935. The plaintiffs allege that the usufructuary mortgage of Banshi, Karu and Bijya was redeemed by *Rai Bahadur* Tukanath himself, that the unregistered sale deed propounded by the defendants Nos. 1 and 2 is a fraudulent and collusive document, and that the defendants were never in possession of the disputed lands until the decision under s. 145 of the Criminal P. C.

The remaining defendants are members of a joint Mitakshara family with defendants Nos. 1 and 2 who are the managing members.

The suit was contested on the grounds, *inter alia*, that it was barred by limitation, that the disputed lands appertain to *patti* of 19 *dams* and odd share and not to the *patti* of 1*a* 1*d* and odd, and that the defendants, having purchased 1 *bigha* out of the disputed lands, redeemed the usufructuary mortgage of Banshi, Karu and Bija and came into possession of the entire disputed lands.

The learned Subordinate Judge decreed the suit, holding that the disputed lands appertain to the *patti* of 1*a*. 1*d* and odd share which was purchased by Ramkishun Ram in 1914 in execution of his mortgage decree, that the defendants' unregistered sale deed dated March 5, 1916, is not a genuine document, that the usufructuary mortgage of Banshi, Karu and Bija was redeemed not by the defendants but by Tukanath himself, that since the delivery of possession taken in 1915 Ramkishun Ram and after him the plaintiffs were all along in possession of the disputed lands till the decision in the case under s. 145 of the Criminal P. C., and that the suit was not barred by limitation.

The only point urged in this appeal by Mr. Sushil Madhab Mullick on behalf of the appellants is that the suit is barred by limitation under the three years' rule prescribed by Art. 47 of the First Schedule of the Lim. Act as well as under the 12 years' rule.

Article 47 of the First Schedule of the Lim. Act (IX of 1908) is as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
By any person bound by an order respecting the possession of immovable property made under the Criminal P. C., 1898, or the Mamlatdar's Courts Act, 1906, or by any one claiming under such person, to recover the property comprised in such order.	Three years.	The date of the final order in the case.

In the present case the following are the relevant dates:—

Order of the Magistrate	...	August 4, 1932.
Order of the High Court	...	November 11, 1932.
Present suit instituted	...	November 13, 1935, (November 9 to 12, 1935, were holidays.)

Mr. Mullick's contention is that the "final order" is the order of the Magistrate and the present suit, being instituted more than three years after the date of the Magistrate's order, is manifestly out of time. On the other hand, Dr. D. N. Mitter for the respondents contends, and the Subordinate Judge has also held, that in the present case the "final order" is the order of the High Court.

The question, therefore, turns on the true meaning of "the final order in the case". Mr. Mullick relies on the decision of this Court in *Lachman Singh* v. *Diljan Ali* (1) and on the decisions of the Calcutta High Court in *Jagannath Marwari* v. *Ondal Coal Co. Ltd.* (2) and *Kangali Churn Sah* v. *Zomurrudonnissa Khatoon* (3).

Both in *Lachman Singh* v. *Diljan Ali* (1) and *Jagannath Marwari* v. *Ondal Coal Co., Ltd.* (2), it was held that the order of the Magistrate under s. 145 of the Criminal P. C., and not of the High Court is the final order and the three years under Art. 47 should be counted from the date of the Magistrate's order. But these cases were decided when the Criminal P. C. of 1898, as it stood before the amendment of 1923, was in force. In s. 435 there was then sub-s. 3 which provided that proceedings under Chap. XII (which includes s. 145) were not proceedings within the meaning of that section; in other words, order made in proceedings under Chap. XII were not subject to revision. By the Amending Act XVIII of 1923 sub-s. 3 of s. 435 was altogether omitted so that under s. 435 of the Code, as it now stands, an order made under s. 145 is subject to revision. Before the amendment of 192 the High Court had no power to interfere with an order under s. 145 except under its general power of superintendence under the Govt. of India Act. Any order passed by the High Court in exercise of its power of superintendence would not be an order made under the Criminal P. C. In fact this is the reason for the decision in *Jagannath Marwari* v. *Ondal Coal Co., Ltd.* (2), as will appear from the following passage :

"Order under s. 145, Criminal P. C., are not subject to appeal, review or revision. This is apparent from sub-s. 3 of s. 435 Criminal P. C. No doubt a rule was issued by this Court in connection with this order. But that was issued under s. 15 of the Charter Act and it could never have been contemplated by the Legislature when it drew up the provisions of Art. 47 of the Indian Lim. Act that rules issued under our powers of 'superintendence under the Charter Act', and disposed of by us should come within the meaning of the words 'final order' in the case".

In *Lachman Singh* v. *Diljan Ali* (1), which was practically based on *Jagannath Marwari* v. *Ondal Coal Co., Ltd.* (2), the learned Judges said

"The order of the Magistrate is itself a final order. It is not subject to appeal. It can only be set aside under the power of superintendence vested in a High Court if made without jurisdiction. The decision of the High Court confirming the jurisdiction of the Court passing the order cannot affect the date from which it came into force."

From both these decisions it is fairly obvious that the order of the Magistrate was taken to be the 'final order' because under the Criminal P. C., as it then stood, there was no provision conferring any power on any superior Court to interfere with the Magistrate's order.

Indeed the Criminal P. C., makes a clear distinction between an appeal and a revision, because in the case of an appeal the party has a right to be heard (s. 421 of the Code), but there is no such right in the case of a revision (s. 440 of the

(1) 4 P L W 136; 43 Ind. Cas. 955; A I R 1918 Pat. 504.
(2) 12 C W N 840.
(3) 6 C 709.

Code). Revision is entirely in the discretion of the Court. But where the Court does exercise its power of revision under s. 435 of the Code, the order which is ultimately passed by the High Court under s. 439 of the Code is no less effective than an order passed on appeal. Section 439 itself provides that in revision the High Court may in its discretion exercise any of the powers of an Appellate Court. If, therefore, an order passed by an Appellate Court could be regarded as the final order, there is no reason why an order passed by the High Court in exercise of its power of revision under s. 439 of the Code could not be equally regarded as the final order. Whether the High Court ultimately interferes in revision or not, its order is none the less the final order. Where, as in the present case, the Sessions Judge in exercise of his power under s. 435 makes a reference to the High Court under s. 438 with the recommendation that the order of the Magistrate be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order of the High Court passed under s. 439 will be the final order in the case. In this view the period of limitation under Art. 47 in the present case must be computed from the date of the High Court's order.

In the case in *Kangali Churn Sah* v. *Zomurrudonnissa Khatoon* (3), the question that was actually raised before the High Court was whether Art. 47 of Sch. II of the former Lim. Act (Act XV of 1877) was applicable to immovable as well as movable property. But from the facts of that case it appears that the suit, which was brought beyond three years from the date of the Magistrate's order but within three years from the date of the order of the Sessions Judge, was held to be barred by limitation. Article 47 of the Lim. Act (XV of 1877) corresponded to Art. 47 of the present Lim. Act (IX of 1908) with this difference that the Article of the former Act had reference to "an order respecting the possession of property made under the Criminal P. C., Chap. XL", whereas the present Article refers to "an order respecting the possession of immovable property made under the Criminal P. C., 1898". Thus the former Article, though it embraced both movable and immovable property, was otherwise more limited in its scope. It must also be mentioned that the Criminal P. C., which was in force when the case in *Kangali Churn Sah* v. *Zomurrudonnissa Khatoon* (3), was decided was the Code of 1872, *i. e.* Act X of 1872. The sections of that Code corresponding to ss. 435, 438 and 439 of the present Code were ss. 294 to 297 in Chap. XXII. Under s. 520 of the Code of 1872 orders made under ss. 518 and 519 (corresponding to ss. 144 and 143 of the Code of 1898) were not judicial proceedings, but there was no such exception in the case of orders made under Chap. XL (now Chap. XII) of the Code; in other words, orders made under Chap. XL were subject to revision. The position, therefore, was much the same as under the present Code with the amendment of 1923. However apart from the fact that the question now before us was not raised or decided in *Kangali Churn Sah* v. *Zomurrudonnissa Khatoon* (3), that case is dissimilar to the present case in two respects. In the first place, the order passed in revision in that case was that of the Sessions Judge and not of the High Court. Under s. 296 of the Criminal P. C., of 1872 (corresponding to s. 438 of the present Code) the Sessions Judge had no power to pass any final order himself and could only report to the High Court which was to pass the final order under s. 297 of the Code of 1872 (corresponding to s. 439 of the present Code). Therefore the order of the Sessions Judge passed in that case could not be regarded as the final order. In the next place, Art. 47 of the Lim. Act of 1877 was limited to orders made under the Criminal P. C., Chap. XL only. The order passed by the Sessions Judge in exercise of his power of revision under Chap. XXII would not be an order made under Chap. XL of the Code. The "final order" in col. 3 of Art. 47 of the Lim. Act must be understood to refer to the order contemplated by col. 1 of the same Article.

Mr. Mullick contends that the expression "final order in the case" in col. 3 of Art. 47 of the Lim. Act means a final order as distinguished from an interlocutory order. No doubt s. 145 sub-s. (4) provides for an interlocutory order in case of emergency, but such interlocutory, order is not obviously contemplated by col. 1 of Art. 47 of the Lim. Act. Further, s. 522 of the Criminal P. C., which by the terms of Art. 47 of the Lim. Act falls in its purview does not provide for any interlocutory order.

Mr. Mullick refers by way of analogy to certain decisions bearing on other Articles of the Lim. Act, particularly to *Oleo-Unnissa* v. *Buldeo Narain Singh* (4) and *Juscurn Boid* v. *Prithichand Lal Choudhury* (5).

The case in *Oleo-Unnissa* v. *Buldeo Narain Singh* (4), had reference to the Lim. Act (XIV of 1859) s. 1, cl. 5, which provided that the period of limitation applicable "to suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable" was "one year from the date of the final decision, award or order in the case". It was held that

"the final decision, award, or order in the case intended by the fifth clause of s. 1 is the final decision of the Court which has competant jurisdiction to determine the case finally. Consequently, the order of the Principal Sudder Ameen, against which no appeal would lie to this Court, was the final order in the case, and therefore the period of limitation dates from the time when that order was passed, and not from the time when the High Court passed an order declaring that an appeal would not lie from that order of the Principal Sudder Ameen."

It is obvious that the order of the High Court dismissing an appeal for want of jurisdiction could not be the final order.

The case in *Juscurn Boid* v. *Prithichand Lal Chowdhury* (5), was decided with reference to Art. 97 of the First Schedule of the Lim. Act. The suit was brought by an auction-purchaser of a *patni taluk* for recovery of his purchase money after the *patni* sale was set aside by suit brought under s. 14 of the Patni Regulation. The trial Court had decreed the suit, reversing the sale, and its decree was confirmed on appeal. The question arose whether limitation under Art. 97 should run from the date of the trial Court's decree or from that of the appellate decree. Article 97 prescribes that the period of limitation for a suit "for money paid upon an existing consideration which afterwards fails" is three years from "the date of the failure". Their Lordships held that "the failure of consideration was at the date of the first Court's decree". This decision bears no analogy to the present case. Mr. Mullick, however, relies on the following observation of their Lordships:

"Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

This is undoubtedly true, but it is of no assistance in construing the particular Article of the Lim. Act with which we are here concerned.

Dr. D. N. Mitter, on the other hand, relies on the decision of the Privy Council in *Nagendranath De* v. *Suresh Chandra De* (6), and the Full Bench decision of the Madras High Court in *P. P. P. Chidambara Nadar* v. *C. P. A. Rama Nadar* (7). In the Privy Council case what was actually decided was that an appeal "is no less an appeal because it is irregular or incompetent" and such an appeal would extend limitation under Art. 182 cl. (2) of the Lim. Act. In Madras case it was held that the term "appeal" in Art. 182 cl. (2) of the Lim. Act is not used in a restrictive sense so as to exclude revision petitions and the expression "the Appellate Court" in the said Article is not confined to a Court exercising appellate power as opposed to revisional powers. These cases are, therefore, not in point.

In my judgment the suit is not barred by Art. 47 of the Lim. Act. I should, however, like to make it clear that where the High Court summarily dismisses an application for revision, whether its order would be the final order within the meaning of Art. 47 of the Lim. Act, is a question upon which I express no opinion.

I shall now consider the 12 years' rule of limitation. The plaintiffs' case is that the disputed lands appertain to the *patti* of 1*a*. 1*d* and odd share which was purchased by Ramkishun Ram on September 15, 1914, and of which he took delivery of possession on June 1, 1915. Admittedly the disputed lands were given in usufructuary mortgage to Banshi Singh, Karu Singh and Bija Singh under the deed of Ex. F (1) dated September 28, 1900. These mortgagees were recorded to be in possession of the lands in the *khatian* Ex. 13 (*d*) finally published in July 1910. The *khatian* Ex. 13 (*d*), taken along with the corresponding *khewat* Ex. 14 (*a*), shows that the disputed lands appertain to the *patti* of 1*a*. 1*d* share. In the mortgage bond Ex. F (1), however,

(4) 7 W R 151.

(5) 46 I A 52; 50 Ind. Cas. 444; 17 A L J 514; 36 M L J 557; 23 C W N 721; 21 Bom. L R 632; (1919) M W N 258; 30 C L J 71; 46 C 670; 26 M L T 131; 10 L W 416; A I R 1918 P C 151 (P C).

(6) 59 I A 283; 137 Ind. Cas. 529; A I R 1932 P C 165; Ind. Rul. (1932) P C 195; 36 C W N 803; (1932) A L J 643; 34 Bom. L R 1065; 55 C L J 528; 33 P L R 621; 36 L W 7; 9 O W N 681; (1932) M W N 817; 63 M L J 329 (P C).

(7) I L R 1937 Mad. 616; 168 Ind. Cas. 561; (1937) M W N 31 & 35; (1937) 1 M L J 453; A I R 1937 Mad. 385; 9 R M 607; 45 L W 457.

the lands were described as appertaining to the *patti* of 19 *dams* and odd share. The plaintiffs suggest that this was fraudulently done by *Rai Bahadur* Tukanath Singh with an ulterior motive. Apart from the record of rights, the defendants' own unregistered sale-deed Ex. K, dated March 5, 1916, shows that the one *bigha* out of the disputed lands which is said to have been purchased thereunder appertains to the *patti* of 1*a*. 1*d* share. The learned Subordinate Judge has held that the disputed lands really appertain to the *patti* of 1*a*. 1*d* share, and though Mr. Mullick attempted to show that this finding is wrong, he argued the question of limitation on the assumption that it is correct.

It is common ground that the usufructuary mortgage of Banshi, Karu and Bija was redeemed. The plaintiffs' case is that the redemption was by Tukanath himself. The defendants, on the other hand, assert that in 1916 shortly after the purchase of the one *bigha* under the unregistered sale-deed Ex. K they redeemed the mortgage on payment of Rs 3,151. The Subordinate Judge's finding that the sale-deed Ex. K is not a genuine document has not been challenged before us. That being so, it is impossible to believe that the defendants without having any title should redeem the mortgage on payment of Rs. 3,151. No doubt the mortgage bond was produced by them with endorsements showing payment through Kashi Singh, defendant No. 2. Curiously enough the endorsements are not dated. The disputed lands as appertaining to the *patti* of 1*a*. 1*d* share had already passed under the auction purchase of 1914 to Ramkishun Ram. It is, therefore, absurd to suppose that after 1914 Tukanath's son (Tukanath having died in 1912) or anybody claiming through him would redeem the mortgage. The plaintiffs have adduced evidence to show that about 1911 Tukanath himself redeemed the mortgage. P. W's. Nos. 5, 7 and 12 have deposed on the point. The evidence of P. W. No. 5 may not be convincing or reliable because he says the Bharna bond was redeemed 4 years before survey, and he is a servant of one Badri Narayan Singh with whom the defendants are, according to his own evidence, on terms of litigation. There is no sufficient reason, however, to discard the evidence of P. W. No. 7 and P. W. No. 12. P. W. No. 7 is grandson of Karu Singh, one of the mortgagees. The only comment on his evidence is that he admits that all his lands have been sold. P. W. No. 12 is sought to be discredited on the simple ground that he is the *raiyat* of the plaintiff. The learned Subordinate Judge has believed the evidence adduced by the plaintiffs and it is very difficult to hold that his view of the evidence is wrong.

Mr. Mullick strenuously argues that it is incredible that Tukanath would redeem the mortgage when Ramkishun Ram's decree on the prior mortgage was being executed. He refers to the suit register Ex. 23 which shows that during Tukanath's life time Ramkishun Ram took out execution of his mortgage decree in 1908 and 1909 and again in 1910. But from that very register it appears that in 1909 Tukanath paid at first Rs. 550 and again Rs. 2,800, total Rs. 3,350. It is, therefore, evident that Tukanath was making payments towards the decree. It may be that Tukanath thought he could retain the lands as part of his 19 *dams patti* as asserted by him in the mortgage bond Ex. F (1). Be that as it may, the fact remains that the mortgage was undoubtedly redeemed. The question is, when and by whom? Redemption after 1914, that is to say, after the auction purchase by Ramkishun Ram was absurd. Redemption by defendants is definitely disproved. Redemption after Tukanath's death by his son Jhalak Kishore between 1912 and 1914 is quite unlikely. Under these circumstances, I do not think that the learned Subordinate Judge was wrong in accepting the plaintiffs' case that it was Tukanath himself who redeemed the mortgage.

Mr. Mullick lays much stress on the fact that the satisfied mortgage bond was produced by the defendants. But Rampal Singh, defendant No. 1, was, as the evidence shows, the *karpardaz* of *Rai Bahadur* Tukanath Singh, and Kashi Singh defendant No. 2, is brother of Rampal Singh. Kashi Singh is said to have made the payments to the mortgagees and his name appears in the endorsements on the back of the bond. But neither he nor Rampal has been examined. No importance, therefore, can be attached to the fact that the bond was produced by the defendants. The plaintiffs' evidence is that there was no endorsement on the back of the bond which was simply returned to Tukanath. It is said that at the time of return of the bond either its head must have been torn or there must have been an endorsement of satisfaction. But, on the other hand, endorsement without any date is very suspicious. Bija Singh, D. W. No. 8, one of the mortgagees, proves one of the endorse-

ments Ex. J (1) to be in his handwriting. But in his cross-examination when the endorsements were shown to him he said "They do not contain my signature. My sight is defective". This throws a great doubt on the genuineness of the endorsements.

Tukanath having redeemed the usufructuary mortgage, the disputed lands were in the possession of his son Jhalak Kishore Singh at the time of the auction purchase of Ramkishun Ram. The order No. 12, dated September 15, 1914, in the order sheet Ex. 2 in the execution case shows that the 1*a*. 1*d patti* which was lot No. 1 was valued at Rs. 14,000 on the basis of the annual income which was ascertained to be Rs. 700 the bulk of which was derived from 60 *bighas* of *khudkasht* land. These 60 *bighas* of *khudkasht* land which were most valuable apparently included the disputed 32 *bighas* and odd. The *khatian* Ex. 13 (*d*) shows that the total area of *bakasht* lands in *khata* No. 188 was 37.84 acres which would be equivalent to more than 55 *bighas*. Ramkishun Ram, having purchased the 1*a* 1*d patti* of Rs 14,000, was not likely to remain idle if he did not get actual possession of the 60 *bighas* which formed the most valuable part of the *patti* he purchased. It is not suggested that the plaintiffs are in possession of some other lands making up 60 *bighas* as part of 1*a* 1*d patti*.

The plaintiffs examined several witnesses to prove their possession over the disputed lands. Though the learned Subordinate Judge has not discussed their evidence in detail, he has believed their evidence and come to the finding that the plaintiffs were in possession of the disputed lands till the decision in the case under s. 145 of the Criminal P. C. The evidence on behalf of the plaintiffs is consistent with the probabilities. In the circumstances, it is difficult to hold that the finding of the Subordinate Judge, is not correct.

Mr. Mullick argues that this being a suit in ejectment, the plaintiffs must adduce satisfactory evidence to prove their possession within 12 years. He complains that what the Subordinate Judge has done is that he has discussed the evidence of the defendants and having disbelieved their evidence, he has held that the plaintiffs were in possession within 12 years. Of course, his judgment is open to the criticism that he has not discussed the evidence of the plaintiffs' witnesses on the question of possession. But taking his judgment as a whole, and considering the evidence and the probabilities, I am unable to hold that his finding is wrong.

The contentions of the appellants fail and I would dismiss the appeal with costs.

S. *Appeal dismissed.*

RANGOON HIGH COURT

First Appeal No. 18 of 1940

July 4, 1940

DUNKLEY AND BLAGDEN, JJ.

MA KYIN SEIN AND OTHERS—APPELLANTS

versus

MAUNG KYIN HTAIK—RESPONDENT

Burmese Buddhist Law — Adoption — Monk, if can adopt—Adoptive parent's unilateral act, if can terminate adoption — Succession — Adoptive parents indicating by acts, desire to sever relation with their keittima ***child—***Keittima ***child acquiescing in parents desire by living separately — He forfeits right to inheritance — Adoptive parent, if can give adoptive child in adoption to another — Adopted child minor— Consent of person on his behalf, if necessary— Precedent—Parties consenting not to canvass particular legal question—Decision in suit, if binding on inferior Courts as to answer to that question.***

A Buddhist monk is vowed to a life of celibacy and poverty, and has cut himself off from all worldly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person, bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is precluded by his personal law from having natural children cannot adopt. 120 Ind. Cas. 663 (1), relied on. [p. 509, col. 1.]

The relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act (disclaimer) of the parent An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children. 55 Ind. Cas. 258 (2), relied on [p. 509, cols. 1 & 2.]

If the adoptive parents show by their acts that they desire to sever the relationship with their *keittima* child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as *keittima* child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his rights of inheritance. [p. 509, col. 2; p. 510, col. 1.]

[Case-law referred to.]

Obiter.—An adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another. The adoptive parents step into the shoes of the natural parents, and as natural parents can give away their child in adoption, adoptive parents also may give away their *keittima* child in adoption to another person who takes the child with the intention that the child shall inherit to him and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And, just as the adoption from the natural parents has the effect

of severing all the ties of the child with its natural family so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. [p. 508, col. 2]

Where by consent, parties to a suit do not canvass a particular legal question, the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that question is. [p. 515, col. 1.]

F. A. against the decree of the District Court, Pyapon, dated December 29, 1939.

Mr. *U E Maung* (1), for the Appellants.
Mr. *U Aye Maung* (2), for the Respondent.

Dunkley, J—The suit out of which this appeal arises was a suit by the plaintiff-respondent for the administration of the estate of U Maung Maung, deceased, who died in the year 1933. The plaintiff-respondent set up that he is the *keittima* adopted son of U Maung Maung and his first wife, Ma Kyin Si, who died in or about the year 1907. This respondent alleges that he was adopted with a view to inherit by U Maung Maung and Ma Kyin Si when he was a few months old, and that Ma Kyin Si died when he was a little over one year old. U Maung Maung and Ma Kyin Si had a number of children born to them, but the only one who survived infancy was Ma An, (P. W. No. 3), who is the respondent's strongest supporter in his present claim. In or about the year 1909, U Maung Maung married as his second wife one Ma Khin, who died in 1938. The defendant-appellants are the surviving children of U Maung Maung and Ma Khin. Assuming that the respondent's claim to be still the *keittima* son of U Maung Maung is true, he might have claimed his share of his adoptive father's estate on the latter's re-marriage, and again on U Maung Maung's death, and it is extremely significant that he waited until after Ma Khin's death before putting forward his claim, and, although he had erroneously stated in para. 17 of his plaint that his cause of action arose on Ma Khin's death, in the prayer he has asked for the administration of the estate of U Maung Maung. This delay in making his claim is rendered even more important by the facts that on November 22, 1920 (Ex. 5), Ma An was given Rs. 20,000 by U Maung Maung, as her share of the joint property of her mother and U Maung Maung due to her on U Maung Maung's remarriage and that on January 23, 1935, (Ex. 6) she was given by Ma Khin a piece of land in full satisfaction of all claims which she might have in the estate of U Maung Maung then deceased. On neither of these occasions when his (alleged) adoptive sister claimed and obtained a share of her father's estate did the respondent make any claim.

The appellants, in their defence, denied the adoption of the respondent and in the alternative pleaded that the relationship between U Maung Maung and the respondent, if it ever existed, was brought to an end on June 25, 1910. *i. e.*, when the respondent was only three or four years of age by U Maung Maung giving away the respondent in *keittima* adoption to a monk named U Zawana, (P. W. No. 2). The finding of the learned District Judge that the respondent was in or about the year 1906 adopted in the *keittima* form by U Maung Maung and Ma Kyin Si has not been strenuously contested before us. It could not very well be in view of the evidence of U An Za (P. W. No. 1), U Zawana (P. W. No. 2), and Ma An (P. W. No. 3), as to the actual adoption and the admission made by U Maung Maung in the presence of a number of prominent residents of Pyapon who have signed the document as witnesses in the deed of adoption (Ex. 8), dated February 22, 1921 in which he acknowledged that the respondent was the *keittima* son of himself and Ma Kyin Si. It is conceded by both sides that an adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another and I think that this proposition is probably correct, although I have not been able to find any authority for it. The adoptive parents step into the shoes of the natural parents, and it seems probable that as natural parents can give away their child in adoption, adoptive parents also may give away their *keittima* child in adoption to another person who takes the child with the intention that the child shall inherit to him and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And, just as the adoption from the natural parents has the effect of severing all the ties of the child with its natural family so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. But it is unnecessary for us to come to a decision on this question for the purported second adoption of the respondent was invalid on another ground.

Now it is clear from the evidence that soon after his second marriage U Maung Maung desired to sever his relationship with the respondent and purported to do so by

giving away the respondent in *keittima* adoption to the monk U Zawana on June 25, 1910. This purported adoption was evidenced by the document Ex. 8 executed more than ten years later on February 22, 1921. U Zawana who is now 83 years of age and whose mental powers are obviously failing tried to pretend in his evidence that he did not intend to take the respondent in adoption, but he is naturally highly interested to deny that there was a monetary consideration for his execution of this document and I agree with the learned District Judge that the evidence of U Tha Kin, (D. W. No. 1), an Advocate of this Court who signed the document as a witness, is to be preferred as to the circumstances under which U Zawana and U Maung Maung executed it. It was confirmation in writing of an adoption which had taken place more than ten years previously and it shows that U Maung Maung severed his connection with the respondent when the latter was about four years old and remained of the same mind until his death. If a second adoption is possible that would end the case in favour of the appellants provided that the adoption of the respondent by U Zawana were a valid adoption; but, in my opinion, it was invalid for the reason that a Buddhist monk cannot validily adopt. It is perhaps not surprising that there is no reported decision on this point as it must be a very rare occurrence for a pongyi to desire to adopt a child, but in an unreported case, *Ma On Kyi* v. *Ma Thaung May* (1) a Bench of this Court held that a pongyi, being bound by the Vinaya, cannot adopt. With the greatest respect, this must be so. A Buddhist monk is vowed to a life of celibacy and poverty, and has cut himself off from all worldly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person, bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is preculded by his personal law from having natural children cannot adopt.

However, U E Maung for the appellant concedes that the relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act of the parent. An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children: *San Paw* v. *Ma Yin* (2). But U E Maung contends that the action relationship can be severed by the act or acts of the adoptive parent in which the adopted child, having reached the age of discretion, has by his conduct acquiesced. That a *keittima* child may forfeit his right of inheritance by his conduct is unquestioned. According to the Dhammathats he forfeited his right of inheritance by living separately from his adoptive parents (Manukye, Book X, ss. 25 and 26), but the strictness of this rule has been modified by judicial decision; *see Nga Min Gyaw* v. *Me Pi* (3), *Maung Po Sein* v. *Maung In Dun* (4), *Maung Aing* v. *Ma Kin* (5), *Ma Gyan* v. *Maung Kywin* (6), *Maung Shew Thwe* v. *Ma Saing* (7). This question was considered by their Lordships of the Privy Council in 1917 in the case in *Maung Thwe* v. *Maung Tun Pe* (8). In the course of their judgment their Lordships observed at p. 255*:

"A *keittima* child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents. These authorities however draw a distinction between the cases where there are other children with whom the *keittima* seeks to compete and share and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation. This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the *keittima* child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate. The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge his duties to his adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken."

Hence, it is clear that if the adoptive parents show by their acts that they desire to sever the relationship with their *keittima*

(1) A I R 1929 Rang. 173; 120 Ind. Cas. 663; Ind. Rul. (1930) Rang. 39.

(2) 12 Bur. L T 207; 55 Ind. Cas. 258; A I R 1930 L B 55.
(3) (1872-92) L B R 8.
(4) (1872-92) L B R 191.
(5) (1893-96) 2 U B R 22.
(6) (1892-96) 2 U B R 176.
(7) (1897-01) 2 U B R 135.
(8) 44 I A 251; 42 Ind. Cas. 863; A I R 1917 P C 136; 45 C 1; 11 Bur. L T 28; 22 M L T 411; 22 C W N 97; 27 C L J 68; (1918) M W N 9; 20 Bom L R 64 (P C).

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child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as *keittima* child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his rights of inheritance.

When the respondent was adopted U Maung Maung and Ma Kyin Si were living at Eyagyi village, which is about two miles from Naukpyando village, where the pongyi U Zawana lives. Ma Kyin Si's mother, Daw Soon, also lived at Naukpyando. After his second marriage U Maung Maung moved to Pyapon, where he lived up to the time of his death. Naukpyando is about one hour's journey by boat from Pyapon. The respondent has stated in his evidence that after the death of Ma Kyin Si he lived with U Maung Maung and his second wife Ma Khin at Pyapon until he was eight years old, and then he was sent to U Zawana's monastery at Naukpyando, where he lived until he was 18 years old, first as a scholar and later as a novice; that after he left the monastery he lived with Daw Soon at Naukpyando until she died in 1928; that he was married at that time and he and his wife were living with Ma Soon; that he continued to live at Naukpyando until 1938, when he moved to Pyapon; that his occupation since he left the monastery has been and still is that of a carpenter. The respondent cannot have any real recollection of his early life with U Maung Maung, and on this point I prefer the evidence of Ma An, who is 11 years older than the respondent. She is strongly prejudiced in favour of the respondent: she has admitted that in her evidence. She has stated that after the death of Ma Kyin Si she and the respondent were taken by Daw Soon to live with her. They lived with Daw Soon for about a year, and then U Maung Maung took them both to live with him and his second wife at Pyapon. A year later, that is, when the respondent was between 3 and 4 years old, the respondent was sent to U Zawana's monastery at Nyaukpyando. The statement of Ma An on this point corresponds with the date mentioned in the document Ex. 8 as the date on which the original purported adoption of the respondent by U Zawana took place.

Consequently it is clear that from about the time when the respondent was 3 or 4 years old U Maung Maung considered that he had put an end to all the ties between himself and the respondent, and never subsequently looked upon the respondent as his son. He did not maintain the boy, he did not "*shinbyu*" him. Daw Soon fed him and performed the "*shinbyu*" ceremony. U Zawana has stated that U Maung Maung on his visits to the monastery used to give some sweetmeats to the respondent, but it is clear that U Maung Maung and his family respected U Zawana, and that U Maung Maung's visits to the monastery were for the purpose of seeing U Zawana, and not to see the respondent, and it is very slight evidence of any relationship between them that a wealthy Burmese gentleman should give cakes or pocket money to a school-boy on his visits to the monastery. U Maung Maung's treatment of Ma An was in marked contrast. She continued to live with U Maung Maung and Ma Khin until she was 21 years old when she married and set up a separate establishment with her husband.

The respondent did not attempt to perform filial duties towards U Maung Maung. He has stated in evidence that he used to pay visits to U Maung Maung at Pyapon, but he admits that he never slept in U Maung Maung's house and that the number of such visits was only ten in twenty years. U An Za and U Zawana have both stated that the respondent used to visit U Maung Maung, but they are very old and their memories are not good, and as they live at Naukpyando I cannot understand how they could know personally whether the respondent used to visit U Maung Maung or not. On the other hand, the appellants have called a number of the leading citizens of Pyapon as witnesses, some of these witnesses having been close neighbours of U Maung Maung, and they have stated that they had never heard of the existence of an adopted son of U Maung Maung and had never seen the respondent in U Maung Maung's house. They are persons who would have been likely to have known if the respondent had visited U Maung Maung at all frequently. Further Ma An who is the strongest witness for the respondent, has stated that whenever the respondent visited Pyapon he used to stay in her house, and as far as she is aware he never went to her father's house.

It has been urged upon us that these facts do not show any intention on the

part of the respondent to sever the tie of adoption, because he had been repudiated by U Maung Maung and was therefore prevented from discharging his filial duties, which he was always ready and willing to discharge; but there are other facts which in my opinion, show conclusively that the respondent, after he had come of age, acquiesced in U Maung Maung's severance of the relationship between them, and did not consider himself to be the *keittima* son of U Maung Maung. U Maung Maung was a Sino-Burman. According to the custom of persons of this class, he was buried with Chinese ceremonies, and in these ceremonies the son of the deceased takes a very prominent part. Also all the near relatives of the deceased wear black clothes for a considerable time after his death. U Maung Maung died in 1933, when the respondent was 27 years of age. I am prepared to accept the evidence that the respondent attended the funeral, although his presence was so inconspicuous that U An Za did not notice him. He attended on two days as a follower of U Zawana, and did not stay at the funeral house. He was merely an ordinary guest at the funeral. He did not wear mourning clothes although the appellants and their mother Ma Khin and Ma An did so. He took no part whatever in the funeral ceremonies. Clearly therefore he did not consider himself to be a son of U Maung Maung. In November 1920, Ma An was given Rs. 20,000 by U Maung Maung as her share of the joint estate of U Maung Maung and Ma Kyin Si. The respondent admits that he knew about this transaction. He was 14 years old at the time, and he had U Zawana and Ma Soon to advise him. Yet he made no claim for himself. In January 1935, after the death of U Maung Maung, Ma An made further claim against her father's estate and was given a piece of land, valued at Rs. 1,500, by Ma Khin. The respondent admits that he knew about this transaction at the time. He was 29 years old at that time, but he made no claim for himself. Baw Soon died in 1928, and at the time of her death she owned a holding of paddy land a house and garden. Ma An applied to the revenue authorities to have these properties assessed to revenue in her name on the ground that she was the sole heir of Daw Soon. The respondent objected, alleging that he was a joint heir with Ma An. U Maung Maung was examined by a revenue officer, and stated that the respondent was not his adopted son, and consequently Ma An's application was successful. The respondent did not proceed further with his objection, and did not prosecute his claim before the Civil Courts. Ma An's statement in evidence in regard to this matter is extremely illuminating. She said :

"At the time of his filing the objection he and I were temporarily on bad terms with each other. We are now on speaking terms with each other. We have been so far about seven years (*i. e.* since 1932). About seven years ago he expressed his regret to me for having filed the objection and said that he had made a mistake."

Yet she is now strenuously supporting the respondent's claim, because she has, as she admits, quarrelled with the appellants. A sister of U Maung Maung, named Daw Gyi, died in 1938, and according to Chinese Customary Law (which at that time was held to be applicable to Sino-Burmans) her nephews were he heirs. One nephew brought a suit in the Township Court of Pyapon for the administration of her estate, and he joined her other nephews as defendants in the suit. If the respondent were the *keittima* son of U Maung Maung, he was also a nephew of the deceased and entitled to share equally with the other nephews in the estate. Yet he was not made a party to the suit, and although the respondent admits that he knew that Daw Gyi's nephews had inherited her estate he has never claimed a share therein.

All these facts raise the irresistible inference that the respondent acquiesced in and agreed to the act of U Maung Maung in severing the tie of adoption and repudiating the respondent as his son, and for many years before U Maung Maung's death did not consider himself to be U Maung Maung's adopted son. Hence the presumption arises that the respondent had intentionally severed the relationship with his adoptive father, and had thereby forfeited his right of inheritance. This appeal must therefore be allowed, the judgment and decree of the District Court of Pyapon set aside, and the suit of the plaintiff-respondent dismissed with costs in both Courts, Advocate's fee to be calculated *ad valorem* on the amount of the claim, *viz*, Rs. 35,325. As the plaintiff-respondent was permitted to sue *in forma pauperis*, it is now ordered that he shall pay the court-fees on his plaint which he would have had to pay if he had not been permitted to sue as a pauper, and the District Court of Pyapon is directed to send a copy of the decree in this appeal to the Collector of the Pyapon District.

Blagden, J.—This appeal raises interesting questions of mixed law and fact. The plaintiff claims to administer the estate of U Maung Maung, deceased, as the *keittima* child of U Maung Maung and his first wife Ma Kyin Si. His adoption was in controversy in the Court below. The plaintiff adduced evidence to show that he was received into U Maung Maung's household as an infant of about six months; that a meal was given to pongyis to celebrate his adoption on the occasion of his first bath; and that an inscription on the tombstone of Ma Kyin Si referred to him as her son. Our attention was not called to any evidence that the person who caused this inscription to be made was dead, but I see that U Zawana (P. W. No. 2) was able to testify to this and thereby make the inscription evidence under s. 32 (6), Evi. Act. On the other hand a witness was adduced by the defendants who deposed to a conversation with U Maung Maung in 1908 in which he referred to the then infant plaintiff as being in his house, so to speak, "on approval" and expressed doubts as to how long he (the deceased) could tolerate his presence. This, if true, was quite inconsistent with *keittima* adoption at the date of the conversation. But the witness was dealing with an event more than thirty years old. Whatever the truth about this conversation (it may for example well be that the words were uttered in jest but, as so often happens with jests, were not so understood) a subsequent event, namely the execution of the document called Ex. 8, makes it clear beyond reasonable doubt that at some time in or about 1907 the plaintiff was adopted as the *keittima* child of U Maung Maung. U E Maung, who appeared for the appellants, did not very strongly contend to the contrary, and therein he showed his usual wise discretion. The area of the dispute before us has also been greatly narrowed as learned Counsel on both sides agree that if at the date of the death of U Maung Maung the plaintiff was still his *keittima* son, the plaintiff is in the events that have happened entitled to three-eighths (or one-half of three quarters) of the *payin* property and 1/16th (or one-half of one-eighth) of the *lettetpwa* property of U Maung Maung, the other halves being represented by the share of which Ma Ant (his surviving daughter by his first marriage) elected to take possession on the death in 1933 of U Maung Maung in lieu of waiting for that of Ma Khin, his second wife.

Given that the plaintiff was adopted by U Maung Maung, the question remains whether the relationship of father and son by adoption survived till 1933. During the life of Ma Kyin Si, the deceased had his home at Eyagyi. Ma Kyin Si died shortly after the plaintiff's adoption and the two children, Ma Ant and the plaintiff, were apparently left for about a year in the care of her mother Daw Soon at Naukpyandoe. Then the deceased married Ma Khin and at or about the same time went to live at Pyapon, distant according to Ma Ant (P. W. No. 3) about one hour's journey by boat from Naukpyandoe. But a year or more later the two children ceased to be treated alike. When according to the plaintiff) he was about five, or (according to his own witness Ma Ant) when he was three, he was sent back to live with his adoptive maternal grandmother Daw Soon. From the day forward he saw very little of the deceased or the deceased of him From then till he was about 22 he continuously resided either in the house of Daw Soon or at a *kyaung* (also at Naukpyandoe) presided over by U Zawana (P. W. No. 2), where at first he daily attended as a *kyaungtha*, eating and sleeping at Daw Soon's house and where he later, until he was about 18, resided as a *koyin*, Daw soon supplying his food. A *shinbyu* ceremony was performed for him not by U Maung Maung but by Daw Soon, although at about the same time a similar ceremony was performed for a number of other youths by U Maung Maung. During these years almost his only intercourse with U Maung Maung took place when, not more often than monthly, (the plaintiff himself says only about once a year) U Maung Maung visited the *kyaung* when he used apparently to give the boy pocket money and minor comestibles. With the greatest respect to my learned brother's views, I should have thought that this by itself was rather strong evidence of intention to continue adoptive paternity, though I agree it is quite insufficient to outweigh the other available evidence about this matter.

On February 22, 1921 there came into existence the most important document in this case, Ex. 8. It recites first the *keittima* adoption of the plaintiff by U Maung Maung and Ma Myin, then an outright verbal gift of the plaintiff by way of *keittima* adoption to U Zawana 10 years before. It then confirms the latter gift and concludes with what is in effect a covenant

for quiet enjoyment in favour of U Zawana. Whatever the legal effect of this document, it certainly does make it quite clear that the original adoption relied on by the plaintiff in fact took place. On the other hand, if the plaintiff had been given in adoption to U Zawana (if in law that were possible) there is an end of the plaintiff's case since one cannot have more than one father at any one time. We have to consider whether, either in 1911, or at all events as from February 22, 1921, U Zawana in fact purported to adopt the plaintiff as his *keittima* child, and if so could he in law do so effectually? As against him the recital is strong though not irrebuttable evidence that he at all events purported to adopt the plaintiff and I think it some evidence against the plaintiff though by reason only of s. 32 (5), Evi Act, and in all the circumstances I do not myself think it very strong evidence as the plaintiff was no party to the instrument. U Zawana strenuously denied that he ever adopted the plaintiff. He is not the first, or likely to be the last, person (even amongst those habitually dealing with worldly affairs) who has signed a document with a false recital, and as the learned District Judge seems to have been clearly of opinion that there was never even a purported adoption by him I should not myself have been prepared to come to a different conclusion on the facts.

As however my learned brother takes a different view about this I may be—indeed probably am—wrong. Even if I am, *Ma On Kyi* v. *Ma Thaung May* (1) (unreported) is an authority binding on us to show that anyhow a pongyi is in law incapable of making a valid adoption. It would certainly be paradoxical, if a person legally incapable of procreating children or possessing property could do by a legal fiction what he could not do through the usual channels and acquire children to inherit, but to inherit (presumably) nothing. The question whether there was a valid adoption by U Zawana being thus answered one way or another in the negative, it follows that if the plaintiff had been the natural son of U Maung Maung nothing that happened down to the latter's death would have terminated that relationship or, to be more accurate, its legal consequences. In the case of natural parenthood those legal consequences cease (1) on the adoption of the child, (2) on divorce of the parents as between the child and that, if either, parent with whom filial relations are not maintained, and (3) on the child's becoming a "dogson" That the legal consequences of adoptive parenthood also cease on the happening of any of these three events is not in dispute. But none of them here happened. U E Maung contends that adoptive, unlike natural, parenthood can be terminated by mutual consent, and that such consent can be evinced by conduct and need not be expressed. Certainly there seems to be nothing unreasonable in a purely artificial relationship being terminable by purely artificial means.

On the facts, there can be no doubt at all that at latest on February 22, 1921 U Maung Maung intended, so far as in him lay, irrevocably and completely to put an end to the artificial tie which once or then bound him to the plaintiff. He gave expression to that intention by an instrument which on the face of it recorded an adoption. This, as I have said, is not in my opinion shown to have in fact occurred and in law could not have done so; nonetheless he gave emphatic expression to his desire, and the instrument though ineffective as an assignment may still, as U E Maung contends, be effective as a disclaimer. U E Maung, rightly in my opinion, conceded that a disclaimer alone is not enough: parents, adoptive or natural, cannot in law get rid of their obligations to their children by a mere unilateral act; children are not chattels which can be abandoned at the owner's whim: *see* as to this *San Paw* v. *Ma Yin.* (2). U E Maung, therefore, further contends that the plaintiff's conduct, though it never approached that active impiety which would render him a dogson plainly indicates that he assented to the termination of his relationship with U Maung Maung.

It is unnecessary to consider what he did or did not do as a young child: I do not think that can affect the question. But looking only at what took place from February 1921 onwards, I think his conduct taken as a whole was quite inconsistent with his still regarding U Maung Maung as his father. He seems to have behaved towards him with increasing casualness culminating in complete neglect. It may well be that if he had sought greater intimacy he would have been rebuffed, but if he wanted to keep alive his relationship with U Maung Maung I think that at least he should have tendered per-

formance of those obligations which that relationship imposed on him.

That which happened when he ceased to be a *koyin* is particularly important. He was, it seems, about 18 years of age. I ask myself where a youth of that age leaving an educational or similar establishment would naturally go, and the answer is "home—possibly not at once but fairly soon." Where did the plaintiff go? Admittedly to the house of Daw Soon; and he did not go there merely for such a farewell visit as any young man might well pay to an old lady for whose kindness in the past he had every reason to be grateful, but he stayed there for about four years. Taking his evidence as to his relations during this time with U Maung Maung at the highest, he paid to the latter such visits as a young man or boy might be prompted by great affection (or great expectations to pay to a relative more remote than a parent, but his whole procedure during this period was inconsistent with his regarding U Maung Maung's house as his home. True, there is no direct evidence that U Maung Maung's wish to sever parental and filial relations with him was ever brought to his knowledge. But the circumstantial evidence that neither regarded the other as father or as son during this period is overwhelming. It may also be true that had he returned, his relations with the defendants (his adoptive step-sisters) would have been intolerable. But, if so I do not see why he should be allowed to have it both ways so as to refuse to share the paternal home because he disliked his adoptive father's real daughters and at the same time to claim his share of their natural inheritance in opposition to them. If, therefore, a *keittima* adoption can in law be terminated in the manner suggested, this adoption was in my opinion so termited. We must consider if it can be.

A passage in the Laws of Manco, Vol. VI, p. 171, and a *dhamma* quoted in s. 201 of Vol. I of U Gaung's Digest show that from very early times adoption differed in law from procreation, being subject to possible restraints from which procreation was free. Still more significant is the passage in Vol. VIII of the Laws of Manoo, pp. 234-6 as showing that subject to certain conditions some adoptions were voidable at the instance of the natural parents. Though the tendency of modern decisions is to identify *keittima* with natural children, it is, I think, true that in those decisions the Court has been considering not how a *keittima* adoption can be terminated but what a *keittima* adoption involves, assuming it to be subsisting at the material time.

Nga Min Gyaw v. *Me Pi* (3) and *Maung Po Sain* v. *Maung In Dun* (4), though not binding on us and of dubious authority in view of *Ko Pe Kyai* v. *Ma Thein Kha* (9) which I shall mention later, at all events indicate that by living apart from his adoptive parents (even after his own marriage) a *keittima* child may (not must) lose his rights of inheritance, and they are based on explicit passages in the Dhammathats there cited, which, read literally, go even further than the decisions themselves. For example:

> "If the adopted child be not living with the parents, and their own children are, he shall have no right to share; Manu Dhammathat, Vol. X, para. 25."

> "If the child, being a notoriously adopted child, shall not live with the parents who adopted him but.... shall marry and live separately, he shall have no share in the property of the parents who adopted him: *Ibid*, para. 26."

It is true that these requirements must receive a reasonable construction regard being had to the changed conditions of modern times *Ma Gyan* v. *Maung Kywin* (6) and indeed it may be said that in view of *Maung Aing* v. *Ma Kin* (5) they are no longer part of our law at all. But they are relevant to the present problem as showing that *keittima* children were never for all purposes in an identical position with natural children. It must be observed that in *Ma Gyan* v. *Maung Kywin* (6) it was said (at p. 161):

> "The real issue for determination ... is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not,"

a sentence which pre-supposes that the artificial family tie can be intentionally severed. At the very least these early authorites show that long ago it was considered that right of a *kettima* child to inherit might be lost where that of a natural child would not be. Other authorities to the same effect are *Maung Aing* v. *Ma Kin* (5), *Maung Shew Thwe* v. *Ma Saing* (7) and *Ma E* v. *Maung Shwe Kaing* (10). Though in the last cited case the relaxation in modern times of the strict requirement of joint living, especially where there are no natural children, was pointed out, the possibility of loss of inheritance by a *keittima* child living apart

(9) 1937 Rang. 426; 173 Ind. Cas. 238; A I R 1937 Rang. 455; 10 R Rang 327.

(10) (1893-1900) L B R 520.

*Page of (1892)—961 24, B. R.—[*Ed.*]

was again clearly recognized as it was by their Lordships of the Privy Council in *Maung Thue* v. *Maung Tun* (8). Again, a Full Bench of this Court in *Maung Po An* v. *Ma Dwe* (11) was of opinion that a *keittima* adopted son could not claim from his adoptive mother on the death of the adoptive father the *auratha* sons's quarter share of the parents' joint estate, which again indicates that the *keittima* child is not for every purpose in a position identical with an own child. This also appears from *Ma Nyun Sein* v. *Maung Chan Mya* 12) where it was held that a *keitttma* child who enters and then leaves the priesthood is not *ipso facto* re-adopted, though in similar circumstances the legal consequences of the natural relationship of parent and child would again come automatically into force.

At first view the decision of the Judicial Committee in *Maung Ba Pe* v. *Maung Shwe Ba* (13) appears to be in the respondent's favour. But on a close examination one finds that that case actually decided nothing which affects the present question. The fourth issue settled in the District Court was (see p. 520) : "Has Maung Shwe Ba lost his right to inherit on account of conduct inimical to Ma Ka ?" In other words, "is the plaintiff a dogson?" Had the wording of the issue stopped at the word "inherit" light would doubtless have been thrown on the question we have to decide. But that the parties chose to confine the dispute to the particular question of "dogson or not dogson" is made abundantly clear by the agreed interpretation of the fourth issue set out at the top of p. 522. Where by consent parties to a suit do not canvass a particular legal question the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that questoin is nor do I find any dicta in their Lordships' judgment which affect it.

There have in the last five years been four decisions in this Court which impinge on the case before us. Dealing with these in chronological order, in *Ma Than Nyun* v. *Daw Shwe Thit* (14) the mode of effecting a *keittima* adoption was considered and the publicly expressed intention that the child shall inherit was laid down to be the esential factor. How, if at all, that expression of intention could be revoked was not in issue and therefore the case is really no authority on the point we have to decide.

In *Ko Pe Kyai* v. *Ma Thein Kha* (9), to which I have already alluded, the opinion was expresed that the old requirement of cohabitation is no longer essential to a *keittima* child's inheriting. That dictum, if I may respectfully say so, seem clearly right in view of the decisions already reviewed. There is however much more here than mere failure to live in the adoptive parents' house. There is on the parent's side the clearest possible repudiation of the relationship of father and son ; and there is on the plaintiff's side, as I have said, the deliberate choice of a house which was not the deceased's as his home There is residence there by the plaintiff for four years, two of them before he married, which is quite inexplicable except on the hypothesis that he so regarded the house of Daw Soon. There are then visits to the deceased, at first very infrequent and later ceasing altogether ; the very minor part played by the plaintiff at the funeral of U Maung Maung; and his passive attitude to the rights of inheritance asserted by Ma Ant and another in opposition to him. I have no doubt at all that under the old law he would have lost his rights to inherit, and I see nothing in *Ko Pe Kyai* v. *Ma Thein Kha* (9) which in the circumstances of the present case shows that the contrary is true to-day.

That actual residence with the adoptive parents was not essential was also held by Braund, J. in *U Ba Thaung* v. *Daw U* (15). No doubt, at any rate in modern times, merely sending the child away to receive education, whether secular or religious, would not sever the tie. But as I have said, much more than that took place here, and in my opinion, we should not be doing anything inconsistent with Braund, J.'s decision if we were to hold that in this case the tie was severed on some date prior to the death of U Maung Maung. Finally there is the Full Bench decision in *Maung Thein* v. *U Tha Byaw* (16). The question referred there was :

"What right of inheritance has the child adopted in the *keittima* form according to Burmese Buddhist Law in the estate of the father of his adoptive father, where the latter having acquired the status

(11) 4 R 184; 98 Ind. Cas 621; A I R 1926 Rang. 148.

(12) 11 L B R 124; 66 Ind. Cas. 573; A I R 1921 L B 87.

(13) 6 R 520; 110 Ind. Cas. 306; A I R 1928 P C 197; 55 M L J 95; 28 L W 129; 48 C L J 177; 33 C W N 70 (P C).

(14) 14 R 557; 164 Ind. Cas. 272; A I R 1936 Rang. 344; 9 R Rang. 73 (2).

(15) 1938 Rang. 323; 169 Ind. Cas. 617; A I R 1937 Rang. 170; 10 R Rang. 14.

(16) 1939 Rang. 341; 182 Ind Cas. 268; A I R 1939 Rang. 197; 12 R Rang. 2 (F B).

*Page of 6 R.—[*Ed.*]

of an *auratha* son has died before the death of the grandfather?"

Consequently, the decision which answered that question presupposed a valid adoption and an adoption subsisting at the date of the death of the adoptive father's father. The statement that "*keittima* adoption creates the relationship of parent and child" must therefore be read as referring to a subsisting *keittima* adoption. The question how, if at all, that fictitious relationship of parent and child can be terminated was never discussed. There is therefore in law nothing to preclude us from deciding what as I have indicated, we should in my opinion decide on the facts, namely that though the plaintiff was at one time the *keittima* adopted son U Maung Maung he lost his right to inherit at some time before the death of the latter. It is unnecessary to decide at precisely what date he did so. The appeal should therefore in my opinion be allowed and the suit dismissed with the consequences as to costs indicated by my learned brother.

D. *Appeal allowed.*

OUDH CHIEF COURT

Criminal Appeals Nos. 6 and 7 of 1941
February 13, 1941
THOMAS, C. J.

SHIB SHARMA (SHIVA SHARMA)—
ACCUSED—APPELLANT
versus
EMPEROR—COMPLAINANT—RESPONDENT

Penal Code (Act XLV of 1860), ss. 153-A, 295-A—Book containing passages promoting enmity between classes — Intention of author, how to be judged—Preface of book, if guide — Rediculing Prophet of Muhammadans is offence under s. 153-A — Book published before enactment of s. 295-A—New edition published subsequent to its enactment—Author, if can be convicted under s. 295-A.

In a prosecution under s. 153-A, I. P. C., for publishing a book containing passages promoting enmity between different classes the preface can be no guide with regard to the intention of an accused person. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to produce. [p. 519, cols. 1 & 2.]

A Hindu who ridicules Prophet of the Muhammadans not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Muhammadans, promotes feelings of enmity and hatred between Hindus and Muhammadans and is guilty under s. 153-A, I. P. C. 104 Ind. Cas. 234 (2) and 104 Ind. Cas. 225 (3), referred to. 103 Ind. Cas. 769 (1), dissented from. [p. 520, col. 1.]

Where a new edition of a book published before enactment of s. 295-A, I. P. C., is published after its enactment, its author can be convicted under that section when his connection with the publisher is proved.

Cr. As. against the order of the Sessions Judge of Lucknow, dated January 2, 1941.

Messrs. *H. G. Walford* and *Shankar Sahai*, for the Appellant.

The Assistant Govt. Advocate, for the Crown.

Judgment.—Shib Sharma (Shiva Sharma) and Sham Lal have been convicted by the learned Sessions Judge of Lucknow, under ss. 153-A and 295-A of the I. P. C. and each of them has been sentenced to one year's rigorous imprisonment under each section, the sentences of each accused to run concurrently.

The charge against Shib Sharma was that he wrote the book Ex. 1 called "Chaman Islam ki Sair" which was printed and published at Lucknow in 1939 and which book contained objectionable passages quoted in Exs. 7 and 7-A and also other passages contained in the book against the Muslim religion and that thereby he promoted feelings of enmity or hatred between the Muslim and Hindu subjects of His Majesty, and thus he was guilty of an offence under s. 153-A of the I. P. C. The further charge against him was that by writing this book Ex. 1 and allowing it to be published he insulted the religion and the religious beliefs of the Mussalmans and that he did this with a deliberate and malicious intention of outraging the religious feelings of the Mussalmans and thus he was guilty of an offence under s. 295-A of the I. P. C.

The charge against Sham Lal accused was to the same effect, excepting that he published the book which was written by Shiv Sharma.

It may be made clear that the charge against Shib Sharma is in respect of the whole book Ex. 1 and Exs. 7 and 7-A are six particularly most objectionable passages which form the basis of the charge.

Shib Sharma is the head preacher of the Arya Samaj in this province and Sham Lal is a seller mainly of Arya Samajist books.

It may be mentioned that Ex. 1 is the third edition. It was first published in 1922 and the second edition was published in 1928 and the third edition (Ex. 1) was printed from the second edition of 1928 at the Shukla Printing Press in 1939. The book was proscribed and the accuseds' prosecution was sanctioned on September 7, 1939. A complaint was filed in the Court

of the District Magistrate of Lucknow against the two accused on September 11, 1939, when warrants were ordered to be issued.

Sham Lal was arrested on March 4, 1940, and Shib Sharma presented himself in Court on April 8, 1940, (*vide* the evidence of P. W. No. 12, B. Ajodhia Prasad Singh, second officer).

The accused Shib Sharma made a fiery speech in Amir-ud-Daula Park Lucknow on December 31, 1939, at which some Police Officers were present. It is strange that the Police did not know his whereabouts or arrested him on that date when there was a warrant of arrest against him.

The accused Sham Lal admitted having published the book at the Shukla Printing Press. He stated that his intention was not to promote or attempt to promote feelings of enmity or hatred between Muslim and Hindu subjects of His Majesty and that he published it with the permission of Shib Sharma because there was a demand for it. He further stated that he was only an ordinary scholar of Hindi and could not read Hindi very well.

The accused Shib Sharma has made a lengthy statement and has also filed a written statement, Ex. D-1. His account of how he came to write the book is that one Parmanand, who was a student at Agra, used to discuss other religions. He asked him (Shib Sharma) to write a collection of references, criticising passages in the Mussalman scriptures so that he might have material for debating with the Mussalmans. He wrote such a collection of references and gave it to Parmanand who printed it in the form of a book without his (Shib Sharma's) permission. When the book was read over to him in the Magistrate's Court, he found that there had been changes in the printed book from what he had written in the collection of references. He further stated that he was not responsible for what was published because Parmanand had taken the copyright and published it. In brief his defence is that he did not write the book with any malicious intention of outraging the religious feelings of the Mussalmans or to promote feelings of enmity or hatred between Hindus and Mussalmans. His object in writing the book was the preservation of his own religion and to prevent conversion of his religionists to Muhammadanism and further it was to help Arya Samajist preachers to argue and discuss religion with Mussalmans.

It is conceded by the learned Counsel on behalf of Shib Sharma that the accused wrote the book, and on behalf of Sham Lal it is also conceded that he got the third edition in 1939 printed at the Shukla Printing Press. The evidence shows that 1000 copies were printed.

The appeal of Shib Sharma has been argued by Mr. Walford and of Sham Lal by Mr. H D. Chandra. Both the Counsels have not criticised the evidence of the prosecution, but have taken their stand on legal grounds.

No copy of the first edition has been filed by the prosecution. Exhibit 3 is the second edition and Ex. 1, as I have said, is the third edition.

The six objectionable passages which are quoted in Exs 7 and 7-A were picked out by Nazir Ahmad, P. W. No. 6, who has studied Muslim theology and is a scholar in Arabic and Persian and the entries which find place in the remarks column are his observations.

Mr. Walford has contended that the passages quoted in Exs. 7 and 7-A are from the Holy Koran and the correct references of paras and pages are given in front of the passages, that any one who read the whole passages would know that they were correct passages and that there was nothing objectionable, that the book was printed in Hindi which would not be read by the Mussalmans and the idea of the author was to enlighten his own brethren and prevent them from accepting the Muhammadan religion that the comment, if any, was a fair comment, and not malicious, that the first edition was published in the year 1922 and the Govt. did not prescribe the book or ordered the accused's prosecution. It, therefore, must be presumed that the accused was not guilty under s. 153-A of the I. P. C.

With regard to s. 295-A, I. P. C., it was urged that as the book was written in 1922 when this section did not exist in the I. P. C, and as there was no evidence that Ex. 1 was published with the permission and knowledge of the accused, therefore, the accused's conviction under this section was illegal. It was further urged that there was no evidence to show that Ex. 1 was the true copy of the first edition.

Before dealing with the evidence in the case, I may mention that on December 31, 1939, a Conference of the Arya Samaj was held in Amir-ud-Daula Park, Lucknow. There were a large number of persons present as it was the Annual Conference of the Arya Samaj and speeches were made. Shiv Sharma spoke at the meeting and said that he

had written "Chaman Islam ki Sair". This he said when he was criticising the Mussalmans. The above fact is proved by the evidence of P. W. No. 1, Chandra Shekhar Soti, Sub-Inspector. The speech was taken down by Mukhtar Ahmad Naik, P. W. No. 2, and is Ex. 4. Ex. 5 is its duplicate. The speech undoubtedly was inflamatory and likely to cause bad blood between Hindus and Muhammadans, but I have no concern with it in this case excepting for the fact that Shiv Sharma bragged about writing "Chaman Islam ki Sair."

The learned Sessions Judge has not dealt with each passage in Ex. 7 separately because he did not think it advisable to do so as it would only tend to give it further publicity. In my opinion he has adopted the correct course. I am myself not going to analyse each passage for fear of giving it further publicity which will certainly promote feelings of enmity or hatred between Hindus and Muhammadans. I may just quote one or two passages.

Now coming to the evidence of the prosecution, the two most important witnesses to whose evidence reference may be made are P. W. No. 5, Abdus Salam and P. W. No. 6, Nazir Ahmad.

Abdus Salam is a teacher in theology in Darul Muballighin, which is a religious institution in Lucknow. He has read thoroughly Mishkat and Minhaj, which are religious books. He stated that he had "Chaman Islam ki Sair" read through and in his opinion the book as a whole was very painful to the Mussalmans and insulted the religion and the founder of the religion and that it calculated to excite the anger of Muhammadans. With regard to the passages Exs. 7 and 7-A, the witness stated that they were painful to Muhammadans and insulted the Prophet and that Mishkat and Minhaj were misquoted.

P. W. No. 6, Nazir Ahmad, is a political pensioner and a scholar in Arabic and Persian. He has studied Muslim theology. He filed the passages mentioned in Exs. 7 and 7-A In his opinion the whole book is insulting to Muhammadans and provocative to them. The witness further stated that the passages given in col. 2 were either totally wrong or have been distorted so as to change the meaning. They were objectionable and insulting to the religion and the Prophet. They were likely to create bad blood.

The first passage in Ex. 7 in as follows :

"Hazrat ne apni bibi ke nahaye hue tasle ke pani se wazoo kiya halanki istri janabi thi (bhog karai hue thi). Bibine kaha pani napak hai. Hazrat ne farmaya pani ne bhog nahin karaya hai."	Safa 11 Para 31

There can be no doubt in my mind that by reading this passage one would understand that the Prophet was willing to use for religious ablution water polluted by his wife's bathing. In Muslim Law a woman is "Janabi" when she has sexual intercourse with her husband and the literal meaning of the word "Janabi" is polluted. No Mussalman will ever use such polluted water for *wazoo*.

The second passage is that

"Hazrat Aisha used to go to the tomb of the Prophet and Abu Bakr without clothes, and she would say that one is my husband and the other is my father, there is no occasion for me to be modest;"

The note of the author, that is the accused Shib Sharma, is that

"at the time of becoming a widow Aisha was 18 years old. How far was it proper for her to go naked there at such an age ?"

Hazrat Aisha is one of the first ten persons who gave the teaching of the Prophet to others, and is considered most beloved of all Mussalman women among at least the Sunni Mussalmans. The learned Counsel on behalf of Shib Sharma tried to show that some other Muhammadan authors have also said that she used to go naked. In my opinion the word "Saub" which has been used in Mishkat means either a *chadar* or clothing. What the author of Ex. 1 has done is to have collected a number of passages which may be perfectly right and harmless in their proper setting, but when disconnected or detached may seem scurrilous, indecent and highly objectionable. Any Muhammadan who reads the passages given in Exs. 7 and 7-A must feel them highly painful and excite his anger and disgust. There can be no doubt that misinterpretation of Mishkat and Minhaj must be highly painful and displeasing to the Mussalmans. The learned Sessions Judge in his judgment points out that Vishnu Sarup, an Arya Samajist preacher, who was examined on behalf of the defence, when being cross-examined on his interpretations of the scriptures and when supporting them with such reason as he could find, suddenly objected that some of his answers may be very displeasing to the Maulvis who were present

in Court at the time of the trial and he might be murdered.

The main question for consideration is what was the intention of the author who wrote the book. Was it merely an easy book of reference as is urged by the learned Counsel or was it written to promote feelings of enmity or hatred?

Before I discuss this point I may dispose of the argument of the learned Counsel that there was no evidence that the accused was the author of these passages.

I cannot compliment the prosecution for their conduct of this case because there are a good many gaps left which could have easily been filled. This argument is really based because there is no copy of the first edition on the record or any evidence to show that the book was not available. I am informed by Mr. Ghosh, the learned Assistant Govt. Advocate, that there is no difference between Ex. 1 and Ex. 3. In his written statement, Ex. D-1, Shib Sharma does not say anything about any alteration in the book. Nor does he say that it was published without his permission. He simply stated that it was written in Hindi so that the Mussalmans should not try to read it, but that it should only come into the hands of Arya Samajists and Hindus. He further stated that the Mussalmans frequently insult the Hindu religion and that he wrote this book of reference as a means of refuting the Muslim religion.

P. W. No. 7, Manna Lal, who is a printer in the Shukla Printing Press stated as follows;

"Exhibit 3 also was printed at my Press. Prem Shankar Varma got it printed. He has now died. When we printed this first a copy was sent to the District Magistrate. Exhibit 3 was printed as far as I remember from a very old book....."

I have no reason to suppose that Ex. 3 was not a true copy of the first publication. I am therefore of opinion that Ex. 1 is the true copy of Ex. 3. If there had been any difference or addition and alteration between Exs. 1 and 3 the accused would have pointed it out. I therefore hold that the accused Shib Sharma is the author of the passages contained in Exs. 7 and 7-A.

In order to prove the innocent intention of the accused the learned Counsel referred me to the preface of the book which is harmless. In my opinion the preface can be no guide with regard to the intention of an accused person. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred in my opinion the writer must be presumed to intend that which his act was likely to produce. The accused who is a missionary may be entitled to a certain latitude in respect of re-expression of religious opinions, but it cannot for a moment in this case he said that the book was written in a spirit of fair and honest criticism without any malicious intention of producing any hatred. In my opinion if the intention of the accused was harmless he would have taken care to quote the full passages, and not only the objectionable portions.

The learned Counsel relied on the case of *Raj Paul* v. *King-Emperor* reported in (A. I. R. 1927 Lahore, 590) (1). The case is commonly known as "Rangila Rasul case" in which it was held that

"Section 153-A was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polomics against deceased religious leaders however scurrilous and in bad taste such attacks might be."

This case was decided on May 4, 1927, and is a decision of a Single Hon'ble Judge of that High Court.

There is another case reported in the same volume, that is A. I. R 1927 Lahore at p. 594, (*Devi Sharan Sharma* v. *Emperor*) (2). It was decided on August 6, 1927, and is a Bench decision and the Hon'ble Judges have placed a different interpretation on s. 153-A. It is true that the Single Judge case, reported at p. 590* was not brought to their notice.

Mr. Ratanlal in his Commentary on the Law of Crimes, 15th Edition, p. 682, says that the *Rangila Rasul case* (1) was overruled by the Bench decision in which it was decided that a scurrilous vituperative and foul attack on a religion or on its founder would come within the purview of s. 153.

I do not think that the case has been clearly overruled because there is no reference of the judgment in the *Rangila Rasul case* (1). The *Rangila Rasul case* (1) was expressly dissented from by Mr. Justice Dalal in the case reported in A. I. R. 1927 Allahabad 654 (*Kali Charan Sharma* v.

(1) A I R 1927 Lah. 590; 103 Ind. Cas. 769; 28 P L R 514; 28 Cr. L J 721; 9 Lah. L J 379; 8 A I Cr. R 403.

(2) A I R 1927 Lah. 594; 104 Ind. Cas. 234; 28 P L R 497; 28 Cr. L J 794.

*Page of A. I. R. 1927 Lah — *Ed.*]

King-Emperor) (3) in which the learned Judge stated as follows:—

"The learned Counsel who argued this revision showed me a copy of a judgment of an Hon'ble Judge of the Lahore High on a similar book 'Rangila Rasul' issued in the Punjab. Possibly the judgment was cited as both books appeared to have been issued in prosecution of the same Hindu propaganda. With all respect to the learned Judge, I am not prepared to agree with the nice distinction he has drawn between a book which may hurt the feelings of Muhammadans and a book which may cause feelings of enmity or hatred between different classes of His Majesty's subjects,' (now follows the most important and pertinent portion of the judgment). "Speaking for myself I look at such a matter not as a somewhat learned Judge of a High Court, but as a common or ordinary citizen of a town in India. I would place myself in the position of a Muhammadan who honours his Prophet, and then consider what my feelings would be towards a Hindu who ridiculed that Prophet, not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Muhammadans. In such a position from the hatred of the author I would, as an ordinary man, proceed to hatred of the class to which the author belonged and which instigated the author. There cannot be the slightest doubt that the writing such as that of the book before me..... will certainly promote feelings of enmity and hatred between Hindus and Muhammadans",

and this is exactly the view which I take of the present case. There can be no doubt that the passages quoted in Exs. 7 and 7-A must be highly painful to the Muhammadan who reads or hears them and must excite his anger and disgust. In one of the passages there is a clear suggestion that the Prophet was a debauch and of infamous character. Shib Sharma's pleas that he wrote the book in Hindi so that it should not come into the hands of the Mussalmans and that for 19 years, (that is when the book was published), the Govt. did not take any section, are in my opinion useless and of no avail.

The learned Sessions Judge in his judgment has made reference that the accused was previously prosecuted and convicted for similar offences in respect of another book written by him. This he has done in order to gather the intention of the author. It was suggested by the accused learned Counsel that the learned Judge should not have taken the accused's conviction into consideration. In my opinion the learned Judge under s. 14 of the Evi. Act was justified in doing so and even if we exclude his previous conviction from consideration, there is enough material on the record to uphold his conviction. The accused's intention can also be gathered from the speech which he made on December 31, 1939, at Amir-ud-Daula Park.

An attempt was made by the accused' learned Counsel to explain away these passages and some evidence was also produced on behalf of Shib Sharma to explain these passages. In my opinion the learned Sessions Judge was right in rejecting the evidence of those witnesses.

After giving careful consideration to the evidence in the case and the circumstances I am of opinion that the intention of the accused was to ridicule the Prophet and his religion and to promote feelings of enmity or hatred between the Hindus and Muhammadans. I do not for a moment believe that the book was written for reference for Arya Samaj missionaries.

It was next contended that the conviction under s. 295-A, I. P. C. was illegal. The book, as I have said, was first published in the year 1922 and s. 295-A was introduced by the Criminal Law (Amendment) Act (XXV of 1927) which came into force on September 22, 1927. This section was introduced owing to the agitation following the decision of the "Rangila Rasul" case to which reference has already been made. It is true that the section has no retrospective effect, but if Shib Sharma's connection with Sham Lal accused is proved his conviction under s. 295-A is perfectly legal.

Sham Lal stated that he published the book at the instance of Shib Sharma. The learned Sessions Judge has relied on this statement. The learned Assistant Govt. Advocate has, and in my opinion, rightly conceded that this statement of Sham Lal cannot be used against the co-accused.

It was suggested that Sham Lal hardly knew Hindi and he did not know the contents of the book. I am not prepared to accept Sham Lal's statement when he says that he did not know the nature of the book. He is a seller of Arya Samajist books and there is evidence to show that he is a regular attendant at all Arya Samaj conferences, (*vide* the statement of D. W. No. 2, Pt. Kali Charan). He is a worker of the Arya Samaj and sells books at their conferences. It is inconceivable that he would have printed the book without the permission of the author. It was in the interest of the author and his co-religionists that the book should be printed. I am of opinion that Sham Lal's connection is established beyond doubt with Shib Sharma.

Both the accused have rightly been convicted under ss. 153-A and 295-A of the I. P. C. and I dismiss their appeals. They

(3) A I R 1927 All. 654; 104 Ind. Cas. 225; 25 A L J 846; 28 Cr. L J 785; 50 A 157; 8 A I Cr. R 204; L R 8 A 124 Cr.

were on bail. They are present in Court and are taken into custody. Their bail bonds are cancelled.

s. *Appeals dismissed.*

MADRAS HIGH COURT

Civil Revision Petition No. 714 of 1938
November 9, 1939
KUNHI RAMAN, J.

MATTAPALLI APPA RAO—
PETITIONER
versus
Ch. RAMAMURTHI AND OTHERS—
RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 66 (2)—Allowance under—Discretion of Court—Insolvent claiming expenses in lump sum for his daughter's marriage—Application, if falls under s. 66 (2)—Proper procedure stated.

The making of the allowance is left to the discretion of the Court. It is not possible to hold that an application where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of s. 66 (2), Prov, Insol. Act. But under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the insolvent to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under s. 66 (2). The claim can certainly not be made as a matter of right. *Sundari Ammal* v. *Subramania Iyer* (5) and 141 Ind. Cas 424 (6), relied on, *Ex parte Holthausen*; *In re Scheibler* (1), *In re East Gate, Ex parte Ward* (2), *In re Mapleback*; *Ex parte Caldacott* (3) and 101 Ind. Cas. 368 (4), referred to.

C. R. P. to revise an order of the District Court, East Godavari at Rajahmundry, dated December 7, 1937.

Mr. *V. Viyyanna*, for the Petitioner.
Mr. *D. Narasa Raju*, for the Respondents.

Order.—This civil revision petition arises out of certain insolvency proceedings pending in the Court of the learned Subordinate Judge of Cocanada (I. A. No. 204 of 1937 in I. P. No. 29 of 1932). The petitioner was adjudged insolvent and all his properties became vested in the Official Receiver of East Godavari. On an application made by the petitioner under s. 66 (2), Pro. Insol. Act, it is stated that a monthly allowance of Rs. 50 out of the estate has been made in his favour by the learned Subordinate Judge. While this order was in force, the petitioner presented another application for an allotment of Rs. 4,000 to be made for celebrating the marriage of his daughter who had just attained the age of 14 years. It was conceded in the Subordinate Judge's Court that this amount included a sum of Rs. 2,000 which petitioner wanted for *katnam* (dowry). The balance of Rs. 2,000 was claimed by him for meeting the actual expenses of the marriage. The learned Subordinate Judge has held that in any event, the petitioner was not justified in claiming Rs. 2,000 to enable him to give it as dowry at the time of the marriage of his daughter and that it was not open to him to claim the balance of Rs. 2,000 under s. 66 (2), Pro. Insol. Act. In the course of his order the learned Subordinate Judge has recorded that in his opinion a sum of Rs. 500 would be sufficient for meeting the expenses of the marriage of the petitioner's daughter. This however was only an observation made by him in the course of his order. On appeal to the learned District Judge of East Godavari, the order made by the learned Subordinate Judge was confirmed and the appeal was dismissed. It is against this order that the present revision petition is filed.

The learned Advocate for the petitioner contends that the property of the insolvent must be deemed to have vested in the Official Receiver subject to all the liabilities that could have been enforced against it in the hands of the insolvent himself. In support of this proposition he has cited certain English decisions where the view taken is that the trustee in bankruptcy stands in the position of the bankrupt, that he takes the property of the insolvent subject to rights of third parties and that he is in effect the legal representative of the bankrupt: *Ex parte Holthausen*, *In re Sacheibler* (1), *In re East Gate Ex parte Ward* (2) and *In re Mapleback*, *Ex parte Caldacott* (3). He has also cited the case reported in *Sheobaran Singh* v. *Kalsum-un-nissa* (4) where a right of pre-emption to which a third party was entitled with regard to certain property of the insolvent was enforced subsequent to insolvency. The substance of these decisions has been sum-

(1) (1874) 9 Ch. 722; 44 L J Bk. 26; 31 L T 13.
(2) (1905) 1 K B 465; 74 L J K B 324; 92 L T 207; 21 T L R 198; 53 W R 432; 12 Manson 11.
(3) (1886) 4 Ch. D 150; 46 L J Bk. 14; 35 L T 503; 25 W R 103; 13 Cox C C 374.
(4) 54 I A 204; 101 Ind. Cas 368; A I R 1927 P C 113; 49 A 367; 52 M L J 658; 29 Bom. L R 877 4 O W N 543; (1927) M W N 444; 31 C W N 853 25 A L J 617; 26 L W 326 (P C).

marized in Mulla's commentaries on the Pro. Insol. Act where the learned author states that the property which the Official Receiver takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens.

The learned Advocate for the respondent, on the other hand argues that according to Hindu Law the creditor's rights are recognized as supreme even as against the sons of the insolvent and that there is no warrant for the claim put forward on behalf of a daughter. He cites the decision reported in *Sundari Ammal* v. *Subramania Iyer* (5), in support of his contention. There a wife had expended moneys for celebrating her daughter's marriage and subsequently sued her husband for recovering the amount so expended but it was held that she was not entitled to recover. He also relies on the decision reported in *Jawahir Singh* v. *Parduman Singh* (6) where it is observed in the judgment that

"it is settled law that the debts contracted by a Hindu governed by Mitakshara School take preference over the right of maintenance of his wife and minor children."

In Mayne's Hindu Law at p. 429, the case law relating to this subject has been summarized:

"In cases governed by the Mitakshara Law a father may sell or mortgage not only his own share but also the share of his male issue in family property for the purpose of satisfying antecedent debts of his own not incurred for any family necessity or benefit, provided they are not immoral or illegal, and the sale or mortgage may be enforced against his sons by a suit or proceedings to which they are not parties.... ..."

A creditor may enforce payment of the personal debt of a father not being illegal or immoral, by attachment or sale of the entire interest of father and sons in the family property and it is not absolutely necessary that the sons should be parties either to the suit itself or to the proceedings in execution. In view of these authorities, it is not possible for the petitioner to contend that the daughter is entitled as a matter of right to claim the amount mentioned in the petition from out of the estate of the insolvent as against the creditors of the insolvent. The application, as already stated, was presented under s. 66 (2), Pro. Insol. Act. This clause of the section is worded as follows :

"The Court may from time to time make such allowance as it may think just to the insolvent out of his property for the support of himself and his family.....but such allowance may at any time be varied or determined by the Court."

It will be seen that the making of the allowance is left to the discretion of the Court. It is not possible to hold that an application like the present where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of this section. I am prepared to hold that under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the petitioner to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under s. 66 (2), Prov. Insol. Act. The claim can certainly not be made as a matter of right, for, there is no authority for holding that the insolvent has a right to claim out of his estate the expenses that he contemplates incurring for celebrating the marriage of his daughter. In these circumstances, I am not satisfied that the view taken by the lower Courts is wrong. The petitioner may, if so advised, make an application for increasing the allowance already made to him by the learned Subordinate Judge but the petition that was filed by him in the learned Subordinate Judge's Court out of which this revision petition arises was clearly not sustainable. This civil revision petition must therefore be dismissed. I make no order as to costs.

N. D. *Petition dismissed.*

(5) 26 M 505.
(6) 14 L 399; 141 Ind. Cas. 424; A I R 1933 Lah. 116; 34 P L R 291; Ind. Rul. (1933) Lah. 119.

LAHORE HIGH COURT

Second Appeal No. 1716 of 1938
June 21, 1940
TEK CHAND AND BECKETT, JJ.
BIR BHAN—PLAINTIFF—APPELLANT
versus
Pandit JAGAN NATH AND OTHERS—
DEFENDANTS—RESPONDENTS

Custom (Punjab)—Adoption — Sarsut Brahmins of Mauza Jandola, Tahsil Thanesar, District Karnal are governed by Hindu Law in matter of adoption.

The initial presumption in the case of Sarsut Brahmins of *mauza* Jandola, Tahsil Thanesar District Karnal, is that they are governed by Hindu Law in matters of adoption and an adoption of wife's,

sister's son is therefore valid. The mere fact that the family of these Brahmins owns one-half of the village raises no presumption that they have given up Hindu Law and adopted the custom of agricultural tribes in all matters.

S. A. from the decree of the District Judge, Karnal, dated September 2, 1938.

Mr. *Panna Lal Behl*, for the Appellant.

Mr. *J. R. Agnihotri*, for the Respondents.

Tek Chand, J.—This is a second appeal arising from a suit instituted by the plaintiff-appellant against the defendant-respondent for possession of land situate in *mauza* Jandola, Tahsil Thanesar, District Karnal. The suit has been dismissed by both the Courts below. The land in suit belonged to Uma Dutt, a Sarsut Brahmin of *mouza* Jandola. He died sonless in December 1936. About five months before his death, on July 3, 1936, he had executed a deed declaring that six years earlier he had adopted Jagan Nath defendant No. 1 (who is his wife's sister's son) as his son after the performance of the necessary ceremonies according to Hindu Law and that he had brought him up as such. On the same day, he executed a will that after his death Jagan Nath would succeed to his property. Four months later, on November 16, 1936 he made an oral gift of the land in dispute in favour of Jagan Nath and put him in possession. At his instance, the revenue authorities sanctioned the mutation in favour of Jagan Nath. The present suit was instituted by Bir Bhan, a collateral of Uma Dutt in the third degree, claiming to succeed to his property as the next heir. He denied the factum and validity of the adoption and also impugned the gift and bequest. He averred that the parties were governed by "the custom of the argicultural tribes of the Punjab," according to which a sonless proprietor cannot adopt a non-agnate, nor devise by gift *inter vivos* or will ancestral property to a stranger.

The suit was resisted by Jagan Nath, who pleaded that the parties were governed by Hindu Law and not by custom, and that Uma Dutt had full power to adopt him and also to devise his property, whether ancestral or not. The Courts below have upheld the defence and dismissed the suit. The factum of the adoption is no longer disputed. The only question agitated in this appeal is that the parties were governed by custom and that the adoption of the defendant by Uma Dutt is invalid. After hearing Counsel and examining the evidence, I can find no force in this contention. As stated adove, the parties are Sarsut Brahmins. The initial presumption therefore is that they are governed by Hindu Law. In the plaint it was alleged that they were groverned "by custom of the agricultural tribes of the Punjab." In his evidence as a witness the plaintiff, however, shifted his ground and stated that they did not follow the custom of the agricultural tribes of the Punjab or of Thanesar Tahsil; but a special family custom of the Barhmins of *Mouza* Jandola. Not a single instance has been proved from the family or from amongst the Brahmins of *Mauza* Jandola or the neighbouring village in which Hindu Law has been departed from in matters relating to adoption or succession. There is no documentary evidence whatever and the oral evidence produced is of the vaguest possible kind, the bald statements made by the witnesses not being supported by any instance. Counsel for the appellant solely relied upon the fact that one-half of the village is owned by this family of Brahmins, and a *lambardar* has invariably been appointed from amongst them. But these facts, by themselves, are wholly insufficient to prove that in matters relating to adoption the parties do not follow Hindu Law.

The *kafiat dehi* prepared in the settlement of 1887, produced by the plaintiff himself, shows that the land in dispute originally belonged to the Raja of Ladwa and was a part of *Mauza* Bahain. During the Sikh times, the Raja gifted it by way of charity to his *prohit* Sobha Ram Brahmin, who got it cultivated by tenants. The gifted land was separated from *Mouza* Bahain and given a separate name as *Mauza* Jandola. Subsequently, one of Sobha Ram's sons sold his half share of the village to certain Mahajans. The village was then divided into two Pattis called Patti Brahmanan and Patti Mahajanan. It will thus be seen that the ancestors of the plaintiff performed priestly functions and acquired the land by way of charity. Since then some descendants of Sobha Ram have been cultivating the land themselves, while others have been following trade and other avocations in life. Uma Dutt himself never cultivated land. He had left Jandola and settled at Ladwa where he had a shop for selling milk. This being the history of the family, the mere fact that they owned one-half of the village raises no presumption that they have given up Hindu Law and adopted the custom of agricultural tribes in all matters.

As the village is owned by Brahmins and Mahajans alone, the *lambardar* must necessarily be appointed from amongst them. The fact, therefore, that he has invariably been a descendant of Sobha Ram, has no bearing on the question whether the family follows Hindu Law or custom. In my opinion, the lower Courts have rightly held that the plaintiff, on whom the onus lay, has failed to prove that in matters relating to adoption this family is governed by custom. Admittedly, the adoption is valid under Hindu Law and therefore, the defendant Jagan Nath, as the adopted son of Uma Dutt, is entitled to succeed to his property, apart from the gift or will. The appeal fails and is dismissed with costs.

S. *Appeal dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 2 of 1937
January 28, 1941
YORKE AND GHULAM HASAN, JJ.

BELAHRI CO-OPERATIVE SOCIETY—DEFENDANT—APPELLANT

versus

PUTTU LAL AND OTHERS—PLAINTIFFS—RESPONDENTS

Co-operative Societies Act (II of 1912), s. 23—Scope—Section, if has reference to debts of outgoing members due to Society—U. P. Co-operative Societies Rules, rr. 20 (7), 20 (12) (ii), 20 (i) — Violation of r. 20 (7)—Effect—Award, if invalid—Award invalid—Failure to appeal—Award, whether become final and conclusive—Bar of jurisdiction of Civil Court, if absolute—Reference to arbitration pending — Fresh reference to another arbitrator is incompetent and of no legal effect.

The words "the debts of a registered society as they existed at the time when he ceased to be a member" in s. 33, Co-operative Societies Act refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. [p. 526, col. 2.]

The provisions of rr. 20 (7) (*i*) (*ii*) and (*iii*) of the Rules framed by the U. P. Govt under the Co-operative Societies Act, refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities. [p. 527, col. 1]

Even if the award is invalid on the ground that it was ante-dated or had been made after the expiration of the time fixed for making the award and without obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting aside the award is by means of an appeal to the Assistant Registrar as provided by r. 20 (12) (*i*). If no such appeal is preferred within limitation, the award becomes final and conclusive between the parties. [p. 527, col. 2.]

The bar of jurisdiction of a Civil Court created by r. 20 (12) (*ii*) of the Co-operative Societies Rules is not absolute but limited only. A Civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction. [p. 525, col. 2; p. 530, col. 1.]

[Case-law referred to.]

Where a dispute referred to arbitration is still pending a fresh reference to another arbitrator is not competent and must be disregarded as of no legal effect upon the rights of the parties.

S. C. A. against the order of the Civil Judge of Kheri, dated September 30, 1936.

Mr. *H. D. Chandra*, for the Appellant.
Mr. *K. P. Misra*, for the Respondents.

Judgment.—This second appeal has been referred by a learned Single Judge of this Court for decision to a Bench of two Judges under s. 14 (2) of the Oudh Courts Act. The appeal is by the defendant and is directed against the decree dated September 30, 1936, passed by the Civil Judge of Kheri setting aside the decree passed by the Additional Munsif of Kheri and decreeing the plaintiffs' suit.

The facts out of which this appeal has arisen are as follows : —

The plaintiffs-respondents four in number became members of the defendant society known as Belahri Co-operative Society in Kheri District some time in 1919. Some time before 1925 the defendant Society borrowed Rs. 1,615-8-0 from the Central Bank of Gola. The debt not having been paid, the Bank obtained a decree on March 30, 1926, against all the members of the Society including the present plaintiffs-respondents. In the course of execution proceedings taken by the Bank against the Society a compromise was effected between the Bank and the plaintiffs on March 12, 1927, whereby the liability of the plaintiffs to the Bank was apportioned. Under this compromise the plaintiffs were made liable to pay Rs. 889-10-0 to the Bank.

The plaintiffs' liability *inter se* was separated as follows :

	Rs.	A.	P.
Puttu Lal ...	309	8	0
Suraj Prasad ...	157	10	0
Bhagwan Din ...	212	8	0
Kunwar Chandra ...	210	0	0
Total	889	10	0

Inspite of this compromise the Bank took out execution of the entire decree against the plaintiffs. The application was rejected by the Munsif of Kheri and the order of dismissal was upheld by this Court on

appeal. The plaintiffs ceased to be members of the Society on May 2, 1929. After the plaintiffs had severed their connection with the Society, the latter applied to the Registrar, Co-operative Societies, to appoint an arbitrator to settle the disputes between them and the plaintiffs. Mr. Mohammad Ahmad Siddiqi, Inspector of the Co-operative Societies, was appointed an arbitrator and made his award on February 7, 1930 under which he rejected the claim of the Society. In September 1933, the Society passed a resolution asking for the appointment of a fresh arbitrator to settle the dispute with the plaintiffs. The Registrar of the Co-operative Societies appointed Mr. Puttu Lal Bisaria, Circle Inspector, as the sole arbitrator in the case. Mr. Bisaria also rejected the claim of the Society by his award dated February 17, 1934. On March 12, 1935, the Sociey preferred an appeal to the Assistant Registrar of the Co operative Societies and the latter set aside the order and decreed the claim of the Society on April 10, 1935.

The plaintiffs thereupon instituted a suit on January 10, 1936, in the Court of the Munsif of Kheri for a declaration that the decision of the Assistant Registrar be set aside as being *ultra vires*. The cause of action is alleged in the plaint to have accrued on April 10, 1935, the date of the decision of the Assistant Registrar. The ground of the claim as put forward in the plaint was that the decision of Mr. Mohammad Ahmad Siddiqi, the first arbitrator, had become final by reason of the fact that no appeal had been preferred against his award to the Assistant Registrar as provided by r. 29 (12) (*i*) of the rules framed by the Local Govt. under s. 43 of the Co-operative Societies Act (II of 1912).

The principal defence to the suit was that as the decision of the Assistant Registrar of Co-operative Societies in appeal against the award of Mr. Bisaria had become final under r. 20 (12) (*ii*) of the U. P. Co-operative Societies Rules, the Civil Court had no jurisdiction to try the suit. The learned Munsif framed the following two main issues in the case :

1. Is the order of the Assistant Registrar, Co-operative Societies, *ultra vires* and not binding on the plaintiffs as alleged ?

2. Is the suit not maintainable in this Court?

On the first issue the learned Munsif held that the order of the Assistant Registrar (Ex. 1) is perfectly valid and legal. In dealing with this issue the learned Munsif held that the award of Mr. Mohammad Ahmad Siddiqi the first arbitrator, was not valid and binding and for the reasons mentioned by the Assistant Registrar in his order (Ex. 1) accepted the opinion of the Assistant Registrar.

These reasons were that the arbitrator did not record evidence of the parties, that he made the award after the expiration of the period fixed by the Registrar and without obtaining any extension of time and that the award had not been communicated to the parties. He also held that the award was alleged to have been made on February 7, 1930, while the proceedings of the case continued till February 22, 1930 and hence the award was ante-dated. He agreed with the opinion of the Assistant Registrar that the award was of no legal effect, that the Society was perfectly justified in asking for a fresh reference to another arbitrator and that the decision of the Assistant Registrar was, therefore, perfectly valid and binding upon the parties. It was also contended on behalf of the plaintiffs that their liability for the debt of the Society had ceased in 1934 when the second reference to arbitration was made inasmuch as by virtue of s. 23 of the Co-operative Societies Act their liability for the debts of the Society as they existed at the time when they ceased to be members could continue for two years only, namely, up to 1931. The learned Munsif repelled this contention and held that s. 23 of the Co-operative Societies Act refers to the debts due by the Society to third persons and not to the debts due to the Society by its members. As regards the second issue the finding of the learned Munsif was that the bar of jurisdiction of a Civil Court created by r. 20 (12) (*ii*) of the Co-operative Societies Rules was not absolute but limited only. He was of opinion that the jurisdiction of a Civil Court is barred only when the order of the Registrar or the decision of an arbitrator is in accordance with the provisions of the Co-operative Societies Act and the rules made thereunder. If the order was not in consonance with the provisions of the Act or if the authorities of the Co-operative Societies had exercised power which was not vested in them by the Co-operative Societies Act, it was open to the parties to challenge the validity of such an order by means of a suit for declaration in a Civil Court. Upon these findings the suit was dismissed. In appeal by the plaintiffs the learned Civil

Judge of Kheri held that the award of Mr. Mohammad Ahmad Siddiqi was inoperative and did not require the filing of an appeal to set it aside. He disagreed with the learned Munsif about the interpretation of s. 23 of the Co-operative Societies Act and expressed the opinion that s. 23 relates to those cases also in which a past member is liable to the Society for the debts due from the Society to third persons and that this liability was discharged after two years of the termination of the plaintiffs' membership.

According to the learned Civil Judge therefore no dispute touching the business of the Society as contemplated by r. 20 and consequently the arbitration proceedings of Mr. Bisaria were perfectly invalid and inoperative and the decision of the Assistant Registrar in appeal based on an invalid arbitration was equally inoperative and not binding upon the plaintiffs. The result was that he set aside the decision of the learned Munsif and decreed the suit.

The defendant then preferred a second appeal to this Court which originally came up before a learned Single Judge of this Court, who in view of the public importance of the questions involved referred it for decision by a Bench of two Judges under s. 14 (2) of the Oudh Courts Act. Learned Counsel appearing for the defendant-appellant has argued three points before us :

Firstly, it is contended that the interpretation put upon s. 23 of the Co-operative Socities Act by the lower Appellate Court is erroneous. Secondly he has contended that the award of Mr. Mohammad Ahmad Siddiqi was a nullity and the order of the Assistant Registrar on appeal in the second reference to the arbitration of Mr. Bisaria is valid and binding upon the parties. Thirdly, his argument is that the suit for cancellation of the order of the Assistant Registrar is not maintainable in a Civil Court.

We have heard learned Counsel of both parties at great length. We are of opinion that the first contention put forward on behalf of the appellant is well-founded and must be accepted. Section 23 of the Co-operative Societies Act, 1912, runs thus :

"The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member."

We have no doubt whatever upon a plain construction of the language used in this section that the words "the debts of a registered Society as they existed at the time when he ceased to be a member" clearly refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. In our opinion, the debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. A reference to s. 24 of the Co-operative Societies Act, 1912, also supports the above construction. According to s. 24 the estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered Society as they existed at the time of his decease. A further corroboration of this view may be found in para. 167 (*ii*) in Chap. XIV of the General Instructions, printed in the Manual for Co-operative Societies in the United Provinces (1923) Vol. I, which is to the following effect:—

"The liquidator should also bear in mind the provisions of ss. 23 and 24 of the Act in determining contributions. A past member is liable only for such debts of his Society as were contracted while he was still a member, and he remains liable for such debts only for two years from the date on which he ceased to be a member. If, therefore, the Society came under liquidation after more than two years from the date on which he ceased to be a member, he would not be liable to pay any contributions. Similarly, the estate of a deceased member remains liable only for one year from the date of the deceased member's death and for such debts of the Society as existed at the time of his death."

A similar construction was placed upon the language of s. 23 in a case, *Dhanpat* v. *Anjuman Dehi Alo Maha*, (A. I. R. 1935 Lah. 947 (1) where it was held that though s. 23 limits the liability of a past member for the debts of the registered Society, there is no limitation either in the Act or in the rules under the Act for a debt of a past member due to a registered Society.

The decision in *Anjuman Dehi* v. *Keshar Singh*, (A. I. R. 1936 Lah. 901), (2), while dissenting from the decision taken in *Dhanpat* v. *Anjuman Dehi Alo Mahar* (A. I. R. 1935 Lah. 947, (1) upon another point, did not touch the question of the interpretation of s. 23 of the Act which did not arise in that case.

(1) A I R 1935 Lah. 947.

(2) A I R 1936 Lah. 901; 168 Ind. Cas. 43; 38 P L R 1113; I L R (1937) Lah. 92; 9 R L 587.

As regards the second contention put forward on behalf of the appellant, it has been argued that the award of Mr. Muhammad Ahmad Siddiqi must be disregarded as a nullity by reason of the fact that he had violated the imperative provisions of r. 20 (7) (*i*), (*ii*) and (*iii*). Rule 20 (7) (*i*) requires an arbitrator to record the evidence of parties. Rule 20 (7) (*ii*) requires that a copy of the award shall be given to each party. Rule 20 (7) (*iii*) requires that the arbitrator shall give an award within the time fixed by the Registrar. Provided that no award shall be invalid by reason of its being given after the expiry of the time fixed, if an application for extension is made and granted previously or subsequently by the Registrar. Rule 20 (8) (*iii*), however lays down that no award shall be invalid by reason of its not complying with the provisions mentioned above or by reason of other irregularities. This rule seems to indicate that the provisions of r. 20 (7) (*i*), (*ii*) and (*iii*) refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularties. Rule 20 (12) (*i*) and (*ii*), however, clinches the matter as far as the present question goes. It runs:—

"(12) (*i*) Any party considering itself aggrieved by the award of an arbitrator or arbitrators may appeal to the Registrar within one month of the date of the award, and the Registrar shall pass such order as he deems fit; Provided that the time taken in obtaining a copy of the award shall be excluded in counting the period of one month."

(*ii*) A decision of an arbitrator or arbitrators under these rules if not appealed against within the said period and an order of the Registrar shall, as between the parties of the dispute, not be liable to be called in question in any Civil or Revenue Court and shall in all respects be final and conclusive."

By a correction slip dated January 2, 1924, the words "the date of the award" in r. (20) (12) (*i*) have been replaced and substituted by the words "the communication of the award". It is admitted that no appeal was filed by the Society against the award of Mohammad Ahmad Siddiqi to the Registrar as required by the aforesaid rule and by the operation of r. 20 (12) (*ii*) the decision of Mr. Mohammad Ahmad Siddiqi, not having been appealed against become final and conclusive between the parties.

According to Ex. 1 Mr. Mohammad Ahmad Siddiqi was required to give his award by January 15, 1930. The case remained with him till a report was made by the Supervisor of the Society and the Bank to the Assistant Registrar in May 1931. The case was not traced till 1932, when Mr. Mohammad Ahmad Siddiqi submitted the award along with his explanation. The papers were again misplaced and were not traced till January 26, 1934, when it was discovered that the award had been made on February 7, 1930, rejecting the claim of the Society. We however find that the second reference to the arbitration was made in September 1933 and no attempt was made to prefer an appeal either in 1932 when the award came to the notice of the Society or in 1934 when the award was re-discovered. In any view of the matter, we are of opinion that even if the award of Mr. Mohammad Ahmad Siddiqi was invalid on the ground that it was ante-dated or had been made after the expiration of the time fixed for making the award and without obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting aside the award was by means of an appeal to the Assistant Registrar as provided by r. 20 (12) (*i*). Further, we are of opinion, that the second reference to the arbitration of Mr. Bisaria in September 1933, while the dispute was still pending before Mr. Mohammad Ahmad Siddiqi assuming that he had not decided the matter by then and the award is ante-dated was not competent, and consequently all subsequent proceedings based upon that reference must be disregarded as of no legal effect upon the rights of parties. The position seems to us to be perfectly clear. Rule 20 (1) runs as follows:

"Any dispute touching the business of a registered Society between members or past members of a Society or persons claiming through a member or past member, or between a member or a past member or persons so claiming and the committee or any officer, or between two or more registered Societies, shall be referred in writing to the Registrar."

If the award of Mr. Mohammad Ahmad Siddiqi was valid, then the dispute had determined and there was no dispute left touching the business of the Society between the past members and the Society which could be referred to the Registrar within the meaning of r. 20 (1) of the Co-operative Societies Rules. If, however, the award was invalid on any grounds whatsoever, then it should have been set aside by means of an appeal and the arbitrator should have been asked to make a fresh award. There could however, be no second reference while the first reference was pending and had not terminated.

In this connection an alternative argument has been put forward before us on behalf of the respondents that assuming that a second reference to arbitration was competent, the award of Mr. Bisaria dated February 17, 1934, become final inasmuch as no appeal was filed against it until more than a year after, namely on March 12, 1935. An appeal against a decision of an arbitrator must be filed according to the provisions of r. 20 (12) (*i*) within one month from the communication of the award. There is no evidence, however, on the record to show that the appeal to the Assistant Registrar was filed within time. We do not think it necessary to express any opinion upon this latter point.

As regards the question of jurisdiction of the Civil Court to entertain the present suit reference has been made on behalf of the appellant to *Zamindara Bank* v. *Suba*, (A. I. R. 1924 Lah. 418), (3) *Muhammad Barkat Ali Khan* v. *Anjuman Imdad Qarza Dehi* (A. I. R., 1935 Lah. 330), (4) *Dhanpat* v. *Anjuman Dehi Alo Mahar* (A. I. R. 1935 Lah. 947 (1), *Beni Madho Singh* v. *Tahsildar of Unao, Liquidator of Dewara Bank* (44 Ind. Cas. 353 (2)), (5) *Sadasheo* v. *S. N. Fadnavis* (A. I. R. 1926 Nag. 379) (6) *Mathura Prasad* v. *Sheobalak Ram* (I. L. R. 40 All. 89) (7) and *Ganpat Ramrao Masur* v. *Krishnadas Padmanabh Chanaawarkar* (I. L. R. 44 Bom. 582) (8).

The Zamindara Bank v. *Suba*, (A. I. R. 1924. Lahore, 418) (3). In this case the plaintiff sued for a declaration that certain bonds alleged to have been executed by him in favour of the Co-operative Society, called the Zamindara Bank, Sherpur Kalan, were forgeries. The defence of the Soiety was that the Civil Court had no jurisdiction to hear and determine the suit and that the only remedy open to the plaintiff was by way of a reference to the Registrar, who could either decide the case himself or refer it to an arbitrator. The plea was given effect to by the trial Court but was negatived by the District Judge. The learned Judges of the Lahore High Court restored the decision of the trial Court holding that the plaintiffs suit was not maintainable in the Civil Court. This decision was based upon r. 18 of the rules made by the Punjab Govt. under the Co-operative Societies Act of which cl. (*g*) is more or less similar to r. 20 (12) (*ii*) of the Rules framed by the U. P. Govt. It was held that by the substitutional remedy provided under r. 18 in the shape of a reference to the Registrar in the matter of a dispute between a member and a Society the common law remedy by an action in a Civil Court has by necessary implication been taken away.

Muhammad Barkat Ali Khan v. *Anjuman Imdad Qarza Dehi*, (A. I. R. 1935 Lahore, 330, second column) (4). This was a case in which a Society had gone into liquidation and the liquidator had held the plaintiff liable to pay a certain amount as a past member of the Society. The suit for declaration that he was not liable for the said amount as a contribution due from him was dismissed on the ground that under s. 42, sub-s. (2), cl. (*d*) of the Co-operative Societies Act the liquidator had jurisdiction to decide the amount of the contribution due from him and the Civil Court was held to have no jurisdiction to go into the matter:—

Dhanpat v. *Anjuman Dehi Alo Mahar*, (A. I. R. 1935 Lahore 947) (1). In this decision it was held that in a dispute concerning the business of a Co-operative Society the only remedy open to the member is to appeal to arbitration; the jurisdiction of the Civil Courts to impugn the award is barred. The case reported in A. I. R. 1924 Lahore 418 (3), quoted above was relied on. This decision was, however, dissented from by a Division Bench of the Lahore High Court in *Anjuman Dehi* v. *Keshar Singh*, (A. I. R. 1936 Lahore 201) (2). In this case the execution of an award settling the dispute between the Society and its members, was held by the executing Court as time-barred and the Society again referred the same dispute to arbitration and obtained an award. It was held that the dispute between the Society and its member was determined by the first award and the subsequent dispute referred by the Society to arbitration was one which under the rules made under s. 43 could only be decided by the execution Court, for it related wholly to the discharge of the award. It was held that the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void. Reliance was placed by the learned Judges on two decisions of their own Court in *Mohammad Sharif* v. *Union*

(3) A I R 1924 Lah. 418; 71 Ind. Cas. 722.
(4) A I R 1935 Lah. 330 (2).
(5) 44 Ind. Cas. 353; 4 O L J 583; A I R 1918 Oudh 112.
(6) A I R 1926 Nag. 379; 94 Ind. Cas. 40; 24 N L R 5.
(7) 40 A 89; 42 Ind. Cas. 968; 15 A L J 863.
(8) 44 B 582; 57 Ind. Cas. 423; A I R 1920 Bom. 62.

Bank Ltd. (A. I. R. 1932 Lahore, 53) (9), and *Hira Nand* v. *Anjuman Imdad'i Qarza,* (A. I. R. 1935 Lahore 631) (10). In the former case the award of the Deputy Registrar was declared invalid by the Civil Court as the submission of the dispute to the Registrar for decision was not within the rules framed under the Act. In the latter case the awards made by the arbitrator were transferred for execution to the Civil Court. The decree was held by the Court to be fully satisfied and the execution proceedings came to an end. The Society thereupon referred the matter again to the Registrar and an award was made. In a suit filed for a declaration that the arbitration proceedings and the award were ineffectual, it was held that the matter could not be referred to arbitration again as the dispute had ended by the order of the executing Court, and the Civil Court had no jurisdiction to entertain the suit for a declaration.

Beni Madho Singh v. *The Tahsildar of Unao* (44 Ind. Cas 353) (5), *Sadasheo* v. *S N. Fadnavis* (A. I. R. 1926 Nag. 379) (6), *Mathura Prasad* v. *Sheobalak Ram* (I. L. R. 40 All. 89) (7) and *Ganpat Ramrao Masur* v. *Krishnadas Padmanabh Chandawarkar,* (I. L. R. 44 Bom. 582) (8), were cases where the liquidator had made certain orders of contribution against the members during the course of winding up of the Society, and it was held that the Civil Court had no jurisdiction to entertain the suit by those members to have the orders declared null and void under cl. (6) of s. 42 of the Co-operative Societies Act of 1912.

Reference has been made by learned Counsel for the respondents to a decision of the Lahore High Court in *Mukand Lal* v. *Malhotra Bank, Hafizabad,* (A. I. R. 1933 Lah, 442) (11), where it was held that the liquidator has power to determine the contribution to be made by a member, but he has no power to determine whether a particular person is a member or not, and if a person disputes his membership, the dispute can be decided by a Civil Court.

Reference has also been made on behalf of the respondents to—

1. *Balwant Singh* v. *Anjuman Imdad Bahami Qarza.* (A. I, R. 1939 Lah. 40) (12).

2. *Ramendra Nath Mukherjee* v. *Balurghat Central Co-operative Bank, Ltd.* (A. I. R. 1932 Cal. 317) (13).

3. *Chatra-Serampore Co-operative Credit Society* v. *Gopal Chandra Mitra,* (A. I. R. 1940 Cal. 198) (14) and

4. *Arya Co-operative Bank Society* v. *Pandit Shiv Charan* (A. I. R. 1940 All. 482) (15).

It was held in *Balwant Singh* v. *Anjuman Imdad Bahami Qarza,* (A. I. R. 1939 Lah. 40) (12), that where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in the execution proceedings, started in pursuance of the award, the objector's remedy being an appeal to the Registrar.

Remendra Nath Mukherjee v. *Balurghat Central Co-operative Bank Ltd.* (A. I. R. 1932 Cal. 317) (13). In this case the Society not only purported to acquire all the preference shares but proceeded to so modify its Regulations as to make itself a "pure type Society", that is to say, to adopt a new constitution on the footing that it had no preference share-holders, and no members other than the registered Societies who held ordinary shares. The plaintiff filed a suit for a declaration that the resolution passed by the Society was *ultra vires* and illegal. It was held that the plaintiff's cause of action was not withdrawn from the Courts by r. 22 of the Rules made under s. 43 (1) of the Act, which was to the effect that "any dispute touching the business of a registered Society between members... shall be referred in writing to the Registrar."

Chatra-Serampore Co-operative Credit Society Ltd. v. *Gopal Chandra Mitra,* (A. I. R. 1940 Cal. 198) (14). In this case it was held that where an award by an arbitrator appointed under the rules of the Co-operative Societies Act was without jurisdiction or there was violation of the rules regulating the arbitration in matters of substance, a Civil Court could certainly declare it to be a nullity.

Arya Co-operative Bank Society v. *Pandit Shiv Charan,* (A. I. R. 1940 All. 482) (15). In this case a dispute arose whether a certain person was the representative of a deceased member of a Co operative Society

(9) A I R 1932 Lah. 53; 133 Ind. Cas. 883; 32 P L R 780; Ind. Rul. (1931) Lah. 851.

(10) A I R 1935 Lah. 631; 161 Ind. Cas. 248; 8 R L 705; 38 P L R 355.

(11) A I R 1933 Lah. 442; 144 Ind. Cas. 264; 34 P L R 717; 14 L 703; Ind. Rul. (1933) Lah 427.

(12) A I R 1939 Lah. 40; 180 Ind. Cas. 242; 11 R L 666; 41 P L R 225.

(13) A I R 1932 Cal. 317; 139 Ind. Cas. 506; 36 C W N 414; 59 C 1165; Ind. Rul. (1932) Cal. 639.

(14) A I R 1940 Cal. 198; 188 Ind. Cas. 213; 70 C L J 492; I L R (1940) 1 Cal. 82; 12 R C 674.

(15) A I R 1940 All. 482; 192 Ind. Cas. 337; (1940) A L J 588; 13 R A 309.

who owed money to it. The Registrar referred the matter to an arbitrator. The arbitrator passed a personal decree against the person. Thereupon he brought the suit for a declaration that the personal decree was null and void and that the property attached in execution of it was not liable for attachment. It was held that the suit was maintainable and the arbitrator had no jurisdiction to pass a personal decree.

Having regard to the trend of authorities cited above we are of opinion that a Civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act, or is otherwise without jurisdiction. It may also be mentioned that the plaintiffs' liability to the Bank has already been apportioned by means of a compromise entered into between the Bank and the plaintiffs and it would not be consonant with the principles of justice, equity and good conscience to saddle the plaintiffs with the liability for the same amount twice over.

We maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Rule No. 1348 of 1939

May 3, 1940

B. K. MUKHERJEA AND MOHAMMAD AKRAM, JJ.

GOBARDHAN BAR—PETITIONER

versus

GUNADHAR BAR—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885 as amended in 1938), ss. 26-F and 26-C—Right of pre-emption when accrues, whether at date of registration or at date of execution of deed of transfer — Right of re-purchase under s. 26-F and pre-emption under Muhammadan Law, compared and distinguished from Roman Law —Co-sharer tenant exercising right of re-purchase under s. 26-F, whether should make other co-sharers parties to proceedings — Registration Act (XVI of 1908), s. 47—Registered document when takes effect— Position of parties to document and third parties in the matter, explained.

It is perfectly true that the Amending Act of 1938 is not retrospective in its operation. It does not take away or impair any vested right that accrued under the old section and the rights which it creates could arise only in respect of transfers taking place after it came into force.

But the rights of pre-emption under both the Amending Act and the old Act accrue only at the date of registration of the deed of transfer and not at the date of its execution. Hence no question of the Amending Act being retrospective can arise. Sections 26-F and 26-C as amended read with ss. 26-F and 26-C of the old Beng. Ten. Act make it clear, that the provisions of the new Act would be applicable in respect of transfers which were registered after the new Act came into force, whereas the old Act would apply to the cases where the document of transfer was registered at a time when the old Act was still in operation.

The right of Shafa as recognized by the Muhammadan Law as well as the right of re-purchase created by s. 26-F, Ben. Ten. Act, are not rights of pre-emption in the sense in which they were used by the Roman lawyers. Pre-emption, according to Roman Law, connoted an obligation on the part of the intending vendor to sell preferentially to the pre-emptor, if he offered as good conditions as any intending vendee The right of purchase that is created by s. 26-F, Ben. Ten. Act, like the right of pre-emption under the Muhammadan Law, attaches an obligation to a particular status which binds the purchaser from the person obliged to hand over the property purchased to the obligee on receiving the price paid by him for it with or without additional compensation. The obligation can only arise when the property passes from the original owner to the purchaser. Under s. 26-C, Ben. Ten. Act, the transfer can only be made by registered document and title cannot possibly pass to the transferee till registration is effected. 23 Ind. Cas. 385 (1), relied on.

There is no provision in the Ben. Ten. Act, which makes it necessary that the co-sharer tenant who seeks to exercise his right of re-purchase under s. 26-F, of the new Act should make the other co-sharers parties to the proceeding. The provision of s. 188 cannot be attracted to the present s. 26-F and, as such the non-joinder of the other co-sharer tenants would not in any way make the proceeding defective.

It is undoubtedly true that as between the transferor and the transferee the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property both of which are registered, the one executed earlier in point of time will have priority, but as regards third party the point of time at which the deed is to be effective is when it is registered. 160 Ind. Cas. 730 (4), relied on.

C. Rule from the order of the 2nd Court, Sub-Judge, Midnapur, dated May 30 1939.

Mr. *Gopendranath Das* for Mr. *Ambica Prasanna Sen Gupta*, for the Petitioner.

Dr. *Radha Binode Pal* and Mr. *Shyama Pada Mojumdar*, for the Opposite Party.

B. K. Mukherjea, J.—This rule is directed against an appellate judgment of the Subordinate Judge, Second Court, Midnapur dated May 30, 1939, reversing an order of the Munsif, first Court, Tamluk, made in a proceeding under s. 26-F, Ben. Ten. Amendment Act of 1938. There is no dispute about the material facts which lie within a narrow compass. There was an occupancy holding recorded in interest No. 79 of the finally published Record of Rights *mouza* Nilkanthea, which belonged jointly to Indra Mull and Barada Dei. One

of the plots comprised in the said holding which is C. S. plot No. 1050 was sold by these tenants to two persons, namely Gobordhan Bar, the petitioner, and Nakul Bar his brother. On August 9, 1938, a *kobala* was executed by Nakul Bar in respect of his half share of plot No. 1050 in favour of the opposite party and the document was registered on August 24 following. On August 18, 1938, the Ben. Ten. Amendment Act of 1938 came into force and the petitioner who was a co-sharer of the vendor presented an application within four months from the date of the sale claiming to exercise his rights of purchase under s. 26-F of the new Act. The application was resisted by the opposite party purchaser on two grounds. It was contended in the first place that the *kobala* being executed before the new Act came into force, even though it was registered after that the provisions of the old Act would apply and the rights of pre-emption could be exercised by the immediate landlord and not by the co-sharer tenants. The second point taken was that the application was not maintainable in the absence of the other co-sharer tenants as parties to the proceeding.

The trial Court overruled both these contentions and allowed the petitioner's prayer. On appeal the decision was reversed and the lower Appellate Court gave effect to both the contentions urged by the opposite party and rejected the petitioner's application. It is against this order that the present rule has been obtained and Mr. Das who has appeared in support of the rule has challenged the propriety of the decision of the lower Appellate Court on both the points. On the first point the Subordinate Judge was of opinion that as in this case the *kobala* was executed on August 9, 1938 when the old Act was still in force, a right of pre-emption vested in the immediate landlord under s. 26-F of the Act and this could not be taken away by the Amending Act of 1938 which came into force only on August 18, 1938; the co-sharer tenants likewise could not claim any right of pre-emption under the new Act as the transfer took place before and not after the new Act became operative. It is perfectly true that the Amending Act of 1938 is not retrospective in its operation. It does not take away or impair any vested right that accrued under the old section and the rights which it creates could arise only in respect of transfers taking place after it came into force. The question however for our consideration is whether the rights of pre-emption would accrue in favour of the immediate landlord under the old section or in favour of the co-sharer tenants under the new, as soon as the conveyance is executed or would they come into existence only when the document is registered. If the date of execution is the material date, the decision of the Subordinate Judge is right and neither the landlord would lose any right which he acquired on the date of the execution of the deed nor would the co-sharer tenants gain any advantage which was created by a statute not then in existence. If, on the other hand, the rights could not arise unless there was a completed transfer by registration of the sale deed, it is the co-sharer tenants who would be entitled to exercise the right of pre-emption and not the immediate landlord. I am inclined to hold that the date of registration is the material date and both under the old Act as well as under the new, no right could possibly accrue in favour of the landlord or the co sharer tenants as the case may be, until the document of transfer was registered.

A transfer of occupancy holding can be made only by a registered document and no title would pass to the transferee unless registration is effected. Under s. 26-C of the old Act the registering officer would not register a deed unless the landlord' fees and the process-fees for service of notice on the landlord were paid by the vendee, and under s. 26-F the immediate landlord had two month's time after the service of notice under s. 26-C, to present his application for pre-emption. Not only there was no valid or complete transfer till the document was registered, but so long as it was not registered, the landlords' right to apply for pre-emption did not arise. If therefore the document was not presented for registration till after the expiry of the old Act, there was no accrued right in favour of the landlord which could be said to have been saved by the repealing enactment. Then again, as in the present case, if the document is registered after the new Act came into force, the provision of the new s. 26-C would certainly be attracted to it. The purchaser would not have to pay landlord's fees even though the *kobala* was executed when the old Act was still in force, and notice would have to be served upon the co-sharer tenants within four months from the date of service of which they would have the right to come up and apply for re-purchase of the share. It is fairly clear from these sections that the intention of the Legislature was that the provisions of the new Act would be appli-

cable in respect of transfers which were registered after the new Act came into force whereas the old Act would apply to the cases where the document of transfer was registered at a time when the old Act was still in operation.

It may be noted here that the Government of Bengal passed an Ordinance known as the Bengal Tenancy Ordinance which came into force on May 31, 1938. By this Ordinance the time for registration of documents of transfer relating to occupancy holdings was extended and the provisions of the new Act were made available in cases where the last date for presentation of the document for registration expired any time between May 31 and September 8, 1938. These were documents executed admittedly when the old Act was in force, but the parties were given the privilege to wait till the new Act became operative so that they might have the advantages of the provisions of the new Act. The view I am taking does not militate in any way, with the general principles relating to the law of pre-emption. Under the Muhammadan Law also, no right of pre-emption can arise unless the sale is complete and there is a total cessation of the vendor's right to the property. It may be pointed out here that the right of Shafa as recognised by the Muhammadan Law as well as the right of re-purchase created by s. 26 F, Ben. Ten. Act, are not rights of pre-emption in the sense in wrich they were used by the Roman lawyers. Pre-emption, according to Roman Law, connoted an obligation on the part of the intending vendor to sell preferentially to the pre-emptor, if he offered as good conditions as any intending vendee. The right of purchase that is created by s. 26-F, Ben. Ten. Act, like the right of pre-emption under the Muhammadan Law, attaches an obligation to a particular status which binds the purchaser from the person obliged to hand over the property purchased to the obligee on receiving the price paid by him for it with or without additional compensation: *vide Budhai Sirdar* v. *Sonaulla Mridha* (1). The obligation can only arise when the property passes from the original owner to the purchaser. There is undoubtedly some conflict of judicial opinion as to when a sale under Muhammadan Law becomes complete, and it has been held by some authorities that for purposes of giving effect to the right of pre-emption a sale would be deemed to be complete under Muhammadan Law as soon as the price is paid and possession of the property delivered to the puchaser : *vide Begum* v. *Muhammad Yakub* (2) and *Abdulla Avjal Momin* v. *Ismail Mugal Foda* (3). But this discussion is immaterial for our present purpose, as under s. 26-C, Ben. Ten. Act, the transfer can only be made by registered document and title cannot possibly pass to the transferee till registration is effected.

Much stress has been laid by the opposite party on s. 47, Regis. Act. It is undoubtedly true that as between the transferor and the transferee the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property both of which are registered, the one executed earlier in point of time will have priority, but as regards third party the point of time at which the deed is to be effective is when it is registered *vide Naresh Chandra* v. *Girish Chandra* (4) I hold, therefore that the view taken by the lower Appellate Court on the first point cannot be sustained. On the second point also I am of the opinion that the decision of the Subordinate Judge is wrong. There is no provision in the Ben. Ten. Act, which makes it necessary that the co-sharer tenant who seeks to exercise his right of re-puchase under s. 26-F, of the new Act should make the other co-sharers parties to the proceeding. It was necessary in the case of the immediate landlord under the old s. 26-F by reason of the provision of s. 188 which laid down that such applications must be made by all the co sharer landlords jointly. The provision of s. 188 cannot be attracted to the present s. 26-F and, as such, I hold that the non-joinder of the other co-sharer tenants would not in any way make the proceeding defective. The result is that the Rule is made absolute and the judgment of the lower Appellate Court is set aside and that of the trial Court restored. The petitioner will have his costs in this rule, the hearing-fee being assessed at one gold *mohur*.

Mohammad Akram, J.—I agree.

D. *Rule made absolute.*

(1) 41 C 943; 23 Ind. Cas. 385; A I R 1914 Cal. 234; 19 C L J 601; 18 C W N 890.

(2) 16 A 344; A W N 1894, 101 (F B).

(3) 46 B 302; 64 Ind. Cas. 913; A I R 1922 Bom. 124; 23 Bom. L R 1079.

(4) 61 C L J 360; 160 Ind. Cas. 730; A I R 1936 Cal. 17; 62 C 979; 8 R C 451.

PATNA HIGH COURT

Appeal from Original Decree No. 168 of 1938

January 22, 1941

CHATTERJI AND MEREDITH, JJ.

GULAB CHAND PRASAD—DEFENDANT—APPELLANT

versus

RAM KUMAR AND OTHERS—PLAINTIFFS AND AJODHYA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 76 (h)—Essentials for applicability of s. 76 (h)—Mortgagee in possession of mortgaged property as mere tenant under lease-deed—S. 76 (h) does not apply—Equitable set-off, if can be allowed.

Before s. 76 (*h*), T. P. Act can be applied it must be shown that the possession of the mortgagee is by way of security for the debt, or in some way referable to the mortgage. [p. 535, col. 1.]

A mortgagee had entered into possession of the mortgaged property under a lease-deed as a mere tenant and not in his capacity of the mortgagee, on agreement of paying certain rent. In the suit on the mortgage the subsequent transferee from the mortgagor contended that the rents from the mortgagee should be set-off against him in reduction of the interest on mortgage money under s. 76 (*h*), T. P. Act:

Held, that the transaction referred to in the lease-deed was merely a lease with a provision for the payment of rent in advance and could in no sense be described as a mortgage of any sort. There was no question of property being held in mortgage unless it was held as security for the debt, and to constitute a mortgage there must also be provision, express or implied for a right of redemption. As in the lease-deed there was neither any provision whereby the property was held as security for the debt nor for redemption, the lessee came in purely as tenant, and not as mortgagee. *Nidha Sah* v. *Murli Dhar* (1) and 68 Ind. Cas. 394 (2), relied on. [p. 534, col. 2.]

Held also, that even if it could be held that the possession under the lease-deed was possession as mortgagee, it was not as mortgagee under the mortgage in suit, and possession was in no way referable to the mortgage upon which the suit had been brought. Hence as the mortgagees were not in possession as mortgagees, but as tenants upon rent under a lease which had nothing whatever to do with the mortgages in suit, s. 76, T. P. Act did not apply to the case for s. 76 (*h*) to be applicable the possession of the mortgagee must be *qua* mortgagee. 172 Ind. Cas. 584 (4), referred to, 58 Ind. Cas. 291 (5) and 105 Ind. Cas. 419 (6), explained. [p. 535, col. 1.]

Held further, that there was no question of equitable set-off as it had not been shown that the rent was due to the subsequent transferee nor had the transferee shown that he had any right, legal or equitable, to raise the plea of set-off.

A. from a decision of the Subordinate Judge of Gaya, dated July 8, 1938.

Messrs. *P. R. Das*, *S. M. Mullick*, *B. C. De* and *M. Azizullah*, for the Appellant.

Sir *M. N. Mukharji* Messrs. *D. N. Varma*, *Vishnu Deo Narayan*, *Brahmadeo Narayan* and *Kanhayaji*, for the Respondents.

Meredith, J.—This is an appeal from a decision of the learned Subordinate Judge of Gaya, dated July 8, 1938, decreeing a suit to enforce three simple mortgage bonds. The appeal is by the defendant No. 10 alone, who is a subsequent purchaser of one item of the mortgaged property.

The first of the bonds in suit was executed on May 13, 1925, for a sum of Rs. 6,000 bearing interest at 14 annas per cent. per mensem compoundable with annual rests. The property mortgaged was a house (holding No. 27) in the town of Gaya. This bond is Ex. 1. The amount said to be due at the time of the suit was Rs. 20,619-5-6. Only a sum of Rs. 15,500 was claimed, and the balance was given up. The second bond (Ex. 7) was executed on February 2, 1929, for a sum of Rs. 3,200. The property mortgaged was the same and there were the same provisions with regard to interest. The claim in this case was for Rs. 7,593-2-3. The third bond (Ex. 66) was executed on August 21, 1929, for a sum of Rs. 5,000. It contained similar provisions with regard to interest, and the same property was mortgaged together with another house (holding No. 66). The claim in this case amounted to Rs. 12,076-12-0. These sums claimed were decreed in full. As however, the interest allowed was compound interest, the learned Subordinate Judge allowed no interest *pendente lite*, or for the period of grace. He ordered that after expiry of the date fixed for redemption interest should run at six per cent. per annum.

The first point taken in the appeal is that the rule of *damdupat* as contained in s. 7 of the Bihar Money-lenders Act must be applied. Section 7 of this Act provides that no Court shall, in any suit brought by a money-lender before or after the commencement of the Act in respect of a loan advanced before or after the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document. It would follow from this that the amount decreed by way of interest for the period to the institution of the suit cannot be in the case of the first

bond more than Rs. 6,000 in the case of the second bond more than Rs. 3,200 and of the third bond Rs. 5,000. The decree of the learned Subordinate Judge will, therefore, have to be modified to this extent, and this is conceded by the respondents.

The principal point argued for the appellant, and indeed the only other point, arises out of the fact that two of the plaintiff-respondents were in possession of the mortgaged house in holding No. 27, which has been purchased by the appellant, upon a rental of Rs. 81 per mensem during the continuance of the mortgage. This rent was admittedly not paid, and the appellant consequently claims that the mortgagees in possesssion must render an account for these rents under s. 76 (*h*) of the T. P. Act, or failing that by way of equitable set-off.

The document by virtue of which the respondents have been in possession is on the record, and is Ex. A. It appears that these respondents had asked the mortgagors, the defendants Nos. 1 to 5, for a lease of the house in question in order to open a shop and, and upon this lease they came into possession on October 20, 1922. The *kabuliyat* (Ex. A), however, was not executed until June 23, 1934. The recitals in this *kabuliyat* may be summarised as follows. The respondent Siri Niwas and his son state that they asked the mortgagors Babu Ajodhya Prasad and Babu Lakshmi Prasad, to rent the house to them to open a shop, and requested them to put the house into repair. The said Babus replied that the repair and reconstruction of the house would cost about Rs. 4,000 and they had not that money available. If however, the lessees were prepared to advance the sum of Rs. 4,000 without interest and agreed to its set-off against the rent, they were prepared in return to give the lease requested and to repair the house. This was accordingly done, and the lessees, therefore, paid in all Rs. 4,000 to the proprietors on account of rent for a period of four years, eight months and ten days at the rate of Rs. 71 per mensem, covering the rent from October 20, 1922 to May 11, 1927. It is then recited that the tenants had come into occupation under this agreement and maintained a cloth shop, and lastly there was a provision that if the lessees on the expiry of June 30, 1927, wished to retain the shop as tenants paying rent, they would pay a rental of Rs. 81 per mensem which had been agreed to by the proprietors.

The argument for the appellant based upon s. 76 of the T. P. Act is that this was actually a *zarpeshgi* lease, and the lessees were in possession as mortgagees. The interest on the first bond for the two years, from May 13, 1925 to May 12, 1927, at 14 annas compoundable annually would amount to Rs. 1,260. Adding this to Rs. 6,000 the amount of the bond, we get a sum of Rs. 7,260 upon which sum the interest of 14 annas per cent. per mensem would amount to Rs. 63 per mensem. It is accordingly argued that Rs. 63 out of the rent of Rs. 81 should be set-off under s. 76 against the interest due on the bond, and the balance of Rs. 18 per month should be set-off towards reduction of the principal of the debt.

It is argued that for the application of s. 76 it is sufficient if the mortgagee takes possession of the mortgaged property. The section does not in terms state that the possession of the mortgagee must be taken *qua* mortgagee.

In my view, the contention of the appellant on this point can by no means be accepted. In the first place, I am of opinion that the transaction referred to in Ex. A is merely a lease with a provision for the payment of rent in advance and can in no sense be described as a mortgage of any sort. It has been held in a number of cases that there is no question of property being held in mortgage unless it is held as security for the debt, and to constitute a mortgage there must also be provision, express or implied for a right of redemption. Upon this point indeed only cite the Privy Council case, *Nidha Sah* v. *Murli Dhar* (1) and a decision of this High Court, *Kesho Prasad Singh* v. *Chandrika Prasad Singh* (2). In Ex. A there is neither any provision whereby the property is held as security for the debt nor is there any provision at all for redemption. It is clear, in my view, that under Ex. A the lessees came in purely as tenants, and not as mortgagees.

Apart from that however, there can be no question that the lessees remained in possession purely as tenants upon a rental of Rs. 81 per mensem from May 12, 1927, which is the only period with which we are

(1) 30 I A 54; 25 A 115; 5 Bom. L R 111; 7 C W N 289; 8 Sar. 435 (P C).
(2) 2 Pat. 217; 68 Ind. Cas. 394; 3 P L T 797; A I R 1923 Pat. 122.

concerned in the present case. That is the clear provision which is found in Ex. A itself.

Lastly, even if it could be held that the possession under Ex. A was possession as mortgagees, it was not as mortgagees under the mortgage in suit, and possession was in no way referable to the mortgages upon which this suit has been brought.

It is quite clear, therefore, that respondents were not in possession as mortgagees but as tenants upon rent under a lease which had nothing whatever to do with the mortgages in suit. This being so, s. 76 of the T. P. Act has, in my opinion no application to the case. It has been held that for s. 76 (*h*) to be applicable the possession of the mortgagee must be *qua* mortgagee, *Page* v. *Linwood* (3). To a similar effect is the decision of the Bombay High Court in *Chunilal Bulakidas Patel* v. *Abdul Karim Shaikh Subrati* (4) where it was held that for the mortgagee in possession to be held liable to account it must be proved that the mortgagee had received possession by virtue of the agreement. There are certain cases which have perhaps gone a little further than this, for example, *Kishundayal Bhagat* v. *Mahabir Bhagat* (5) where s. 76 was held applicable when the mortgagee was in possession not directly upon the terms of the mortgage but under a lease which provided that the rent should be set-off towards the interest due upon the mortgage. This decision has been followed in a Madras case, *Vengubai Ammal* v. *Ramaswami Iyer* (6). But the principle applied in those cases was that the mortgagees had actually taken possession by way of further security for the debt, and they do not in any way conflict with the contention, which is, to my mind, unassailable, that before s. 76 (*h*) can be applied it must be shown that the possession of the mortgagee is by way of security for the debt, or in some way referable to the mortgage. In the present case the possession was in no way referable to the mortgage, and, as I have said, s. 76 has clearly no application.

It is argued, as I have said in the alternative that the appellant should get an equitable set-off of the amount due as rent. That amount, however, if due to any one would be due to the mortgagors, defendants Nos. 1 to 5, and the defendant has not shown that it is a sum in any way due to him. His purchase of the property was only just before this suit was brought. He came into possession under his purchase on May 6, 1937 and the suit was brought on May 15, 1937. In the circumstances the question of equitable set-off cannot arise as between the respondents and the appellant. That plea might possibly have been taken by the mortgagors, defendants Nos. 1 to 5, though it may be noted that one of the plaintiffs stated on oath that the rents had actually been set-off against other debts due from the mortgagors. However that may be, no such plea for set-off was raised by the defendants Nos. 1 to 5, and the appellant-defendant No. 10 has not shown that he has got any right, legal or equitable, to raise it.

There is no substance in this contention for the appellant, and, except with regard to the application of the rule of *damdupat* under s. 7 of the Money-lenders Act, the appeal must fail. For the respondents it was at first argued that interest *pendente lite* should be allowed, if necessary, by the application of O. XLI, r. 33 of the Civil P. C. Apart, however, from the fact that no cross-objection was filed by the respondents, it appears that it was because compound interest had been allowed at a fairly heavy rate that the learned Subordinate Judge did not allow interest *pendente lite*. Before his decision could be reversed upon that point, it might be necessary to consider the whole question of the interest allowed, and upon this being pointed out Sir Manmatha Nath Mukharji has not pressed this point for the respondents.

In the result I would allow the appeal to this extent that the decretal amount will be reduced to give effect to the provisions of s. 7 of the Bihar Money-lenders Act. The decision of the learned Subordinate Judge with regard to interest *pendente lite* and for the period of grace will not be altered. A fresh preliminary decree will be drawn up in these terms providing that the amount due must be paid within three months from the date thereof, failing which the property shall be sold in the manner and order directed in the judgment of the learned Subordinate Judge. From the date, if not paid, interest will run at six per cent. per annum. In my opinion, each party to this appeal should bear its own

(3) 4 Cl. & F 399 (434).
(4) A I R 1937 Bom. 483; 172 Ind. Cas. 584; 39 Bom. L R 795; 10 R B 284.
(5) 5 P L J 492; 58 Ind. Cas. 291; (1920) Pat. 277; 1 P L T 711; 2 U P L R (Pat.) 208.
(6) A I R 1927 Mad. 964; 105 Ind. Cas. 419; 26 L W 450; (1927) M W N 749; 39 M L T 603.

costs. The plaintiffs will get costs in the lower Court proportionate to their success.

Chatterji, J.—I agree.

s. *Appeal allowed.*

MADRAS HIGH COURT

Civil Revision Petition No. 197 of 1937
March 29, 1940
WADSWORTH, J.

V. S. A. R. M. ANNAMALAI CHETTIAR—PETITIONER
versus
VELLAYAN CHETTIAR AND OTHERS—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 73—Decrees by A, B and C against D and his father E who became insolvent—In execution of A's decree Court allowing Official Receiver to sell entire property as Court's agent within certain time and to pay D's share into Court—Property sold beyond period fixed—Execution petitions by B and C—Sale proceeds subsequently deposited into Court—B and C held entitled to rateable distribution.

A, B and *C* obtained decrees against *D* and his father *E* who became insolvent. On application of *A* for the execution of his decree, the Official Receiver was permitted by the Court to sell the entire property as an agent of the Court within certain time and deposit into Court the share of *D* who was non-insolvent. The property was however sold after the period fixed by the Court. *B* and *C* applied for execution of their decrees and subsequently the Official Receiver paid into Court *D's* share in the sale proceeds *B* and *C* applied for rateable distribution:

Held, that the receipt by the Official Receiver in contravention of the rules under which he should have been operating, could not by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court It could not be said that there had been, at the time when these two execution petitions of *B* and *C* were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sale by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from this sale and there was at the time when these execution petitions were filed no subsisting authority to the Official Receiver to sell. Hence the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. *B* and *C* were therefore entitled to rateable distribution. 35 Ind. Cas 850 (1), explained,

C. R. P. to revise the order of the Sub-Judge, Devakottai, dated April 14, 1936.

Mr. *R. Rangaswami Iyengar*, for the Petitioner.

Mr. *K. Rajah Ayyar*, for the Respondents.

Order.—This petition raises a question relating to rateable distribution which is not, so far as I am aware, covered by any precise authority. The petitioner respondent No. 1 and respondent No. 2, all had decrees against respondent No. 3 and his father who became an insolvent. Respondent No. 1 executed his decree on October 15, 1934, and on January 5, 1935, the Court ordered sale of the entire properties of the father and the son. This order was modified by a later order restricting the sale only to defendant No. 2's half share and after this order, the Official Receiver was impleaded and when he did not appear, the order was again revised directing that the entire properties should be sold. At this stage the Official Receiver wrote to the Court pointing out that if he were permitted to sell the entire property as the agent of the Court and deposit into Court the share of the non-insolvent son, this procedure would be for the benefit of the attaching decree-holder. The Court on February 13, 1935, passed an order permitting the Official Receiver to sell the entire property as desired by him and directing him to hold the sale within three months. The Official Receiver did not hold the sale within the time allowed and the executing Court was approached to withdraw the sale from the Official Receiver and sell through the Court While correspondence between the Court and the Official Receiver was proceeding with reference to this proposal, the Official Receiver actually sold the property on October 28, 1935, the price being received by the Official Receiver in two instalments, on October 29, 1935 and November 7, 1935. It is common ground that on the latter date the execution petitions of the petitioner and respondent No. 2 had not yet been filed. The petitioner's execution petition was filed on November 30, 1935, and that of respondent No. 2 on December 20, 1935. After the Official Receiver's sale was concluded, there was further correspondence and no sale deed was drawn up until on March 30, 1936, the Official Receiver paid the son's share of the sale proceeds into Court and on April 8, 1936, the sale was finally ratified by the Court.

Quite clearly, if the date of the payment of the sale proceeds to the Official Receiver is the date of the receipt of the assets by the Court, for the purpose of s. 73, Civil P. C., the petitioner and respondent No. 2 have no right to share rateably in these assets. If, on the other hand, the date of the receipt is the date when the money was actually paid by the Official Receiver

into Court, then both the petitioner and respondent No. 2 are entitled to rateable distribution. The learned Subordinate Judge has taken the view that the date of the receipt of the assets is the date of the receipt by the Official Receiver acting as the agent of the Court. He rests his view largely on the decision in *Galstaun* v. *Woomesh Chandra Banerjee* (1), which can hardly be said to be a case exactly covering the facts with which we now have to deal. That was a case of the sale of movable property by the Court and with reference to movable property the rules prescribe that the price of each lot shall be paid at the time of the sale, presumably to the officer who holds the sale. The learned Judges, distinguishing a case relating to immovable property, point out that if the entire purchase money was paid by the purchasers into the hands of the auctioneers in one instalment, it was immaterial for the purpose of s. 73 whether the purchase money was actually paid into the treasury or into the hands of the person employed by the Court to hold the sale.

The present case however presents certain special features. At the time when the Official Receiver held this sale, he was not authorized to hold it. He had failed to hold it within the time allowed and when he actually held the sale, the Court had apparently decided to withdraw from him the power to hold the sale. Presumably, he must be regarded as having been appointed in the first instance as the selling officer under O. XXI, r. 65. But it does not appear that there was any regular proclamation by the Court, though the value for the purpose of the proclamation had been settled at an earlier stage. Assuming that the Official Receiver was the selling officer appointed by the Court under r. 65, his proceedings would necessarily be governed by the provisions of O. XXI. In accordance with those provisions he would have authority to receive a deposit of 25 per cent. of the purchase price, but the balance would under r. 85 be payable into Court. Assuming that the lack of authority of the Official Receiver to sell at the time of the sale and the lack of regularity in the manner of the sale have been condoned by the subsequent ratification of the Court and by the absence of any objection to the irregularities of the procedure, it seems to me difficult to hold that the Official Receiver was the agent of the Court to receive this money when, in the case of sales of immovable property, the rules under which the Official Receiver was authorized contemplate only the power of the officer to receive 25 per cent. of the purchase price, the balance being payable into Court. When there is clearly no authority given to the agent to receive the full amount of the purchase price, I find difficulty in holding that the receipt by the agent in contravention of the rules under which he should have been operating, can, by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court; and there is the further difficulty that the adoption of such a view would deprive the other decree holders of their accrued rights of sharing in any assets which might be received by the Court after the date on which their execution petitions were filed.

It cannot, in my opinion, be said that there had been, at the time when these two execution petitions were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sales by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from this sale and there was at the time when these execution petitions were filed no subsisting authority to the Official Receiver to sell. We are not now concerned with the final validity of the sale. That has been accepted by the Court and no one has objected. But it does seem to me apparent that this subsequent ratification by the Court cannot transmute the unauthorized receipt of this money by the Official Receiver into a receipt by the Court. My attention has been drawn to numerous cases relating to the receipt of assets by Collectors executing decrees under Sch. III, Civil P. C. I do not propose to discuss those cases, for it seems to me that they depend upon the special statutory provisions which give to the Collector functions to some extent analogous to those of executing Courts and have no real bearing on the facts of the present case. It is clear that the Official Receiver in this case might have been either the officer appointed by the Court to sell under r. 65, or a party selling with the permission of the Court under r. 83, if the sale is to have any validity so far as the son's share was concerned. In the Court below it was not suggested that he acted under r. 83 and it seems to

(1) 44 C 789; 35 Ind. Cas. 850; A I R 1917 Cal. 740; 25 C L J 303.

me unnecessary to consider the case from this aspect.

In the result therefore I am of opinion that the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The petition is therefore allowed with costs here and in the Court below. The petitioner and respondent No. 2 will be entitled to share rateably in the proceeds of the sale of respondent No. 3's share in the property.

N.-S. *Petition allowed.*

PATNA HIGH COURT

First Appeal No. 56 of 1938
November 16, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

Mst. BESAR KUAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMHIT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Registration Act (XVI of 1908), ss. 17, 49—Document connected with partition not registered—Inadmissible to prove actual partition or share of party—Admissible to prove jointness or otherwise of person—Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suit by Hindu widow for possession of husband's property, against his relatives, whether for declaration and consequential relief.

A document connected with a partition is not admissible in evidence in the absence of registration, to prove actual partition and to prove what was allotted to any person by that partition. It is, however, clearly admissible to establish the status of a party to the document or to establish separation in the family and to rebut any case that such party died in a state of jointness. 53 Ind. Cas. 901 (2), relied on.

On the death of a Hindu leaving his property in possession of members of another branch of his family, his widows brought a suit on the allegation that he died in a state of separation and that they as his widows were entitled to possession of the property left by him:

Held, that the suit was one for possession and not for a declaration and consequential relief namely possession of the property following the declaration.

F. A. from the original decree of the Sub-Judge, Muzaffarpur, dated June 30, 1937.

Sir *Sultan Ahmed*, Messrs. *Ray Parasnath* and *Prem Lall*, for the Appellants.

Mr. *S. M. Mullick* and Rai *T. N. Sahay*, for the Respondents.

Harries, C. J.—This is a first appeal brought by plaintiffs from a decree of the learned Subordinate Judge of Muzaffarpur dismissing their claim for a declaration and recovery of possession of certain property. The plaintiffs were the widows of one Shivaraj who died in the month of September 1934. They alleged that Shivaraj died in a state of separation and that they as his widows were entitled to possession of the property left by Shivaraj. The defendants were the male members of another branch of the family and they claimed that Shivaraj died in a state of jointness with them and, therefore, the plaintiffs had no right to possession of any property and that their only rights were to maintenance out of the joint family properties. The learned Subordinate Judge eventually came to the conclusion that Shivaraj died in a state of jointness and therefore dismissed the plaintiffs' claim in its entirety.

In this appeal the plaintiffs-appellants have urged that certain important documents were tendered by them in evidence in the Court below but were wrongly rejected by the learned Subordinate Judge. These documents have been printed in a supplementary paper-book. The first document, which is printed at pp. 1 and 2 of that supplementary paper-book, is headed "Statement of the exclusive share of Babu Sheoraj Nandan Singh in *Mauza* Dagar, 1927-28," and, on the face of it, the document appears to have been signed by Shivaraj and Harihar Prasad Singh who is defendant No. 2 in the suit. The other document is printed at pp. 3 to 10 of the supplementary paper-book and is called "Kurra Barawarda of village Madanpur." This document also appears to bear the signature of Shivaraj and Ramhit Singh, defendant No. 1 in this suit. Both the documents are papers connected with a partition, and the learned Judge was of opinion that they were not admissible in evidence by reason of the fact that they were not registered. He accordingly refused to admit them in evidence for any purpose whatsoever. Sir Sultan Ahmed who has appeared on behalf of the appellants concedes that these two documents cannot be admissible in evidence to prove an actual partition by metes and bounds or to prove what share was allotted to any particular person by such partition. As the documents have not been registered as required by s. 17, Regis. Act, they are inadmissible to prove partition or possession of property on partition. Counsel, however, has strongly urged that these documents are admissible to establish the status of Sheoraj Singh or to establish the nature of his possession over property held by him at his death. On the other hand, Mr. S. M. Mullick, who

appears on behalf of the respondents, contends that as these papers on the face of them suggest partition they should not be admitted for any purpose whatsoever. In my judgment, the learned Judge was wrong in refusing to admit these documents in evidence. It is true that in the absence of registration they are not admissible in evidence to prove actual partition and to prove what was allotted to any person by that partition. They are, however, in my view, clearly admissible to establish the status of Shivaraj or to establish separation in the family and to rebut any case that Shivaraj died in a state of jointness.

A similar point arose for consideration in *Subba Rao* v. *Mahalakshamamma* (1). In that case it was held that a document between two persons containing lists of properties that fell to the share of each on a partition, written in duplicate, signed by each and attested and intended to be evidence of the partition, must be regarded as the formal and operative deed of partition between them; and unless registered as required by s. 17, Regis. Act, such documents are inadmissible in evidence to prove what properties were taken by each on partition. The Court, however, held that the documents were admissible to prove a division in status. There is no real distinction between this *Madras case* [*Varada Pillai* v. *Jeevarathnammal*] (2), and the present case before the Court. The learned Judges of the Madras High Court relied upon a decision of their Lordships of the Privy Council in *Varada Pillai* v. *Jeevarathnammal* (2), where their Lordships held that though a certain unregistered document was not admissible to prove a gift it was admissible in evidence to show the character of the possession of the alleged donee. There was a conflict of opinion concerning this question in the past; but such conflict appears to have now been resolved, and the trend of judicial authority is to the effect that documents of a nature of the two excluded documents in the case are admissible in evidence not to prove partition or to prove what properties were allotted but for the limited purpose of proving separation and the status of any of the parties. That being so, the two documents to which I have referred should have been admitted in evidence and considered if they were satisfactorily proved by the plaintiffs who adduced them. In my view these documents must be considered before findings of fact can be arrived at upon the question of separation or otherwise.

Both parties agree that the most convenient course would be to remand the case to the Court below to enable the plaintiffs to tender these two documents in evidence. The plaintiffs will be entitled to call evidence as to their execution and custody and generally to prove their genuineness. The defendants on the other hand will be entitled to call evidence directed to establish that the documents are not genuine and should not be accepted as such. After the Court below has considered the matter, it will forward its report to this Court as soon as convenient. A period of three months should be sufficient for the lower Court to hear this evidence and to forward its report to this Court. Sir Sultan Ahmed has also argued that certain other documents were wrongly rejected by the Court below, apparently, on the ground that they were tendered too late. His complaint is that a document tendered on behalf of defendants on April 6, 1936, and exhibited on April 12, 1936, has been relied upon by the learned Judge, whereas certain documents which were tendered before this date were rejected as being tendered too late. No copies of these documents, the rejection of which is now complained of, have been filed in this Court, and it is impossible for us to say whether the documents were or were not rightly rejected. The matter is left open, and the appellants may ask this Court when the matter again comes before it for hearing to admit the documents if the Court thinks that they were wrongly rejected.

It was reported by the office in this case that there was a deficiency of court-fee in the Court below. The suit was really a suit for possession, but the office appears to think that it was a suit for a declaration and consequential relief, namely possession of the property following the making of a declaration. It is true that something in the nature of a declaration was asked for in the plaint, but in reality the suit was an ordinary suit for possession. In all cases where possession is claimed, the plaintiffs must establish title, and all that the plaintiffs claimed in this case was possession after they had established that they were entitled to it. They were not claiming, firstly, a declaration which would give them a title and then consequential relief after obtaining such relief. It was wholly

(1) 54 M 27; 128 Ind. Cas. 561; A I R 1930 Mad. 883; 59 M L J 558; 32 L W 233.

(2) 43 M 244; 53 Ind. Cas. 901; A I R 1919 P C 44; 46 I A 285; (1919) M W N 724; 10 L W 679; 24 C W N 346; 38 M L J 313; 18 A L J 274 (P C).

unnecessary for the plaintiffs in this case to obtain any declaration whatsoever before they were entitled to possession. A recent Special Bench of this Court held that cases of this kind must be regarded as suits purely for possession and that being so, the court-fee levied in the Court below was sufficient.

The result, therefore, is that this case is remanded to the Court below to receive in evidence the two documents to which I have referred and which are printed in the supplementary paper-book and to receive evidence of both parties relating to the same. The learned Judge, after hearing the witnesses and the cross-examination, will forward his report upon these two documents to this Court within a period of three months from to-day. Fourteen days time is given to the parties to make any objections they may desire to make to the report of the learned Judge when received. Let the case be listed before this Bench at the expiry of the fourteen days for objection.

Manohar Lall, J.—I agree.

S. *Case remanded.*

CALCUTTA HIGH COURT

Appeal No. 201 of 1939
April 22, 1940
HENDERSON AND SEN, JJ.

MAHAMMAD ALI—APPELLANT
versus
DINESH CHANDRA ROY CHOUDHURY AND OTHERS—RESPONDENTS

Muhammadan Law—Waqf—*Gift in future, validity*—Waqif *must be owner at time of dedication*—Waqf *found to be invalid—Beneficiary, if trespasser until it is set aside—Mussalman Waqf Validating Act (IV of* 1913), *s.* 3—Waqf *for maintenance of family and children—Ultimate gift to religious, pious or charitable purpose, is essential—Provincial Insolvency Act (V of* 1920), *s.* 53—*Transfer in pursuance of contract prior to insolvency—Transfer not in terms of contract—Transfer, if voluntary*—Waqf *in pursuance of contract found to be invalid—Transfer can be set aside—Creation of* waqf *by debtor, a day prior to insolvency, in favour of wife and children*—Waqf *held* mala fide—*Will—Construction—Intention—Memorandum held neither will nor gift but contract.*

Under the Muhammadan Law immediate possession is essential for gift. A gift in future is void. Where the donor retains possession during his lifetime and the donee is to take after his death, the gift is void. *Yusuf Ali* v. *Collector of Tipperah* (1), relied on.

There are many kinds of *waqfs* but the term *waqf* has a definite legal meaning; it cannot be said that an undertaking to create a *waqf* is void for uncertainty. If nothing more is said the undertaking means that the person has contracted to create such a *waqf* as to him seems suitable or best. He is, however, not free to dispose of the property in any way he likes: the disposition must be by way of a valid *waqf*. When he makes the *waqf* he will have to specify the objects of the *waqf* with reasonable certainty or the *waqf* will be void for uncertainty; but the contract to make a *waqf* would not be invalid because the terms of the proposed *waqf* are not mentioned in the contract [p. 544, col. 1.]

Under Muhammadan Law the property dedicated by way of *waqf* must belong to the *waqif* at the time of dedication. [p 544, col. 2; p. 515, col. 1.]

The fact that the deed is not a *waqf* will not make it a void deed. It is a deed by which an interest has been conveyed by the *waqif* to the beneficiary and until it is set aside, the beneficiary can not possibly be called a trespasser. [p. 545, col. 2; p. 516, col 1.]

In the case of a *waqf* for the maintenance of the *waqif's* family and children, an ultimate gift for a religious, pious or charitable purpose is essential for its validity as a *waqf* and the intention to make such a gift cannot be inferred from the mere use of the word *waqf*. 147 Ind. Cas. 196 (2), relied on. [p. 544, col. 2]

The *waqif* by the *waqfnama* provided for the payment of certain trivial sums payable annually to the Imam of a Masjid, to a High School, a Girl's School and a Madrasa. He also awarded two gold medals. The rest of the income was divided among the members of his family and on their deaths among their eldest male issue. He then further stated that if any of the beneficiaries died without male issue the income would "revert to the *waqf* estate and will be appropriated by the *mutwalli*";

Held, that there was no ultimate gift to a religious, pious or charitable purpose and consequently the *waqf* was invalid.

A transfer which the debtor is bound to make in pursuance of a contract entered into prior to his insolvency petition is voluntary within the meaning of s. 53, Prov. Insol. Act if it is not in terms of the contract. Consequently where a *waqf*, which the debtor was found to create under a contract, is found to be invalid, the transfer is voluntary and is liable to be annulled if it falls within the mischief of s 53.

The deed of transfer purported to be a *waqfnama* executed by the debtor just one day before he applied for insolvency. Although he could retain considerable benefits out of the properties, he divested himself of all the rights therein and conferred them almost wholly on his wife and children.

Held, that the transaction was *mala fide* and without consideration and was liable to be annulled under s 53, Prov. Insol. Act.

In construing a document alleged to be a will the intention of the person executing it must be deduced from the language of the document itself. It is entirely wrong for a Court to interpret a document in a particular way because some one taking under the document chooses to put that interpretation upon it. The intention of a party to a document must be deduced from the document itself by giving the words therein their ordinary natural meaning. [p. 543, col. 1.]

On the objection of the son to the father's application for revocation of the settlement of his properties under the Ben. Settled Estates Act, the son and the father entered into a transaction on condition that the son should withdraw his objections. The transaction was embodied in a memorandum which was executed by both the parties. By its terms the son was to withdraw his objec-

tions if he was allotted roughly one-third of the property. The father agreed to this, provided, the son did not take possession of the property till after the father's death and provided, the son undertook to execute a suitable *waqf* of the remaining two-thirds when he got the property. The son accepted these terms and the settlement was accordingly revoked by their joint application. After the father's death the son created a *waqf* of the properties in pursuance of the agreement appointing his son as *mutwalli*. It was contended that the document operated as a will:

Held, that the terms of the memorandum were irrevocable. The memorandum was not a will since it was executed both by father and son who took benefit under it and it took effect during the lifetime of the father, nor was it a gift. The memorandum evidenced a contract between the parties for which there was a consideration given by both parties.

A. from the original order of the District Judge, 24-Parganas, dated May 29, 1939.

Messrs. *Atul Chandra Gupta* and *Subodh Chandra Sen*, for the Appellant.

Messrs. *Phani Bhusan Brahma*, *Rajendra Chandra Guha*, *Abul Quasem No.* II, *Bama Prasanna Sen Gupta* and *Amiya Ranjan Roy Choudhury*, for the Respondents.

Sen, J.—This appeal arises out of an application made by the Official Receiver of 24-Parganas under s. 53, Prov. Insol. Act, for the setting aside of a transfer made by Altaf Ali, an insolvent, on the ground that it was a voluntary transfer made without consideration and not in good faith. The deed of transfer purports to be a *waqfnama* executed by Altaf Ali on August 27, 1934, just one day before he applied for insolvency. The deed is Ex. F. For a proper appreciation of the different points urged, it will be necessary to state the following facts. The property transferred together with other property belonged to Nawab Bahadur Nawab Ali Chaudhuri. In 1911 Nawab Bahadur Nawab Ali Choudhuri settled all his property under the Bengal Settled Estates Act (III of 1904) by which he became the first life-tenant, Altaf Ali the second life tenant, and Mahammad Ali, Altaf Ali's eldest son, the third life tenant. In 1927 the Nawab wanted to revoke this settlement and to make a *waqf* of this property, and on September 24, 1927, he applied under s. 24 of the aforesaid Act for a revocation of the settlement. Altaf Ali opposed this application. Sir Provash Chandra Mitter, a friend of the family, intervened and the dispute between father and son was settled on certain terms. These terms were recorded in a document which is dated October 20, 1928, and which is described in the heading thus:

"Memorandum of points of settlement arrived at between the Hon'ble Nawab Bahadur Saiyid Nawab Ali Chaudhuri Khan Bahadur, C. I. E. and Nawabzada Saiyed Altaf Ali, in connection with the application of the Nawab Bahadur to the Govt. of Bengal for permission for revocation of the settlement of certain properties of his settled estates and of other differences and disputes between the parties."

The document is referred to in the learned Judge's judgment as Ex. E. On October 29, 1928, a joint petition was filed by father and son by which both parties stated that they had come to terms and that they desired that the settlement under the Bengal Estates Settlement Act should be cancelled. They made the memorandum, Ex. E, a part of this petition. It will now be necessary to say something about the terms of compromise between Nawab Bahadur Nawab Ali Chaudhuri and his son which were recorded in the memorandum of October 20, 1928. The terms substantially were these: The Nawab Bahadur proposed to execute a *waqf* of all his properties except a certain portion approximating roughly one-third. Regarding this one-third the Nawab Bahadur would remain in possession thereof during his lifetime, but without any power "to sell, transfer, encumber, deteriorate or damage it in any way." On the death of the Nawab Bahadur Altaf Ali would take possession of part of this one-third immediately and of the remaining part after three years. The Nawab Bahadur also agreed to set apart an income of Rs. 500 out of his estate for specific charities the administration of which would be entrusted to Altaf Ali. Then comes a term which is embodied in para. 8 of the memorandum. As this is a most important provision regarding the interpretation of which there has been a great deal of discussion, I consider that it should be set out verbatim. Paragraph 8 runs thus: "Nawabzada Altaf Ali agrees to make a suitable *waqf* of the interest allotted to him herein."

The memorandum goes on to state that the parties agreed that there should be an application filed before the Govt. asking for the cancellation of the settlement under the Bengal Settled Estates Act and that within one month of the date of the memorandum the parties, their heirs, executors and administrators would execute necessary documents to give effect to the compromise arrived at. If any party failed to do this the other would have the right to enforce the terms of the agreement through

Court. The last paragraph of the memorandum states that the compromise has been arrived at on the mediation of Sir Provash Chahdra Mitter and that if any difficulty or difference arose in regard to the drafting of the documents or in regard to any points not provided for in the memorandum the matter would be referred to him and his decision on the matter would be final. On November 13, 1928, the Govt. of Bengal gave effect to the joint application of the Nawab Bahadur and Altaf Ali and cancelled the settlement of properties of the Nawab Bahadur made under the Bengal Settled Estates Act. On April 25, 1929, the Nawab Bahadur executed a *waqfnama* with respect to two-thirds of his property leaving out the portion allotted by the compromise to Altaf Ali. In this document, which is Ex. D, there is a recital of the history of the family and property of the Nawab Bahadur. Mention is made in the *waqfnama* of the compromise between the Nawab Bahadur and his son with respect to the application for the setting aside of the settlement under the Bengal Settled Estates Act and the terms of the compromise are set out in para. 7 of the deed. These terms are in the main the same as those contained in the Memorandum of Points (Ex. E), but they are given in greater detail. The nature of the *waqf* which Altaf Ali agreed to create is described as a

"*waqf-alal-aulad* for the purposes of making proper provision for the maintenance of himself (Altaf Ali) and of all his children after his death : (*vide* para. 7 (*ka*) of the *waqfnama*, Ex. D)."

Again in para. 7 (*jha*) of the *waqfnama* Ex. D, the kind of *waqf* which Altaf Ali is to create is described in these words :

"I have agreed to give properties to Sriman Syed Faizal Bari Mohamed Altaf-ul-Ali Choudhuri for enjoyment and possession by him till his death, on executing a *wdqf-alal-aulad*, and after his death for enjoyment by his heirs according to the shares as provided by Muhammadan Law; but in the notes of memo it has not been stated through mistake who shall be the *mutwalli* after his death."

There is a further statement in this paragraph that Altaf Ali should be the first *mutwalli* and after him any one of his sons as he may appoint. The Nawab Bahadur states in this document that a draft agreement of the terms of the compromise had been sent to Altaf Ali for his signature and complains that Altaf Ali had raised certain objections and refused to sign it. He says that thereafter Sir Provash Chandra Mitter after considering the objections of Altaf Ali made alterations in the draft and sent it to Altaf Ali but that he had not yet signed it. The Nawab Bahadur goes on to say that there had been great delay already and that he was executing his *waqf* deed, in accordance with the terms of the agreement, without waiting any further.

On April 16, 1929, a few days after executing this deed, the Nawab Bahadur died. On August 5, 1929, his heirs other than Altaf Ali executed releases in favour of Altaf Ali with respect to the one-third share allotted to him. Nothing further appears to have been done to carry out the terms of the compromise by Altaf Ali till August 27, 1934, when he executed the deed Ex. F, which purports to be a deed of *waqf-alal aulad* appointing his son Mahammad Ali *mutwalli*. On the next day Altaf Ali applied to be adjudicated insolvent and he was so adjudicated on April 8, 1935. Thereafter the Official Receiver applied under s. 53, Pro. Insol. Act, for the setting aside of the *waqf*. The application was opposited by Altaf Ali, his wife, the Commissioner of *waqf* and the *mutwalli* Mahammad Ali. The learned District Judge has annulled the *waqf* and the *mutwalli* Mahammad Ali appeals. I do not propose to deal with every point taken before the learned District Judge and disposed of by him but shall confine myself to those arguments which have been persisted in in this Court.

Mr. Brahma appearing for the Official Receiver contended that the memorandum of the points of compromise operated as a will and that Altaf Ali got the property which is the subject-matter of these proceedings by way of bequest. He then argues that under the Muhammadan Law a conditional bequest takes effect free from the condition and that Altaf Ali got the property free from any obligation to create a *waqf*. The disposition by Altaf Ali was therefore a voluntary disposition and as it was without consideration and not in good faith it should be set aside under s. 53, Prov. Insol. Act. This contention has found favour with the learned District Judge who has held that the memorandum of agreement was a will. Mr. Gupta for the appellant contends that it is impossible to treat this memorandum as a will as it contained terms which were irrevocable and as there is nothing in the terms to suggest that the Nawab Bahadur was making a will. The reasons which induced the learned Judge to hold that the memorandum is a will appear to me to be quite inadequate and erroneous. He says that in determining this question the intention of the party executing the document must

be considered and that no one was likely to know that intention better than Altaf Ali, the son of the Nawab Bahadur. He then points out that in the document Ex. F by which Altaf Ali purports to create a *waqf* he recites that the property was "bequeathed" to him. Next the learned Judge says that the dispositions made in the memorandum were revocable as the terms were vague. On these grounds he holds that the memorandum is a will.

In my opinion, the learned Judge has gone quite wrong both in his method of approach and in his conclusions. A very obvious fact which the learned Judge has failed to notice is that the memorandum Ex. E is not a document executed by Nawab Bahadur Nawab Ali alone but by Nawab Bahadur Nawab Ali and Altaf Ali. It is difficult to conceive of a will being executed jointly by the testator and legatee. Next, if the document be treated as having been executed by Nawab Bahadur Nawab Ali alone his intention must be deduced from the language of the document itself. It is entirely wrong for a Court to interpret a document in a particular way because some one taking under the document chooses to put that interpretation upon it. Altaf Ali's interpretation of the document is entitrely irrelevant. The intention of a party to a document must be deduced from the document itself by giving the words therein their ordinary natural meaning. I have set out how the document describes itself in the earlier part of this judgment. It is merely a record of the points of a compromise arrived at between Altaf Ali and his father, the Nawab Bahadur. There are no words in the document which can by any straining of language be interpreted as words denoting a bequest. A will takes effect after the death of the testator. In this case the document took effect during the lifetime of Nawab Bahadur Nawab Ali. The settlement under the Bengal Settled Estates Act was to be revoked at once and this was done. The Nawab Bahadur was to make a *waqf* of about two-thirds of his property during his lifetime and this was done. Next a will under the Muhammadan Law is revocable except a will whereby a slave is emancipated. I find it difficult to understand how the learned Judge could hold that the terms of this document were revocable. He says that some of the terms were vague and unenforceable and conculdes from this that the terms were revocable. I do not think, that the terms are vague but even if they were vague I would point out that the question whether a contract can be enforced or not is quite a different one from the question whether a disposition is revocable. By this memorandum both parties bound themselves to do certain things and pursuant to the agreement the Nawab Bahadur did certain things and Altaf Ali allowed the settlement under the Bengal Settled Estates Act to be revoked. The terms were in my opinion irrevocable. I hold therefore that the memorandum was not a will and that Altaf Ali did not get the property under any will. If Altaf Ali got the property under a will, then no doubt, under the Muhammadan Law he would take it free from any condition, but as the memorandum is not a will this argument fails.

Mr. Brahma next argued that if Altaf Ali did not get the property under a will he got it by way of gift and that a condition attached to a gift being invalid under the Muhammadan Law he got it absolutely. Mr. Gupta contends that there was no gift at all and that Altaf Ali got the property under a contract and was bound by the terms of the contract. I agree with the view of Mr. Gupta. It cannot be said that the memorandum of the agreement between the Nawab Bahadur and Altaf Ali is a deed of gift. The memorandum evidences not a gift but a contract between the parties for which there was consideration given by both parties. It is hardly necessary to consider the Muhammadan Law regarding gifts as Altaf Ali took not under a deed of gift but under a contract by which he undertook to withdraw his opposition to the Nawab Bahadur's application for revocation in return for certain benefits. I might say incidentally however that in no view can it be said that there was a valid gift of the property to Altaf Ali. Under the Muhammadan Law a gift *in futuro* is void. Immediate possession is essential for a gift. Here the Nawab Bahadur retains possession during his lifetime and Altaf Ali is to take after his death. Such a gift is void under the Muhammadan Law. This was decided in *Yusuf Ali* v. *Collector of Tipperah* (1).

The transaction should be interpreted by reference to its terms and not by having recourse to ingenious fictions. The transaction between the parties broadly speaking was this. Altaf Ali would withdraw his objection to the application of the Nawab Bahadur for revocation if he was allotted roughly 1/3rd of the property. The Nawab Bahadur agreed to this provided Altaf Ali

(1) 9 C 138.

did not take possession of the property till after the Nawab Bahadur's death and provided Altaf Ali undertook to execute a suitable *waqf* when he got the property. Altaf Ali accepted these terms. It is argued by Mr. Gupta that Altaf Ali, having agreed to these terms, was bound thereby to create a *waqf* with respect to these properties and that the *waqf* created by him not being a voluntary transfer it could not be set aside under s. 53, Pro. Insol. Act, as that section applied only to voluntary transfers. Mr. Brahma's answer to this argument is two-fold. He says that if the transaction recorded in the memorandum Ex. E is interpreted as being an agreement, it cannot be enforced as the term "suitable *waqf*" is too vague, therefore Altaf Ali when he got the property could not be compelled to execute a *whqf*. That being so, the *waqf* was a voluntary one and liable to be set aside. The next branch of his argument is that by the document Ex. F Altaf Ali has not created a *waqf* at all as there is no ultimate gift to religious or charitable purposes; it is not such a transfer as was contemplated by the agreement and therefore it is liable to be set aside as a voluntary transfer made without consideration and in bad faith.

I am not inclined to accept the first branch of Mr. Brahma's argument. True, there are many kinds of *waqfs* but the term *waqf* has a definite legal meaning; it cannot be said that an undertaking to create a *waqf* is void for uncertainty. If nothing more is said the undertaking means that the person has contracted to create such a *waqf* as to him seems suitable or best. He is however not free to dispose of the property in any way he likes; the disposition must be by way of a valid *waqf*. True, when he makes the *waqf* he will have to specify the objects of the *waqf* with reasonable certainty or the *waqf* will be void for uncertainty; but the contract to make a *waqf* would not be invalid because the terms of the proposed *waqf* are not mentioned in the contract. I hold therefore that the contract of which the notes are recorded in the memorandum Ex. E is a valid and enforceable contract binding on Altaf Ali and had created a valid *waqf* in terms of the contract I am of opinion that it could not be annulled.

The next branch of Mr. Brahma's argument creates difficulties in the way of the appellant. He says that the *waqf* is invalid as there is no ultimate gift for a religious, pious or charitable purpose. An examination of the terms of the deed Ex. F executed by Altaf Ali which he describes as a *waqfnama* shows that there is no ultimate gift to a religious, pious or charitable purpose. By this deed Altaf Ali provides for the payment of certain trivial sums payable annually to the Imam of the Bogra Jumma Masjid, to a High School, a Girl's School and a Madrasa. He also awards two gold medals. The rest of the income is divided among the members of his family and on their deaths among their eldest male issue. He then states that if any of the beneficiaries die without male issue the income would "revert to the *waqf* estate and will be appropriated by the *mutwalli*." Now the Waqf Validating Act, VI of 1913 states that it is lawful for a Mussalman to create a *waqf* for the maintenance and support wholly or partially of his family children or descendants or if he is a Hanafi Mussalman for his own maintenance and support during his lifetime provided that the ultimate benefit in such case is expressly or impliedly reserved for the poor or for any other purposes recognized by the Mussalman Law as a religious, pious or charitable purpose of a permanent nature. This is s. 3 of the said Act. The present disposition is for the maintenance of the *waqf's* family, but there is no ultimate gift for a religious, pious or charitable purpose. A *waqf* has therefore not been created by Altaf Ali. In this connection I would refer to the case in *Tahiruddin Ahmad* v. *Masihuddin Ahmad* (2) where it was held in the case of a disposition like the present one that an ultimate gift for religious, pious or charitable purposes was essential for its validity as a *waqf* and that the intention to make such a gift cannot be inferred from the mere use of the word *waqf*.

Mr. Gupta for the appellant admits very frankly that a valid *waqf* has not been created by Altaf Ali but he argues that this does not matter. He contends that the Receiver has nothing to do with the validity of the *waqf* and that it is for the *mutwalli* or the beneficiaries to compel Altaf Ali to make a valid *waqf*. I am unable to accept this view. Altaf Ali is the owner of the property by virtue of the contract with Nawab Bahadur Nawab Ali Choudhury and the subsequent releases executed by the Nawab Bahadur's heirs, with this limitation that he is bound to make a valid *waqf* with respect to this property in terms of the contract. Indeed if he be not the owner he could not under the Muhammadan Law

(2) 60 C 901; 147 Ind. Cas. 196; A I R 1933 Cal. 716; 37 C W N 741; 6 R C 298.

make a *waqf* of the property as under that law the property dedicated by way of *waqf* must belong to the *waqif* at the time of dedication. This view is expressed by Sir Dinshah Mulla in his treatise on Muhammadan Law relying on a passage at p. 562, Vol. I of Baillies' Digest of Muhammadan Law. That being so, until Altaf Ali makes a valid *waqf* in terms of the contract his creditors have the right to have recourse to this property to the extent of his interest therein. If Altaf Ali makes a transfer which is not in accordance with his contract it cannot be said that the transfer is one which he is compelled to make; it would be a voluntary transfer and if it fell within the mischief of s. 53, Prov. Insol. Act, in other respects it would be liable to be annulled. Only such a transfer is protected as Altaf Ali is bound to make in terms of his contract with his father. For instance a gift by Altaf Ali to a friend within two years of his application for insolvency would be liable to annulment on an application under s. 53, Prov. Insol. Act.

In the present case Altaf Ali has not made a valid *waqf* of the property, the transfer is therefore not in terms of his contract and must be treated as a voluntary transfer. That it is without consideration and not *bona fide* is quite apparent from the admitted circumstances and indeed this is not seriously challenged. The *waqf* was created a day before the application for insolvency; although under the terms of the contract Altaf Ali could retain considerable benefits out of the property he divests himself of all rights therein and confers them almost wholly on his wife and children. The transaction is clearly *mala fide* and is liable to be annulled under s. 53, Prov. Insol. Act. I express no opinion whether the other terms of the deed Ex. F which is described erroneously as a *waqfnama*, are in accordance with the terms of the compromise. It is not necessary to decide that now as the transfer is not a *waqf* at all. The order of the learned District Judge is maintained but for reasons other than those on which his decision is based. The Receiver shall take immediate possession of the property but he shall not sell the property. He will be entitled to appropriate the income thereform for distribution among the creditors. The respondents shall give up possession to the Receiver forthwith. The appeal is dismissed. There will be no order for costs.

Henderson, J.—I agree and have little to add. The Receiver's application, though under s. 53, Insol. Act, raises a question under s. 4, probably in anticipation of the objection which the appellant would almost certainly make. The appellant could not even pretend that the insolvent received any consideration for the deed. Furthermore inasmuch as it was executed on the day preceding the application for insolvency and reserved nothing for the executant it could not be said that it was executed in good faith. It would therefore be impossible for the appellant to resist the Receiver's application if the deed was a voluntary one. The contention of the appellant is that the insolvent was legally bound to execute a *waqf* and that he had no interest in the property which could pass to the Receiver. This is the substantial question which has been contested between the parties.

In support of his case the Receiver attempted to show that the property passed to the insolvent either by a will or on intestacy. I agree with what has been said by my learned brother on that aspect of the case. The points of agreement between the insolvent and his father are contained in the memorandum which was attached to the petition to His Excellency the Governor-in-Council. As a result of the agreement the insolvent withdrew his opposition and the Governor-in-Council sanctioned the revocation of the settlement. It is therefore perfectly idle to contend that the agreement was not acted upon. When the settlement was revoked the Nawab Bahadur did not obtain the property in its original state but subject to the terms of the agreement for example, it would not have been open to him to transfer or mortgage the property.

In the second place the Receiver contends that even if he is not entitled to sell the property, he is entitled to be put into possession, the deed executed by the insolvent not being a *waqf* within the terms of the agreement. On this branch of the case Mr. Gupta contended that that was not a matter in which the Receiver could intervene at all. The insolvent was legally bound to execute a valid *waqf* and if there was any defect in the deed actually executed, that was not the business of the Receiver. His proper course would be to take steps to eject the appellant as a trespasser. In my judgment that is putting the case far too high. The deed is certainly not a *waqf* but that will not make it a void deed. It is a deed by which an

interest has been conveyed by the insolvent to the appellant and until it is set aside the appellant could not possibly be called a trespasser.

D. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Original Order No. 83 of 1940.

January 29, 1941

CHATTERJEE AND MEREDITH, JJ.

JIWACHH MAHTHA—INSOLVENT—APPELLANT

versus

BANWARI SAH RAMLAGAN RAM—AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 41, 42—Insolvent directed to apply for discharge within certain time, making delay in applying—If ground for refusing absolute order of discharge — Application for discharge delayed—Petition giving reasons for delay filed—Application admitted and notices for hearing issued—Whether amounts to extending of time and condoing of delay—Court considering that discharge should be refused under cl. (a) of s. 41 (2)—Application of cl. (b) or (c) or both should be considered.

Where a person is adjudged insolvent and directed to apply for his discharge within certain time, the delay in so applying is not one of the grounds specified in s. 42, Pro. Insol. Act at all for refusing to grant an absolute order of discharge. It may be a ground for annulling the adjudication.

No doubt, even in a case where the application for time had not been filed until after the expiry of the time fixed, it is still open to the Court in a proper case to allow time, provided that the adjudication has never been actually annulled under s. 43. But whether that should or should not be done upon the merits is a question for consideration.

An insolvent applied for his discharge beyond the time within which he was directed to so apply explaining his failure to apply in time. Upon this petition the order passed by the Court was: "Separate petition showing cause of delay filed. Admit the discharge petition. Issue notice to creditors fixing February 19, for hearing." When the matter came up for hearing, the Court refused the final discharge on the ground that the application was time-barred and no sufficient cause was shown for the delay:

Held, that the order of the Court admitting the discharge petition and directing issue of notice for hearing, could not be taken to mean that the time was extended by the Court and the delay condoned. Until the order refusing discharge was passed the question of the sufficiency of the cause for delay had never received judicial consideration from the Court at all, and the order in the order-sheet was a mere routine order placing the whole matter for consideration after notice.

If the Judge is of opinion that an absolute discharge should be refused under cl. (*a*), of s. 41 (2), Pro. Insol. Act then he should consider the possible application of cls. (*b*) or (*c*), or both, to the case, and pass an order accordingly.

A. from an order of the Additional District Judge of Darbhanga, dated December 11, 1939.

Mr. *K. N. Lal*, for the Appellant.

Messrs. *Hareshwar Prasad Sinha* and *S. M. Saleem*, for the Respondents.

Meredith, J.—This is an appeal by an insolvent against an order of the learned Additional District Judge of Darbhanga, dated December 11, 1939, under s. 41 (2) (*a*) of the Act, refusing an absolute discharge.

The appellant filed his application for adjudication on August 20, 1935. He was adjudicated insolvent on December 5, 1936 and directed to apply for his discharge within one year. He did not do this. He applied only on December 21, 1937 sixteen days late, stating in his application as a reason for the delay that he had been suffering from fever. He was directed to file a separate application, explaining his failure to apply in time, and on January 17, 1938 he did file a petition with an affidavit again ascribing the delay to his illness. Upon this petition the order passed by the Court was: "Separate petition showing cause of delay filed. Admit the discharge petition. Issue notice to creditors fixing February 19, 1938, for hearing". When the matter came up for hearing, the contesting respondent (creditor No. 18) opposed the discharge. The learned Judge observed that the first ground for refusing final discharge was that the application was time-barred, since the petition for final discharge had not been filed within the time fixed. This ground, he said, was to his mind decisive, because he did not consider that sufficient cause had been shown for the delay. Apart from this, he considered that absolute discharge should be refused, because the insolvent had not filed registers and accounts regarding the shop kept by him before adjudication, and also he appeared to have run a rice and *dal* shop while under adjudication. For all the above reasons, he said, he refused an absolute order of discharge.

The order of the learned Judge is defective in several respects. First of all, the ground mentioned by him as decisive for refusing discharge, namely, the delay in the application, is not one of the grounds specified in s. 42, at all for refusing to grant an absolute order for discharge. It might have been a ground for annulling the adjudication. But that is an aspect of the matter which the learned Judge did not

consider at all. The main ground given for the order is, therefore, not a sound one, and the point which should have been considered in that connection, namely, whether the adjudication should have been annulled, was not considered. It has been argued that by the order of January 17, which was to admit the discharge petition and issue notice for hearing, time must be taken to have been extended by the Court and the delay to have been condoned. If that were really so, then it would not have been open for the learned Judge in his final order to consider that question fresh and come to a different conclusion. In fact, however, I am satisfied that until the order under appeal the question of the sufficiency of the cause for delay had never received judicial consideration from the Court at all, and the order in the order-sheet was a mere routine order placing the whole matter for consideration after notice. No doubt, even in a case where the application for time has not been filed until after the expiry of the time fixed, it is still open to the Court in a proper case to allow time, provided that the adjudication has never been actually annulled under s. 43. This has been laid down by this Court in *Gopal Ram* v. *Magni Ram* (1). But whether that should or should not be done upon the merits is a question for consideration.

In the second place, the order of the learned Judge is an incomplete order. It simply refuses to grant an absolute discharge, but does not specify any further conditions, and does not settle the future position of the insolvent. It can hardly have been the intention of the learned Judge that the appellant should remain an undischarged insolvent for the rest of his life The Act has provided for cases of this kind in s. 41 in the provisions of s. 41 (2) (*b*) and (*c*). If the learned Judge was of opinion that an absolute discharge should be refused under cl. (*a*), then he should have considered the possible application of cls. (*b*) or (*c*), or both, to the case, and passed an order accordingly.

Furthermore, it appears from the report of the Receiver that there were certain assets of the insolvent for which up to that date he had been unable to realise anything. Amongst these assets were included certain lands, and it appears from the evidence of the contesting creditor in this matter that he was willing to take these lands in part satisfaction of his claim. This also would afford an additional ground for considering the application of s. 41 (*b*) or (*c*) to the case.

In the circumstances the most equitable course, in my opinion, is to set aside this order, and remand the case for fresh consideration in the light of these observations. It is stated on behalf of the appellant that the respondent-creditor No. 18 has never proved his debt, though it may be noted that in the very application for adjudication of the appellant he stated that he was under arrest in execution of this creditor's decree. It is also stated for the appellant that out of the amount owing to this creditor a sum of about Rs. 300, has been realised by the creditor in execution proceedings against the insolvent's brother. Both these matters are matters which it will be open to the appellant to place before the learned Judge for consideration when the case comes up for re-consideration under this order. The parties will bear their own costs of this appeal.

Chatterji, J.—I agree.

s. *Order accordingly.*

(1) 7 Pat 375; 107 Ind. Cas. 830; 9 P L T 329; A I R 2 8 Pat 338.

MADRAS HIGH COURT

Civil Revision Petition Nos. 66, 433 and 434 of 1939

September 16, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

RAJOO AND OTHERS—PETITIONERS

versus

PALANIYAPPA CHETTIAR AND OTHERS—RESPONDENTS

Madras Agriculturists' Relief Act (IV of 1938), s. 3 (ii), Proviso A—Criterion for applicability of proviso is date of assessment and not period for which it is made.

The criterion for the applicability of Proviso A to s. 3 (*ii*), Mad. Agri Relief Act, is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending March 31, 1938, and it does not lay down any restriction regarding the period in respect of which that assessment might have been made. C. R. P. No. 1020 of 1939, relied on.

C. R. P. under s. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Periakulam, dated August 19, 1938 and passed in M. P. No. 734 of 1938 in E. P. No. 648 of 1937 in O. S. No. 15 of 1937.

Mr. *C. A. Seshagiri Sastri*, for the Petitioners.

Mr. *T. P. Gopalakrishna Iyer*, for the Respondents.

Wadsworth, J.—These revision petitions all arise out of applications by sons of the late Bommayya Goundan under s. 19 of Act IV of 1938, to scale down decrees on promissory notes passed against their father.

It is contended that Bommayya Goundan was the manager of a joint family consisting of himself and his sons and that the debts in respect of which the decree were passed were joint family debts. The learned District Munsif has found that the sons were not entitled to the benefit of the Act, because Bommayya Goundan was in the year 1936-1937 assessed to income-tax at the time when he was the manager of the joint family. The main contention urged in these petitions was that Proviso A to s. 3 (*ii*) of the Act did not apply in a case in which the assessment was made in the year 1936-1937 but in respect of the income of the previous year. This contention cannot succeed having regard to the words of the proviso which are not identical with but substantially the same as those in Proviso B in respect of which we have held in *Pandiri Sarveswara Rao* v. *Maturi Umamaheswara Rao* (1), that the criterion is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending March 31, 1938 and it does not lay down any restriction regarding the period in respect of which that assessment might have been made.

A further contention relates to the question whether Bommayya Goundan was assessed in his individual capacity or as manager of the joint family. No doubt, if he was assessed expressly as manager of the joint family, all the members of that family would be disqualified from claiming to the agriculturists. The Collector's certificate Ex. 1 does not state that he was assessed in his capacity as manager of the joint family. The actual order of assessment was not produced in the trial Court but we are informed that it shows Bommayya Goundan could have been assessed in his individual capacity. The learned District Munsif does not appear to have applied his mind to the distinction between the assessment of a person in his individual capacity or the assessment of that person as manager of a joint family. He seems to have assumed that, because Bommayya Goundan was in fact the manager of a joint family at the time when he was assessed to income-tax, the assessment was necessarily in respect of joint family income. It seems to us that this is a question which should be elucidated by the production of the actual order of assessment, and in view of the way in which the learned District Munsif has regarded the question we do not think it proper to allow the petitioners an opportunity to produce the order of assessment at this stage. We may point out that the revision petitions are filed only on behalf of three of the sons, the other son being disqualified from claiming as an agriculturist on personal grounds. We, therefore, allow the three revision petitions and remit the applications so far as these petitioners are concerned to the lower Court for fresh disposal after allowing both parties to adduce evidence on the question whether Bommayya Goundan's assessment was in his individual capacity or on his capacity as manager of the joint family. The petitioners having failed on their main contention we think it proper that each party should bear his own costs in revision.

N.-S. *Petitions allowed.*

(1) 1940 2 M L J 841; (1940) M W N 1192; 52 L W 765; A I R 1941 Mad. 152.

LAHORE HIGH COURT

Criminal Revision No. 1462 of 1939
October 17, 1940
YOUNG, C. J. AND BLACKER, J.
MUHAMMAD YAR—PETITIONER
versus
ALI MUHAMMAD—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Person of 20 years age and healthy must be presumed to be capable of maintaining himself — Burden is on him, to establish contrary.

A person who is 20 years old and who is healthy and does not suffer from any illness must be presumed to be capable of maintaining himself. His station in life does not make any difference in this question and the burden of proving to the contrary is on him. [p. 550, col. 2.]

Facts—By order dated July 4, 1932 a sum of Rs. 15 per mensem was granted to Muhammad Yar, son of Ali Muhammad, as maintenance allowance under s. 488, Criminal P. C., by Mr. Mieen-ud-Din, Magistrate, First Class, Fazilka. Ali Muhammad prayed for cancellation of this order in the Court of *Rai Sahib Lala* Vidya Dhar, Sub-Divisional Magistrate, Fazilka, on the ground that Muhammad Yar was no longer a child as he had attained majority. A copy of the birth certificate of the boy was filed showing that he was born on February 14, 1920, and therefore had attained majority on February 14, 1938. This was not contested. The learned Sub-Divisional Magistrate held

that Muhammad Yar was no longer a child within the meaning of s. 488, Criminal P. C., and therefore cancelled the maintenance order. Against this order, Muhammad Yar has come up in revision.

Report.—The proceedings are forwarded for revision on the following grounds: The petitioner is the legitimate son of the respondent Ali Muhammad, who is a substantial land-owner, being the proprietor of some 5000 *ghumaons* of land. The learned Counsel for the petitioner has drawn my attention to the rulings reported in *Bhagat Singh* v. *Emperor* (1) and *Khedani Rajwarin* v. *Lagan Singh* (2), which lay down that the word "child" as used in s. 488, Criminal P. C., simply means a son or daughter and reference to age is purposely omitted therein. The proposition is laid down that any son or daughter is entitled to claim maintenance whatever his or her age may be, so long as he or she is unable to maintain himself or herself. In the first case, a lame boy, aged 22, was held unable to maintain himself. In the second case, it was remarked that the ability of a child to maintain itself is a question of fact in each case. The lower Court has relied on *Gangaramsa* v. *Vishnusa* (3) and *Abdul Rahim* v. *Ma Shwe May* (4) for the contrary view that a boy who has attained majority cannot legally demand maintenance from his father under s. 488, Criminal P. C. These rulings were based on the Madras ruling reported in *Krishnaswami Iyer* v. *Chanda Vadana* (5). The same view was apparently taken in *Hemanta Kumar* v *Monorama Debi* (6). I have however not been referred to any ruling of our own High Court taking a different view from that expressed in *Bhagat Singh* v. *Emperor* (1). This ruling was referred to in *Shanno Devi* v. *Dayaram* (7), a case of revision; but the point does not appear to have been decided.

I feel bound by the Punjab ruling referred to above. The view taken by the lower Court therefore seems to me to be erroneous. It should have been held, in my opinion, that a boy is entitled to claim maintenance from his father under s. 488, Criminal P. C., as long as he is unable to maintain himself. Inability to maintain himself may be due to mental physical or other causes. The petitioner is at present a student in a local school. His academic career has been none too bright. But that by itself is no ground for withholding maintenance from him. In any case, the learned Magistrate has not gone into the question of the boy's own ability to maintain himself. *Prima facie* it seems to me that he being the son of a substantial *zamindar* is not expected to earn his livelihood as an ordinary labourer. But this is an aspect of the matter which should, in my opinion, be decided on proper evidence by the learned Magistrate, I would, therefore, recommend that the order of cancellation be set aside and the learned Magistrate directed to go into the question of the ability of the boy to maintain himself and then pass an order in accordance with law.

(1) 28 P W R 1910 Cr.; 6 Ind. Cas. 960; 11 Cr. L J 427.
(2) A I R 1921 Pat. 379; 64 Ind. Cas. 64; 22 Cr. L J 336; 2 P L T 109.
(3) A I R 1922 Nag. 249; 65 Ind. Cas. 631; 23 Cr. L J 167.
(4) A I R 1923 Rang. 45; 73 Ind. Cas. 334; 24 Cr. L J 560.
(5) 37 M 565; 20 Ind. Cas. 1005; A I R 1914 Mad. 594; 25 M L J 349; (1913) M W N 695; 14 M L T 224; 14 Cr. L J 525.
(6) A I R 1935 Cal. 488; 157 Ind. Cas. 365; 62 C 639; 36 Cr. L J 1114; 39 C W N 432; 61 C L J 141; 8 R C 105.
(7) A I R 1933 Lah. 1026; 147 Ind. Cas. 719; 35 Cr. L J 473; 35 P L R 320; 6 R L 433 (2).

Order of Reference.

Ram Lall, J.—The sole point raised in this order of reference is whether the word "child" used in s. 488, Criminal P. C., can apply to a person who has attained the age of majority. The learned Sub-Divisional Magistrate, Fazilka, held that as the boy in respect of whom a maintenance allowance of Rs. 45 per mensem had been fixed under s. 488 had now attained the age of 18 the maintenance order was discharged. The learned Sessions Judge, Ferozepore, on revision held that the word "child" was not confined to minors and was synonymous with son or daughter of whatever age and that so long as this person was unable to maintain himself or herself, he or she was entitled to claim maintenance. Whether he or she was unable to maintain himself or herself was always a question of fact. In support of this view the learned Judge relied on a decision of the Punjab Chief Court reported in *Bhagat Singh* v. *Emperor* (1) where Chevis, J. held that the word "child" simply meant son or daughter and that reference to age was purposely omitted from the section.

The current of authority seems to be the other way. In *Abdul Rahim* v. *Ma Shwe May* (4), it was held that a child of 17 or 18 could not insist on staying in school in order to better his prospects. The boy in this case had only passed the VII standard

of Anglo-Vernacular Examination and the *ratio decidendi* appears to be that such a boy could maintain himself by manual labour or because of the small amount of eduction that he possessed.

In *U Ba Thaung* v. *Ma Aye* (8) a girl of 22 was held not to be entitled to maintenance after she had attained majority. The learned Judges, who decided this case, however, refused to lay down a rigid rule and left the question open whether a person who, by reason of physical infirmity, was unable to earn his livelihood could still claim maintenance after attaining majority. The learned Judges merely observed that the section ordinarily contemplated the case of a child unable to maintan itself owing to its tender year; but when the child attained majority, a strong presumption arose that the child was no longer unable to maintain itself. This case, therefore, did not directly decide the point but the observations made therein, though not necessary for the purpose of decision, strongly support the view that on attaining majority the right to maintenance ceases. In *Baran Shanta* v. *Ma Chan Tha May* 85 Ind. Cas. 375 (9) it was again held by the Rangoon Court that a father was bound to maintain his child under the age of majority. In the Madras Court the view has been consistently held that the word "child" means a person who has not attained the age of majority: *vide Krishnaswami Iyer* v. *Chanda Vadana* (5). In *Hemanta Kumar* v. *Monorama Debi* (6) the same view appears to have been taken and the word "child" has been understood to be "a person who is incompetent to enter into any contract or to enforce any claim under the law." In the Nagpur Court it was assumed in *Gangaramsa* v. *Vishnusa* (3) that a boy who had attained the age of majority was therefore capable of earning his livelihood. In *Khedani Rajwarin* v. *Lagan Singh* (2) it was held following the Punjab case referred to above that no limit of age was placed by s. 488 and that it included any person unable to maintain himself otherwise due to some mental or physical defect.

The question was again considered by Punjab Court in *Shanno Devi* v. *Dayaram* (7) where Addison, J. allowed maintenance allowence to a boy till he attained the age of 18. This decision, though not in so many words, seems to indicate that the boy in that case ceased to be a "child" within the meaning of the section on attaining majority. Thus, it appears to me that there is a conflict of authority both in this Court as reflected in *Bhagat Singh* v. *Emperor* (1), on the one side and *Shanno Devi* v. *Dayaram* (7), on the other and also as reflected in *Khedani Rajwarin* v. *Lagan Singh* (2), on the one side and *Baran Shanta* v. *Ma Chan Tha May*, 85 Ind. Cas. 375 (9), *Krishnaswami Iyer* v. *Chandra Vadana* (5), *Gangaramsa* v. *Vishnusa* (3) and *Hemanta Kumari* v. *Monorama Debi* (6), on the other. The matter appears to me to be of some importance because if the word 'child' is to be restricted to a person who has not yet attained the age of majority, a cripple or an imbecile would be left without any legal remedy against his well-to-do parents. I consider therefore that the point is one which should be settled by a Division Bench and I accordingly direct that these papers be laid before the Hon'ble Chief Justice with a recommendation that the case be sent for decision to a Division Bench.

Mr. *R. P. Khosla*, for the Petitioner.

Mr. *Mela Ram Aggarwal*, for the Respondent.

Order of the Division Bench.

The facts of this case are given in the orders of the Courts below and of the learned Judge in Chambers who referred this case. We have been asked to give a definition of the word 'child' appearing in s. 488, Criminal P. C. It does not however appear to us to be necessary for the decision of this case to define that word. It is clear that whatever view is taken, that is to say, whether the word 'child' means a human being under any particular age or whether it is used in the statute in the more general sense as meaning any offspring however old, of a human being, it is qualified by the phrase "unable to maintain itself." In this case the person for whose maintenance allowance was sought was at the time of the proceedings aged 18 and we are informed is now 20. The learned Magistrate has found positively that he is healthy and does not suffer from any illnes. Such a person must be presumed to be capable of maintaining himself. His station in life does not appear to us to make any difference in this question and he is not entitled to any particular luxuries or comforts. He is merely entitled to be maintained. Not only is there a presumption that a person of his age who is healthy is able to maintain himself but it should be noticed that the burden of proving to the contrary was in any case on him. If a per-

(8) A I R 1932 Rang. 94; 137 Ind. Cas 439; 10 R 194; 33 Cr. L J 495; Ind. Rul. (1932) Rang. 130.

(9) 85 Ind. Cas. 375; A I R 1925 Rang. 197; 2 R 682; 26 Cr. L J 535.

son applies for an order under s. 488, Criminal P. C., on the ground that he is a child and unable to maintain himself it is for him to prove that he is unable to maintain himself. It appears to us in this case that he has failed to prove this and we are unable to see why having once failed he should be allowed a further opportunity to lead evidence on the point. We are of opinion that the Magistrate's order in this case was perfectly correct and we see no reason for accepting the recommendation of the learned Sessions Judge. This being our view, we consider it unnecessary to send the case back to the learned Judge in Chambers and we ourselves order that the petition for revision of the order of the Magistrate be dismissed.

D. *Petition dismissed.*

MADRAS HIGH COURT

Application No. 1900 of 1939
December 8, 1939
LEACH, C. J. AND KRISHNASWAMY AYYANGAR, J.
Khan Bahadur ABDUL KAREEM SAHIB—APPLICANT
versus
THE COMMISSIONER, CORPORATION OF MADRAS—RESPONDENT

Madras City Municipal Act (IV of 1919, as amended by Act X of 1936), s. 287—Power of Commissioner to refuse renewal of license.

There is nothing in s. 287, Mad. City Municipal Act, which indicates an intention on the part of the Legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. The Commissioner has in a proper case the power to refuse a renewal. The refusal should not however be arbitrary or prompted by some ulterior motive. *Haji Ismail* v. *Municipal Commissioner of Bombay* (1), relied on.

Messrs. *T. R. Venkatarama Sastriar* and *K. S. Rajagopal Iyengar*, for the Applicant.

The Advocate-General and *A. Suryanarayanayya*, for the Respondent.

Leach, C. J.—The petitioner is a manufacturer of *beedis* and has been carrying on business in Madras for 25 years. As the result of his industry he has succeeded in building up a very substantial concern. The business is carried on in five buildings in Sembudoss Street, George Town, Madras. In No. 41, Sembudoss Street, he stores the tobacco required for the making of his *beedis*. He stores *beedi* leaves in No. 56 and uses Nos. 48, 57 and 58 for the handling and storage of the finished products. Sembudoss Street is in residential part of Madras. It is a very narrow street and it is said that the growth of petitioner's business has resulted in a grave nuisance and a menace to health. On August 19, 1938, thirteen people living in the neighbourhood presented a petition to the Commissioner of Police, complaining of the nuisance and asking that action be taken. The Commissioner of Police had no jurisdiction to interfere, and the petition was forwarded to the Commissioner of the Corporation of Madras. The Commissioner inquired into the complaint and considered it to be well-founded. As the result the corporation refused the petitioner a license to carry on his business in the premises in Sembudoss Street from April 1, 1939. Section 287, Mad. City Municipal Act, as amended by Act X of 1936, requires a person to take out a license before he uses premises for the storage, packing, pressing cleansing, preparing or manufacturing by any process whatever, tobacco, which the Act states shall include cigars, cigarettes and *beedis*. The petitioner asks this Court to direct, either by *certiorari* or *mandamus*, the corporation to issue a license permitting him to carry on his business in these premises as heretofore. He alleges that the corporation in refusing to grant him a license has acted arbitrarily and he says that inasmuch as a license was granted to him in respect of the previous year, the corporation is not entitled in law to refuse to renew it. For the corporation it is said that the refusal to grant the petitioner a license is fully justified by the facts and that it cannot be compelled to renew the license.

On the evidence before the Court it must be held that the carrying on of the petitioner's business in Sembudoss Street does constitute a nuisance and a danger to health. The process of broiling to which the tobacco leaves are subjected creates an offensive smell, and the storage of large quantities of tobacco results in tobacco dust being carried by wind to adjoining houses and causes the inhabitants to cough and sneeze. The business involves the attendance at the premises of large numbers of coolies and other people for whom there is no proper accommodation or sanitary arrangements. The noise also adds to the discomfort of the residents. The Commissioner of the corporation in an affidavit states that he has been advised by the Health Officer of the corporation that the continuance of the business in

this locality will positively endanger the health of the residents. The Health Officer of the corporation has sworn an affidavit in which he confirms the advice given to the Commissioner. In addition, Mr. B. W. Batchelor, a director of Messrs. Binny & Company and a member of the Standing Committee of the corporation, took part in the inspection and has endorsed the opinion of the Commissioner in a separate affidavit. The petitioner denies that there is any nuisance, but his denial is only supported by his own affidavits, and they cannot be accepted in view of what the Commissioner, the Health Officer and Mr. Batchelor have said. It has not been suggested that these gentlemen are not speaking the truth. There is a suggestion that they have perhaps exaggerated the situation, but I am not prepared to accept it. In any event, there is ample evidence on the record to show that the corporation in refusing to renew the petitioner's license has not acted arbitrarily, but in the interest of the health of the residents of locality. The question then resolves itself into this. Has the corporation the power under the Act to refuse the license? Before the Act was amended in 1936, no license was required; but by reason of the amendment of s. 287 and Sch. VI, a license is now requisite. Sub-s. (1) of s. 287 says:

"No place within the limits of the City shall be used for any of the purposes mentioned in Sch. VI without a license obtained from the Commissioner and except in accordance with the conditions specified therein"

Sub-s. (3) says:

"The owner or occupier of every place for the use of which for any purpose a license is required shall apply to the Commissioner not less than thirty days before the place is used for such purpose."

Sub-s. (5) says:

"The Commissioner may grant a license subject to such restrictions and regulations as may be specified by him therein or he may refuse to grant the license."

Sub-s. (6) states that every license shall expire at the end of the year for which it is granted, or at such earlier date as the Commissioner may, for special reasons, specify in the license. By reason of sub-s. (7), an application for renewal of a license must be made not less than thirty days before the commencement of the year for which renewal is sought. Mr. Vekatarama Sastriar on behalf of the petitioner has conceded, as he must, that when s. 287 was amended by Act X of 1936 the Commissioner had the power to refuse to issue a license, notwithstanding that the business had been carried on in the same premises for a quarter of a century. But he says that inasmuch as sub-s. (7) does not state that the Commissioner may, if he so chooses, refuse a license, it cannot be withdrawn once it has been issued, and must be renewed, although on renewal conditions may be imposed. Where there is a power to grant a license, there is power to refuse, and where an act requires a person to apply for the renewal of a license at the expiry of the period for which it is granted, it must, in my opinion, necessarily imply a right to refuse to renew, unless there is indication to the contrary in the statute.

In *Haji Ismail* v. *Municipal Commissioner of Bombay* (1) the Bombay High Court held that the power of the Municipal Commissioner of Bombay to grant a license under s. 394, City of Bombay Municipal Act, (III of 1888), included the power to refuse it. It was also held that unless it was clear that the Commissioner had used his authority with some indirect motive and for a collateral purpose not for the purpose for which the Legislature had armed him with the power, the Court could not interfere with his discretion. There is nothing in s. 287, Mad. Act, which indicates an intention on the part of the Legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. Mr. Venkatarama Sastriar has laid great stress on the provisions of s. 282 of the Act which requires the owner or occupier of a stable, veterinary infirmary, stand, shed, yard or other place in which quadrupeds are kept or taken in for purposes of profit, shall take out a license in the first month of every year. Sub-s. (2) of that section says that the Commissioner may, by an order and under such restrictions and regulations as he thinks fit, grant or refuse to grant the license. Mr. Venkatarama Sastriar argues that because there is no special power given under s. 287 to refuse renewal, it must in view of the terms of s. 282 be taken that the Legislature intended a license for the carrying on of a business to be on a different basis. In this connection he has also drawn attention to the provision of s. 284 which states that if any stable, cattle shed or cow-house is not constructed or maintained in the manner required by or under the Act, the Commissioner may by notice direct that it shall no longer be

(1) 28 B 253; 5 Bom. L R 1001.

used as a stable, cattle shed, or cow-house.

The argument here is really met by the provisions of s. 304. That section says that no person shall, without or otherwise than in conformity with an annual license granted by the Commissioner continue to keep open a private market. Application for the renewal of the license shall be made not less than thirty days before the commencement of the year for which the license is sought. The Commissioner may by an order grant or refuse to grant or renew the license or withhold the license until the owner or occupier executes such works as may be specified in the order. Then follows the important proviso that the Commissioner shall not refuse or withhold the license for any cause other than the failure of the owner or occupier to comply with some provision of the Act or some regulation made under s. 303 or some by-law made under s. 349, or without the approval of the Standing Committee. The proviso indicates that where the Legislature intended that there should be no power to refuse to renew, or intended to limit the exercise of such power, it has used appropriate language. The arugment which s. 304 provides for the respondent corporation is certaily as strong, if not a stronger one, than the argument which can be based for the petitioner on ss. 282 and 284. In my judgment s. 287 must be construed according to the words used therein and when it is so construed, I consider that there is no room for reasonable doubt that the Commissioner has in a proper case the power to refuse a renewal. I say in a proper case, because if the refusal was arbitrary or prompted by some ulterior motive, the position would be different. That cannot be said to be the case here. There is no ground for suggesting that the Commissioner has acted in any way contrary to his duty. For the reasons indicated the petition will be dismssed with costs, and we fix the Advocat's fee at Rs. 250.

Krishnaswamy Ayyangar, J.—I am of the same opinion. I agree that a consideration of the language of not only s. 304 but also of s. 285 C, cl. (3) gives a clear indication that where the statute intends that the Commissioner is not to have the power of refusiug a renewal, it has said so. The effect of the refusal is not to prohibit the petitioner from carrying on his business altogether but only to prohibit it in the premises in which it is now being carried on. There is nothing inherently wrong in the legislature placing a restriction upon the right of an individual in the in'erest of the residents in general of the locality.

N.S. *Petition dismissed.*

CALCUTTA HIGH COURT

Civil Rule No. 157 of 1940
April 29, 1940
R. C. MITTER, J.

EAST BENGAL BANK, LTD.—
PETITIONER
versus
JOGESH CHANDRA BANERJEE—
DEFENDANT—OPPOSITE PARTY

Companies Act (VII of 1913), s. 152—Arbitration Act (IX of 1899), applicability of—Arbitration with Court's intervention and in which company is interested—Arbitration Act (IX of 1899), does not apply but is governed by Sch. II, Civil Procedure Code (Act V of 1908)—Arbitration—Held on fact that Bank could not repudiate Pleader's authority to refer dispute to arbitration and that it was bound by the award.

The Arbitration Act, applies in a case falling within the scope of the Act even when the locus of the subject-matter was outside a presidency town, provided, one of the parties or both of them were companies registered under the Companies Act. The Preamable of the Act makes it clear that that Act has application only to arbitrations without the intervention of the Court. Where, therefore, a reference to arbitration, in which a company is interested, with the intervention of the Court is governed by Sch II, Civil P. C, relating to arbitrations with the intervention of the Court. The Arbitration Act has no application to such a case. 188 Ind. Cas 143 (1), relied on.

The local agent of the Bank had undoubtedly authority to engage a Pleader and to deliver a *vakalatnama* on behalf of the Bank. It was on the *vakalatnama* so delivered that the suit had been instituted in the name of the Bank. That *vakalatnama* contained a power given to the Pleader to enter into arbitration on behalf of the Bank The Pleader himself moved the application for reference to arbitration and participated in the arbitration proceedings on behalf of the Bank :

Held, that the *vakalatnama* was not the *vakalatnama* of the agent but the *vakalatnama* of the Bank itself. The Bank was bound by the terms of that *vakalatnama* and although the agent might not have the power from the Bank to refer the matters in dispute to arbitration, the Pleader, on the basis of that *vakalatnama* had authority to apply for re ferring the matter to arbitration. Where the award was against the Bank, the Bank was not entitled to repudiate the authority of the Pleader for the purpose of nullifying the proceedings.

Mr. *Ajit Kumar Dutta*, for the Petitioner.

Mr. *Priya Nah Dutt*, for the Opposite Party.

Order.—The petitioner before me is the

East Bengal Bank Ltd. (hereinafter called the Bank), a company registered under the Companies Act. The said Bank filed a suit in the Court of the Small Cause for the recovery of Rs. 408 from the defendant opposite party on the basis of a promissory note executed by the latter in its favour. The suit was filed on the basis of a *vakalatnama* executed by the local agent of the Bank on its behalf. The plaint was also verified by the said local agent. On July 28, 1939, a joint petition was filed on behalf of the Bank and by the defendant asking the Court to refer the matter to arbitration. The petition was signed by the legal agent of the Bank but it was approved of by the Pleader engaged by the Bank and was moved by him in Court. On the said petition, an order was passed by the learned Small Cause Court Judge referring the dispute to the named arbitrators. The arbitrators filed their award in Court on August 3, 1939 and in accordance with the award the suit was dismissed by the lower Court after overruling the two material objections of the Bank which are material for the purposes of the present rule. One objection was that the Court could not make the reference in view of the provisions of s. 152, Companies Act, which according to the petitioner required an arbitration, in which a company was interested to be made in accordance with the provisions of the Arbitration Act and to which the procedure laid down in the said Act was to be followed. The second objection was that the local agent had no authority to apply for referring the matter to arbitration on behalf of the Bank.

The rule has been issued on the aforesaid two points. I do not think that any of those contentions raised by the Bank in the lower Court and overruled by it can be given effect to. The Preamble of the Arbitration Act makes it clear that that Act has application only to arbitrations without the intervention of the Court. Having regard to the provisions of s. 89, Civil P. C., the rules contained in Sch. II relating to arbitrations with the intervention of the Court would be applicable in such a case and not the provisions of the Arbitration Act. Section 2, Arbitration Act, limits the applicability of the said Act, in the absence of a notification by the Local Govt. to private arbitrations, that is arbitrations out of Court, if a suit, either with or without leave, could have been instituted in a presidency town relating to the subject-matter of the dispute. Section 152 Companies Act, deals with the matter of arbitration in which company is interested.

As I pointed out in *Jhirghat Native Tea Co. Ltd.* v. *B. Gupta* (1), (a case of arbitration out of Court), sub-s. 3 (1) of s. 152, Companies Act, is of prime importance and it gives a clue to the meaning of s. 152 (1), Companies Act. That section was interpreted in that judgment and according to the interpretation there given, the scope of s. 152 Companies Act, is that the provisions of ss. 3 to 22, Arbitration Act, would apply where one or both the parties to arbitration are companies registered under the Companies Act by force and effect of the Companies Act itself irrespective of the provisions of s. 2, Arbitration Act; that is to say, the said Act would apply in a case falling within the scope of the Act even when the locus of the subject-matter was outside a presidency town, provided one of the parties or both of them were companies registered under the Companies Act. As the Abritration Act has no application to arbitration with the intervention of the Court, the contention raised by the petitioner cannot be given effect to. I accordingly overrule the first point raised before me and also before the lower Court.

I do not also see any substance in the second ground. The local agent of the Bank had undoubtedly authority to engage a Pleader and to deliver a *vakalatnama* on behalf of the Bank. In fact, it is on the *vakalatnama* so delivered that the suit had been instituted in the name of the Bank. That *vakalatnama* contained a power given to the Pleader to enter into arbitration on behalf of the Bank. The *vakalatnama* is not the *vakalatnama* of the agent but the *vakalatnama* of the Bank itself. The Bank is bound by the terms of that *vakalatnama* and although the agent may not have the power from the Bank to refer the matters in dispute to arbitration, the Pleader, on the basis of that *vakalatnama* had authority to apply for referring the matter to arbitration. The Pleader himself approved of the arbitration and he, in fact, moved the petition on which reference was made. Before the arbitrator, he took part in the proceedings on behalf of the Bank and now that the award is against the Bank, the Bank is not entitled to repudiate the authority of the Pleader for the purpose of nullifying the proceedings. The second ground is accordingly overruled.

(1) 44 C W N 285; 188 Ind. Cas. 143; A I R 1940 Cal. 220; I L R (1940) 1 Cal. 358; 71 C L J 62; 12 R C 651.

The Rule is discharged with costs, hearing-fee being assessed at one gold *mohur*.

D. *Rule discharged.*

MADRAS HIGH COURT

Civil Revision Petition No. 245 of 1936

March 15, 1939

SOMAYYA, J.

GOVADA BALABHARATHI CO-OPERATIVE CREDIT SOCIETY, GOVADA—PETITIONER

versus

ALAPATI VENKATAKRISHNAYYA AND ANOTHER—RESPONDENTS.

Madras Co-operative Societies Act (VI of 1932), s. 51—Registrar or arbitrator in passing award under Act, if acts as Court—Proceedings under Act, whether suit and award if decree within meaning of s. 51 (1), Provincial Insolvency Act (V of 1920)—Provincial Insolvency Act (V of 1920), s. 51 (1) and (3)—S. 51 (3), if restricted to sale in execution of decree — Sub-ss. (1) and (3), whether refer to same classes of cases.

The Registrar or the arbitrator in passing the award under the Mad. Co-operative Societies Act certainly acts as a Court. The procedure laid down under the Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are, satisfied in a proceeding under the Act. An award under the Act is a decree as used in s. 51 (1), Prov. Insol. Act. There is however no reason to suppose that a decree-holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder.

Section 51 (3), Prov. Insol. Act, does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the Registrar or the arbitrator under the Mad. Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the Receiver in insolvency. Both ss. 51 (1) and 51 (3) refer to the same classes of cases. 147 Ind. Cas. 614 (1), distinguished.

C. R. P. to revise the order of the District Court, Guntur, in C. M. A. No. 53 of 1935.

Messrs. *V. Subramaniam* and *V. Satyanarayana*, for the Petitioner.

Mr. *K. Kotayya*, for the Respondents.

Order.—Bala Bharathi Co-operative Credit Society of Govada had to get some money from one Ramatulasamma. The Society proceeded under s. 51, Madras Co-operative Societies Act of 1932 to recover the dues and an award was passed directing payment of the sum due. The award was being executed against the property of the debtor. At that stage another creditor of the debtor who is respondent No. 1 in this civil revision petition filed I. P. No. 105 of 1934 to adjudicate Ramatulasamma as an insolvent and applied for the appointment of a receiver under s. 20, Prov. Insol. Act. The Subordinate Judge before whom the application was made rejected the application holding that the Co-operative Credit Society had a first charge upon the entire estate of the debtor. The matter was taken up on appeal, and the District Judge held that the Co-operative Society had no prior charge over the general estate of the debtor and that the prior charge refers only to the interest of the member in the share capital of the Society. By the time the appeal was decided by the District Judge, the properties of Ramatulasamma had been sold by the sale officer under r. 22 of the rules made under the Act, and hence there was no scope for the appointment of a Receiver of the properties. The District Judge therefore dismissed the appeal with a direction that the appellant before him might take necessary steps as regards the sale proceeds in the hands of the Society.

The application out of which the present revision arises, was filed in the Subordinate Judge's Court under s. 51 (1), Prov. Insol. Act, and s. 151, Civil P. C., requesting the Court to call for the entire sale proceeds of about Rs. 2,100 or at least the balance due after deducting the amount due to the Society. The Subordinate Judge dismissed the application holding that neither s. 51 (1), Prov. Insol. Act nor s. 151, Civil P. C., applied to this case. On appeal, the District Judge came to the conclusion that s. 51 (1) Prov. Insol. Act, applies and that the Co-operative Society was bound to remit the sale proceeds to the Insol. Court. The Appellate Court held that the Co-operative Society is not entitled to the benefit of the execution against the Receiver in the insolvency because the assets were realized after the date of the admission of the insolvency petition. This revision petition is filed in this Court by the Co-operative Credit Society. It is argued that s. 51 (1), Prov. Insol. Act, applies only where execution of a decree has issued against the properties of the judgment-debtor. It is said that in this case the property was sold not in execution of a decree but that it was sold in execution of an award under the Co-operatives Societies Act (Mad. Act VI of 1932). The expression "decree" is not defined in the Prov. Insol. Act and under s. 2 cl. 2 of the Act:

"Words and expressions used in this Act and defined in the Civil P. C. 1908 and not herein before defined shall have the same meaning as those respectively attributed to them by the said Code."

Under s. 2 (2), Civil P. C., decree means:

"The formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

What is urged is that the Registrar or arbitrator is not deciding a suit. The Registrar or the arbitrator in passing the award under the Act is certainly acting as a Court. So, the real question is whether a proceeding under the Act is a 'suit'. The procedure laid down under the Co-operative Societies Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are, I think satisfied in a proceeding under the Co-operative Societies Act. Under r. 15, cl. (1) of the rules made under the Madras Co-operative Societies Act the reference under s. 51 of the Act is required to be in writing. This corresponds to the plaint in an ordinary suit; the other clauses of r. 15 show that the subsequent procedure is substantially the same as that followed in an ordinary suit. But Mr. V. Subramaniam, the learned Counsel for the petitioner, relies upon the decision of the Full Bench in *Rajagopala Chettiar* v. *Hindu Religious Endowments Board* (1). The decision was rendered under the Hindu Religious Endowments Act and it was held that a proceeding under s. 84 (2) of the Act was not a suit. There are various provisions in that Act where the proceedings are referred to as suits, but the proceeding under s. 84 (2) is referred to as a petition and the decision of the Full Bench may be distinguishable on this ground. But the decision lays down that an adjudication in a proceeding will be a decree only where the proceeding starts with a plaint I do not therefore wish to base my judgment on the question whether a proceeding under the Madras Co-operative Socities Act is or is not a decree within the meaning of s. 2 (2) Civil P. C., and therefore covered by s. 51 (1), Prov. Insol. Act, though, my own view is that an award under the Madras Co-operative Societies Act is a decree as used in s. 51 (1), Prov. Insol. Act.

Under s. 28 (7), Prov. Insol. Act the order of adjudication relates back to and takes effect from the date of the presentation of the petition. Under s. 28 (2) on the making of an order of adjudication the whole property of the insolvent vests in the Court or in the Receiver and shall be divisible among the creditors. Reading s. 28 (2) and s. 28 (7) together the result is that on an adjudication the properties of the insolvent vest in the Receiver with effect from the date of the presentation of the petition. There are similar provisions in Presidency Towns Insol. Act and in the English Bankruptcy Act. If matters stood there, all dealings with the property after the date of the insolvency petition would be null and void but certain provisions are enacted to protect persons who deal *bona fide* with the insolvent before the date of actual adjudication. A payment by the insolvent to any of his creditors, a payment or delivery to the insolvent, any transfer by the insolvent for valuable consideration and any contract or dealing by or with the insolvent for valuable consideration, are protected provided that the transaction took place before the date of the order of adjudication and the person with whom such transaction takes place had not at that time notice of the presentation of any insolvency petition by or against the debtor: *see* s. 55, Prov. Insol. Act. Then we have s. 51 of the Act which provides for sales in execution of the property of the insolvent. Under s. 51 (3):

"a person who in good faith purchases the property of the debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver.'

This does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the Registrar or the arbitrator under the Madras Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the Receiver in insolvency. Section 51 (1) deals with the assets realized in execution. The clause itself begins with the expression "where execution of a decree has issued against the property of the debtor" and provides that in such a case no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realized in course of the execution by sale or otherwise before the date of the admission of the petition. It appears to me that both ss. 51 (1) and 51 (3) refer to the same classes of cases; under cl. (3) the sale itself is good and under cl. (1) the sale proceeds go to the Receiver if realized after the date of the admission of the petition and to the creditor if realized before that date. There is no reason to suppose that a decree-holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder.

(1) 57 M 271; 147 Ind. Cas. 614; A I R 1934 Mad. 103; 66 M L J 43; (1933) M W N 1385; 6 R M 362; 39 L W 4 (F B).

If the contention advanced by Mr. Subramanian is correct, then the protection given under s. 51 (1) will not apply. If the award under the Madras Co-operative Societies Act is not a decree, then the whole of s. 51 (1) becomes inapplicable. In such a case there is no other provision in the Act which will give the Society any immunity even to the extent to which such immunity is provided in the case of executions of decrees by s. 51 (1). The acceptance of the argument far from benefiting the petitioner, is against him. I think therefore that s. 51 (1) should be held to apply to all execution sales and should not be confined to assets realized in execution of "decres" as restricted by the decision of the Full Bench in *Rajagopala Chettiar* v. *Hindu Religious Endoments Board* (1). In either view therefore whether the word "decree" as used in s. 51 Prov. Insol. Act is to be understood in a general sense or in the restricted sense, I think the same result follows so far as this revision is concerned. This civil revision petition is therefore dismissed with costs.

N.S. *Petition dismissed.*

SIND CHIEF COURT

Criminal Transfer Application No. 107 of 1940

July 30, 1940

DAVIS, C. J.

Haji IMAMDINO *Haji* OSMAN—APPLICANT

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 526, 476, 197—Any person, irrespective of status can be prosecuted for making false complaint—Fact that member of Legislature is figuring in case is no ground for transfer—Prosecution of M. L. A. under s. 476—Sanction is not required.

The Magistrate when he tries a case under s 406, I. P. C., should be alert to see that his Court is not used for the purpose of oppression by introducing the evidence of any *zemindar* or any Member of the Legislative Assembly who as such has no special position or privilege at all in any Court of Law, and the Magistrate must deal with the case as it comes before him strictly upon its merits. If for instance he believes the case is a false case inspired by some prominent person, he will, if he thinks that that prominent person has aided or abetted the making of a false complaint or has given false evidence in Court, not hesitate to take such action under s. 476, Criminal P. C., as the interest of justice requires. It must be made known that Magistrates will not be deterred from doing their duty merely because a person concerned is a *zemindar*, an M. L. A., or a prominent person It is, a truism that wherever British concepts prevail, all men are equal before the law, and a *zemindar*, an M. L. A., or a prominent person has no special privilege under the Criminal P. C., and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way as against any other person. Hence the fact that such a person is figuring in a case is no ground for transferring it.

No sanction under s 197, Criminal P. C., is required for the prosecution of a Member of Legislative Assembly under s. 476.

Mr. *K. H. Nagrani*, for the Applicant.

Mr. *Hashmatrai G. Chainani*, for the Opponent.

Mr. *Partabrai D. Punwani*, Advocate General, for the Crown.

Order.—I have here before me what are in effect two applications for transfer of cases against the same accused Haji Imamdino, one under s. 498, I. P. C. before the first class Magistrate, Sujawal, and another, a case before the second class Magistrate at Dokri under s. 406, Penal Code, which relates to the criminal breach of trust of a horse under somewhat rather unusual circumstances. But the broad ground on which these applications for transfers are based is that these cases are part of a campaign conducted by one Mr. Muhammad Usman Sumro, a Member of the Legislative Assembly who it is said in this application for transfer, is a person of some notoriety and of such influence that a Magistrate before whom he appears as a witness would find it difficult to reject his evidence. I have a distinct recollection that this Court itself has on one occasion rejected this gentleman's evidence and that the gentleman concerned was prosecuted for perjury with results which are not precisely known to us. I should think myself therefore that the Magistrate should have no difficulty whatever in rejecting this gentleman's evidence as false or incorrect, if from the evidence itself and the evidence of the other witnesses the Magistrate came to the conclusion that on this occasion this gentleman had not or had been unable to testify with truth and accuracy, and though from the statement of the case in the application for transfer it does appear at first sight that there is some support for the case that this Mr. Muhammad Usman Sumro is the person behind three separate complaints made in three separate Courts in two separate districts for the purpose of harassing the applicant, on inquiry the case for the applicant is by no means so pathetic as his Advocate suggests. For instance, it is said that as the result of the trouble with the woman not only has the applicant, and others been the subject of a compliant under s. 498, I P. C before the first

class Magistrate at Sujawal, but in order further to harass, the accused has been the subject of another complaint under s. 406, I. P. C. before the Sub-Divisional Magistrate at Shahbunder. This relates to a criminal breach of trust in respect of a gold ornament (dhurri) ; but he has also been made the subject of a complaint under s. 406, I. P. C. relating to a horse before the second class Magistrate of Dokri.

Now so far as the case under s. 406, I. P. C. regarding the gold ornament is concerned, it appears that that case was withdrawn. The complaint is dated March 31, 1939, while the complaint under s. 498, I. P. C. relating to the woman is dated May 22, 1939 : so that the complaint under s. 406 relating to the ornament is prior in time to the complaint under s. 408, I. P. C. relating to the woman; not very much prior in point of time, and the two cases, of course, may be connected. But it does appear that permission to withdraw the case under s. 406, I. P. C. relating to the gold ornaments was made as a result of a compromise between the parties. That compromise has been read out to me, and one cannot say from the way it is worded that it is not what it purports to be—a real compromise between the parties relating to the offence involving this gold ornament. So that I cannot say that this complaint relating to the gold ornament has anything to do with the complaint relating to the woman or that it is subsequent in time. But the complaint before the second class Magistrate at Dokri relating to the horse is subsequent in time; it is dated November 17, 1939. It is said that that case is false on the face of it, and the Magistrate should have dismissed it and that in any case the Magistrate should not have issued warrants. But the Advocate-General has read out the diary of that case to me, and it does not appear that the Magistrate issued warrants until he had tried other means to secure the presence of the accused. The warrants issued by the Dokri Court were bailable warrants. and so far as this Dokri case is concerned, I cannot say that there is any action on the part of the Magistrate which would justify the transfer of the case.

The Magistrate, however, when he tries this case under s. 406, I. P. C. should be alert to see that his Court is not used for the purpose of oppression by introducing the evidence of any *zamindar* or any Member of the Legislative Assembly who as such has no special position or privilege at all in any Court of Law, and the Magistrate of Dokri, though a second class Magistrate must deal with the case as it comes before him strictly upon its merits. If for instance he believes the case is a false case inspired by some prominent person, which, I believe, is a phrase now much in vogue, he will, if he thinks that that prominent person has aided or abetted the making of a false complaint or has given false evidence in Court, not hesitate to take such action under s. 476, Criminal P. C., as the interest of justice requires. It must be made known that Magistrates will not be deterred from doing their duty merely because a person concerned is a *zamindar*, an M. L. A., or a prominent person. It is, as I have said before, a truism that wherever British concepts prevail, all men are equal before the law, and a *zamindar*, an M. L. A., or a prominent person has no special privilege under the Criminal P. C. and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way against any other person. But, once the attention of the Magistrate has been directly drawn to this aspect of the case—and I do not even say that it was necessary to draw his attention to this aspect of the case—he will, I have no doubt, do his duty. I see therefore no reason to transfer this case from the second class Magistrate at Dokri, and I wish to make it clear that nothing that I have said should be taken to mean that I have formed any opinion in any way as to the truth or falsity of this case relating to this horse. The Magistrate will deal with the case upon its merits.

Similarly with regard to the case under s. 498, I. P. C. before the first class Magistrate at Sujawal. The case may be true or false; I say nothing whatever about its merits at this stage, And even if this Mr. Muhammad Usman Sumro, an M. L. A., should be a witness in this case and his name appears as witness No. 16 on the list in the complaint, in view of what I have said the Magistrate should have no difficulty in forming an unbiased opinion as to the truth or falsity of the evidence given by this Mr. Muhammad Usman Sumro; if he should give evidence, and if the Magistrate should find that his evidence is false, then he knows his duty under s. 476, Criminal P. C. No sanction by Govt. no reference to Govt. no consultation with Govt. is in any way required under the provisions of the Criminal P. C. by which this Magistrate, as all other Magistrates are bound, for the.

prosecution of this Mr. Muhammad Usman Sumro, if within the provisions of s. 476, Criminal P. C., this Magistrate should think that the interest of justice so require. Again I do not wish it to be inferred in any way that I think this Mr. Muhammad Usman Sumro wil give false evidence. The Magistrate must deal with his evidence without any bias and impartially consider and weigh it in relation to the other evidence on the record, direct or circumstantial. It may very well be that the influence of this Mr. Muhammad Usman Sumro has been exaggerated because in one of the cases referred to in the application as an instance of his influence and power, the accused was discharged by the Magistrate.

Lastly, I have before me on the record what purports to be a letter from one Mr. Khushaldas Moolram, Advocate, to the first class Magistrate at Sujawal (Ex. F, p. 22 of the paper-book), written, it is said, to this Magistrate to postpone the case under s. 498, I. P. C. which appears to be a most improper letter to be written by an Advocate to a Magistrate trying a case in which he is appearing. But I do not even know that that letter was written by Mr. Khushaldas because I have not yet asked him, and I will make no further remark upon this letter until the Registrar shall have, under my direction, written to Mr. Khushaldas in this matter and I shall have had his reply. It seems to me therefore that there is no reason whatever to transfer either one or the other of these cases from the first class Magistrate, Sujawal, and the second class Magistrate at Dokri, and I dismiss these transfer applications accordingly.

D. *Applications dismissed.*

MADRAS HIGH COURT

Second Appeal No. 70 of 1937
February 29, 1940
HORWILL, J.

VEMURI RAMJEE RAO—APPELLANT
versus
THE MUNICIPAL COUNCIL MASULIPATAM—RESPONDENT

Contract Act (IX of 1872), s. 72—Tax paid under misapprehension as to liability for it—If can be recovered back.

A person who makes payment under a mistake of law cannot recover it back again. Hence, a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, either under s. 72, Contract Act or under equitable principles.

[Case-law referred to.]

Messrs. *Ch. Raghava Rao* and *V. V. Sastry*, for the Appellant.

Mr. *V. Govindarajachari*, for the Respondent.

Judgment.—The only question that arises in this appeal is whether the plaintiff, who had paid property tax to the defendant Municipality upon demand in a wrong belief that he was bound to pay that tax, is entitled to have it refunded. Both the lower Courts held that as the payment was a voluntary one, he is not entitled to have any such refund. His suit was therefore dismissed and his appeal to the Subordinate Judge, Masulipatam, was also dismissed. Mr. Raghava Rao, in his very able argument, has put forward two contentions. They are that under s. 72, Contract Act, the plaintiff is entitled to a refund of money paid by mistake of law and that even though s. 72 would debar a person from recovering money paid under a mistake of law in a *quasi*-contract, there would still be open to such a person the equitable relief that a Court can give to a person who has wrongly parted with money independently of any contract. *Municipal Council, Dindigul* v. *Bombay Co. Ltd.* (1) is a decision on which Mr. Raghava Rao has placed great reliance. It discusses the English principles to be applied in a case somewhat similar to the present one, in which a person made a payment to a corporate body under protest and then claimed it back. The question that arose was whether the suit was in time; because it had been filed more than six months after the payment had been made, six months being the period allowed by s. 350, Mad. District Municipalities Act, for bringing a suit against a municipality in certain classes of suits. Both Couts-Trotter, C. J. and Madhavan Nair, J. held that the suit claim was not one arising out of a contract and that therefore principles of the English Courts of Equity could be applied; for, in Indian Courts no distinction had ever been drawn between equitable jurisdiction and legal. Such equitable principles being applied, it was considered by these learned Judges that the suit was one for "money had and received" and not an action for damages and compensation. It was held therefore that s. 350, Mad. District Municipalities Act, did not apply, but Art. 62, Lim. Act. It has therefore been argued by Mr. Raghava Rao that it is unnecessary to apply the principles of the Common Law

(1) 52 M 207; 120 Ind. Cas. 867; A I R 1929 Mad. 409; 56 M L J. 525; 29 L W 525; (1929) M W N 225; Ind. Rul. (1930) Mad. 67.

Courts of England, which, he says, have been reproduced in s. 72, Contract Act, and that this suit may be looked upon as one in the general equitable jurisdiction of Civil Courts. *Municipal Council, Dindigul* v. *Bambay Co. Ltd.* (1) may be regarded as an authority for the position that either a cause of action arises independently of s. 72, Contract Act, or that when applying s. 72, Contract Act, one should not be bound by the somewhat narrower principles of the Common Law Courts of England; but may well have regard to the decisions of the Court of Equity.

That a suit for "money had and received" will lie apart from s. 72, Contract Act, has been held in *Narayanasami Reddi* v. *Osuru Reddi* (2), where a person was obliged to pay his landlord some money which was really not due, in order to avert a summary sale of his land. It was held that although the money was not paid by mistake yet the person who paid it was entitled to have it back. But even if we regard this suit as one to which s. 72, Contract Act, does not apply, I do not consider that the plaintiff's claim would be any stronger; because Courts have generally held that where a payment is made by mistake of law, there is no room for the application of equitable principles. The person who makes the payment is under no obligation to do so; and if he, of his own free will and accord, having the same opportunity of knowing the general law as the person to whom he pays it, makes such a payment, there is no injustice done which Courts of Equity should remedy. It is pointed out in Halsbury's Laws of England (Vol. 23 at p. 168, in para. 246 and Vol. 7 at p. 278 in para. 249) that it is not an absolute rule that a payment made under a mistake of law cannot be recovered. A few exceptions do exist, especially where the person who makes the payment has much less opportunity of knowing the law than the person to whom he pays it and relies on the word and experience of the person paid. It has however never been held, even by Courts of Equity, that a payment made under circumstances like the present is recoverable in a Court. Mr. Raghava Rao has been at some pains to point out that in more recent decisions in England there has been a tendency to interpret more liberally the rule against the recovery of money paid by mistake of law; but Ramesam, J., who was apparently dealing with the same argument in *Appavoo Chettiar* v. *South Indian Railway Co.* (3), thought that the recent decision of the House of Lords and the remarks* of Scrutton, L. J. indicated that there had been no modification of the general principal against forcing a person to return money paid under a mistake of law.

Returning to s. 72, Contract Act, it has been held in a number of cases that payments made in India by mistake of law cannot be recovered. *Appavoo Chettiar* v. *South Indian Railway Co.* (3) is a direct authority with regard to a payment of the kind here made. In *Raja of Ramnad* v. *Secretary of State* (4) it was held that a wrong payment of income tax could not be recovered for the same reason. In recent cases the principle that a person who makes payment under a mistake of law cannot recover it back again has been accepted without question : *see Municipal Council, Tuticorin* v. *Ralli Brothers* (5) and *Chairman, Municipal Council, Rajahmundry* v. *Subba Rao* (6). I have therefore no doubt that as the law stands at present, a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error. The appeal is accordingly dismissed with costs.

N=S. *Appeal dismissed.*

(2) 25 M 548.

(3) 56 M L J 269; 114 Ind. Cas. 358; A I R 1929 Mad. 177; (1928) M W N 385; 28 L W 591; Ind. Rul. (1929) Mad. 278.

(4) 52 M 12; 114 Ind. Cas. 829; A I R 1929 Mad. 179; 55 M L J 770; 28 L W 667; Ind. Rul. (1929) Mad. 349.

(5) 67 M L J 566; 150 Ind. Cas. 890; A I R 1934 Mad 420; 39 L W 660; 7 R M 33.

(6) (1937) 1 M L J 496; 169 Ind. Cas. 330; A I R 1937 Mad. 559; (1937) M W N 293; 45 L W 489; 10 R M 1.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

Appeal No. 163/58 of 1939

November 15, 1940

ALMOND, J. C. AND MIR AHMAD, J.

Haji HABIB GUL JAN GUL—JUDGMENT-DEBTOR—APPELLANT

versus

GOPI CHAND SINGH JAWAHAR MAL AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

N.-W. F. P. Agriculturists Debtor's Relief Act (IV of 1939), s. 2, Proviso (1)—House or shop property mortgaged—Proviso, if contemplates that equity of redemption should not be worth more than Rs. 500.

The Proviso (1) to s. 2, N.-W. F. P. Agri. Debtor's Relief Act, does not contemplate that in a

case of morgaged property the equity of redemption should not be worth more than Rs. 500. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500.

A. from a decision of the Senior Sub-Judge, Mardan, dated September 28, 1939.

Mr. *P C. Kapur*, for the Appellant.

Sardar Bahadur Sardar Raja Singh, for the Respondents.

Almond J. C.—This is an appeal preferred by Habibgul whose application for relief under s. 9, Agriculturists Debtors Relief Act, IV of 1939, was dismissed on the ground that he was not an agriculturist in view of proviso 1 to s. 2 of the Act. It is not disputed before us that the petitioner was the owner of a Mandi including shops in the Municipality of Hoti and that a mortgage decree amounting Rs. 19,000 had been passed against the petitioner on the basis of the motgage of that property. It is contended however by learned Counsel for the appellant that the petitioner was not given an opportunity of proving that the value of the equity of redemption was less than Rs. 500 the sum mentioned in the proviso. The proviso reads as follows :

"Provided that a person who owns house other than his own residential house or shop property within municipal or cantonment limits of the value of Rs. 500 or more will not be considered an agriculturist."

Learned Counsel has contended that the proviso contemplates that in a case of this nature the equity of redemption should not be worth more than Rs. 500. That however is not what the section states. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500. It is clear that the petitioner is the owner of shops and as they were mortgaged originally for Rs. 10,000 they are certainly worth more than Rs. 500. We find that the decision of the original Court was correct and therefore dismiss this appeal with costs. Pleader's fee Rs. 32.

D. *Appeal dismissed.*

PATNA HIGH COURT

Appeals from Appellate Decrees Nos. 252 and 253 of 1940

January 21, 1941

HARRIES, C. J. AND FAZL ALI, J.

Smt. JAGATMAYA KUMRI—PLAINTIFF—APPELLANT

versus

Munshi RAM BAHADUR PRASAD—DEFENDANT—RESPONDENT

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), ss. 8, 7 — Mortgage for Rs. 960 at Re. 1-4-0 interest per mensem in 1928 — Rs. 203 only paid in cash, balance set-off against previous mortgage of 1925 for Rs 486—Payment by mortgagor of Rs 100 in 1929 and Rs. 800 in 1934 appropriated towards interest—Suit on mortgage—Payment appropriated towards interest held could not be used to reduce principal under s. 8—Mortgagee held entitled to decree for Rs. 689 only, which was total of advances made in 1925 and 1928—Plaintiff held not entitled to claim any further interest in suit.

The Bihar Money-lenders Act, was enacted for the protection of such debtors as needed some relief on account of their property or inability to pay their debts. That may be the reason why proviso to s. 8 excludes from the operation of s. 8 such debtors as were able to pay their interest at the agreed rate and had already paid it. [p. 563, col. 1]

The plaintiff brought a suit on the basis of a mortgage bond, executed by the defendant on August 11, 1928, to secure a loan of Rs. 960 which was to bear interest at the rate of Re. 1-4-0 per cent. per mensem. with yearly rests Out of the sum of Rs. 960 a sum of Rs. 203 only was paid in cash and the balance was set-off against a previous debt which was due to the plaintiff under a mortgage bond executed in 1925 for a sum of Rs. 486. Sum of Rs. 100 had been paid by the defendant towards the dues under the bond in suit on June 25, 1929, and a further sum of Rs. 800 had been paid by him on September 30, 1934. The plaintiff, after giving credit as to these two amounts, claimed that a sum of Rs. 2,100 was still due to him;

Held, that as on the dates on which the sums of Rs 100 and Rs 800 respectively were paid by the defendant, the Bihar Money-lenders Act, was not in operation the creditor was entitled to charge interest at the bond rate on that date and the interest which was due to him on those dates was far in excess of the amounts actually paid. Under the law the creditor was entitled to appropriate these payments towards interest and after the appropriation had been made those amounts could not be used to reduce the principal under s. 8 according to the proviso to s. 8 of the Bihar Money-lenders Act. The plaintiff was therefore entitled to a decree for a sum of Rs. 689 which was the total of the principal sums which were advanced by him 1925 and 1928 respectively. If interest was calculated at the rate of nine per cent. per annum, as it should be under s. 8 of the Act, the amount which was payable as interest on the total principal sums advanced by the plaintiff was much less than the sum of Rs. 900 which had already been paid towards interest. That being so, the plaintiff was not entitled to claim any further interest in the suit. Section 7 of the Act was not applicable to the case. [p. 562, col. 2; p. 563, col. 1.]

A. from a decision of the Subordinate Judge, First Court, Monghyr, dated September 30, 1939, modifying that of the Munsif First Court, Begusarai, dated June 24, 1939.

Mr. *Ray Parasnath*, for the Appellant.

Messrs. *K. K. Banerji* and *G. C. Banerji*, for the Respondent.

Fazl Ali, J.—This second appeal arises out of a suit instituted by the appellant to recover a sum of Rs. 2,100 on the basis of a mortgage bond. This bond was admittedly executed by the defendant and his father on August 11, 1928, to secure a loan of

Rs. 960 which was to bear interest at the rate of Re. 1-4-0 per cent. per mensem with yearly rests. It is common ground that out of the sum of Rs. 960 which is stated to be the amount of the loan under this bond a sum of Rs. 203 only was paid in cash and the balance was set-off against a previous debt which was due to the plaintiff under a mortgage bond executed in 1925 for a sum of Rs. 486. The plaintiff has stated in the plaint that a sum of Rs. 100 had been paid by the defendant towards the dues under the bond in suit on June 25, 1929, and a further sum of Rs. 800 had been paid by him on September 30, 1934. The plaintiff, after giving credit as to these two amounts, claimed that a sum of Rs. 2,100 was still due to him and prayed for a decree for that sum.

The defendant contested the suit mainly on the ground that the interest was excessive and he was entitled to relief under the Bihar Money-lenders Act.

Both the Courts below have upheld his contention and re-opened the transaction under s. 8 of the Bihar Money-lenders (Regulation of Transactions Act, 1939). The first Court, after making certain calculations, came to the conclusion that the plaintiff was entitled to a decree for a sum of Rs. 472; but the lower Appellate Court found that there were certain errors in this calculation and it has awarded a decree to the plaintiff for a sum of Rs. 402-12-0. That Court, after showing that for the purposes of determining the amount to which the plaintiff is entitled, it must be held that the principal amounts should be the sum of Rs. 203 paid in cash on August 11, 1928, and the sum of Rs. 486 which had been paid under the earlier bond of 1925, observed as follows:—

"The total amount of interest on Rs. 486 and Rs. 203 up to September 30, when the repayments amounted to Rs. 300 came to Rs. 518 (Rs. 406 + Rs 112). The repayments exceeded the amount of interest by Rs. 382 which went towards the payment of the principal reducing it to Rs. 307 Interest on this amount up to the date of the suit came to Rs. 90-4-0. The plaintiff, therefore, was not entitled to more than Rs 397-4-0 on the date the plaint was filed. The amount which should have been awarded according to the defendant *viz.* Rs. 402-12-0 exceeds the amount allowable. As the defendant himself prays for a decree for Rs. 402-12-0 the amount cannot be further reduced."

The learned Advocate for the appellant conceded in this Court that the Courts below were entitled to re-open the transactions under s. 8 of the Bihar Money-lenders Act; but he has pointed out that the learned Subordinate Judge who heard the appeal from the judgment of the trial Court has entirely overlooked the proviso to s. 8 of the Money-lenders Act. That proviso runs thus:—

"Provided further if anything has been paid or allowed in respect of any liability for interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan, nothing in cl (*a*) or (*b*) shall be deemed to require the creditor to repay any amount so paid or allowed in excess or to reduce the amount of the principal of the loan."

It may be stated here that cl. (*a*) of s. 8 enables the Court to re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan.

Clause (*b*) of that section provides that

"nothwithstanding any agreement purporting to close previous dealings and to create a new obligation, the Court may re-open any account already taken between them and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of secured loan and twelve per centum simple per annum in the case of an unsecured loan."

Now, from the passage which I have quoted from the judgment of the learned Subordinate Judge, it will appear that, in his opinion inasmuch as the sum of Rs. 900, which has been admittedly paid by the defendant towards the loan, exceeded the interest which was payable on the principal sums (calculating interest at the rate of nine per cent. per annum) the excess amount paid by the defendant must go to reduce the amount of the principal sums. But this is exactly what the proviso to s. 8 provides against. That proviso states that if any amount has been paid in respect of any liability for interest in excess of nine per cent. simple in the case of a secured loan, nothing in cl. (*a*) or (*b*) shall be deemed to require the creditor to reduce the amount of the principal of the loan. On the dates on which the sums of Rs. 100 and Rs. 800 respectively were paid by the defendant, the Bihar Money-lenders Act was not in operation. The creditor was, therefore, entitled to charge interest at the bond rate on that date and on calculation it appears that the interest which was due to him on those dates was far in excess of the amounts actually paid. Under the law the creditor was entitled to appropriate these payments towards interest and after the appropriation had been made those amounts could not be used to reduce the principal under s. 8

according to the proviso to s. 8 of the Bihar Money-lenders Act. It was contended by the learned Advocate appearing for the respondent that the proviso, if it bears the construction which is put upon it on behalf of the appellant, creates a somewhat anomalous position inasmuch as a debtor who has been making payments towards his debt is in a much worse position than one who has made no payments whatsoever. That may be so, but we have to give effect to the plain words of the proviso which clearly states that if a payment has been made in respect of any liability for interest that payment will not go to reduce the principal. It must be remembered that the Bihar Money-lenders Act was enacted for the protection of such debtors as needed some relief on account of their poverty or inability to pay their debts. That may be the reason why this proviso excludes from the operation of s. 8 such debtors as were able to pay their interest at the agreed rate and had already paid it.

Now, if the proviso is given effect to, it seems to me that the appellant is entitled to a decree for a sum of Rs. 689 which is the total of the principal sums which were advanced by him 1925 and 1928 respectively. It is not difficult to explain how this result is arrived at. I have already shown that the payments which have been made by the defendant cannot go to reduce the principal. These payments must be taken as payments towards interest. Now, if interest is calculated at the rate of nine per cent. per annum as it should be under s. 8 of the Bihar Money-lenders Act, the amount is payable as interest on the total principal sum advanced by the plaintiff is much less than the sum of Rs. 900 which has already been paid towards interest. That being so, the plaintiff is not entitled to claim any further interest in the suit. He is entitled only to recover the principal sums which amount to Rs. 689.

It was contended on behalf of the appellant that he is entitled to a decree at least for a sum of Rs. 1,020. The reasoning upon which this argument is based is this. The learned Advocate for the appellant points out that under s. 7 of the Bihar Money-lenders Act he is entitled to a decree for at least such amount of interest for the period preceding the institution of the suit as is together with the amounts already realised by him equal to the amount of the principal sums advanced. In the present case it is pointed out that the loan advanced was Rs. 960, and if to this sum is added an equal sum as representing interest and from the total amount is substracted the sum of Rs. 900 already paid by the defendant, the balance will be Rs. 1,020. But argument, however, can be accepted only if it is held that s. 7 only is applicable to the case and s. 8 does not apply to it. That once s. 8 is found to be applicable as was conceded by the learned Advocate for the appellant in the course of his arguments, I think that the only mode of calculation is the mode which I have already indicated.

I would, therefore, partly allow this appeal and direct that a mortgage decree be passed in favour of the appellant for a sum of Rs. 689 instead of a sum of Rs. 402-12-0 for which decree was passed by the lower Appellate Court. This sum will carry interest at the rate of nine per cent. per annum up to the expiry of the period grace which is fixed as three months from to-day and after the expiry of the period at six per cent. until realisation.

The defendant moved this Court at the time of the argument to fix instalments for the payment of the decretal amount. It appears that the Munsif thought that the sum decreed by him should be paid in four instalments but the learned Subordinate Judge on appeal observed that as the defendant could pay Rs. 800 in one instalment and has given no reason why he required instalments for a smaller amount, this was not a fit case for fixing instalments for the payment of the decretal amount. The defendant did not appeal from this part of the decree and we have no materials before us to enable us to pass a suitable order for making the decree payable in instalments. It is however, conceded on behalf of the appellants that the matter can be agitated at the time of the execution of the decree under s. 13 of the Money-lenders Act. That being so, no order need be passed in this respect in the present decree. The plaintiff shall get costs in all the Courts proportionate to his success but the cost incurred by him on account of the court-fee on the plaint shall be paid in full.

Harries, C. J.—I agree.

S. *Appeal partly allowed.*

LAHORE HIGH COURT

Criminal Revision Petitions Nos. 233 and 280 of 1939

October 30, 1939

DIN MOHAMMAD AND RAM LALL, JJ.

Khwaja GHULAM SADID-UD-DIN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 435 439—Order of District Magistrate under s. 3, Sarais Act (XXII of 1867), calling upon certain persons to register their Sarais, if subject to revision by High Court.

The District Magistrate as the chief officer charged with the executive administration of a district, in criminal matters can under no stretch of language be treated as a Court His function as an executive officer are poles asunder from his functions as a judicial officer and it is only in his judicial capacity that he is subject to the revisional jurisdiction of the High Court. His order calling upon certain persons to register their Sarais, under s. 3, Sarais Act, not being a judicial order is not subject to the revisional jurisdiction of the High Court.

Cr. R. Ps. from the order of the Sessions Judge, Dera Ghazi Khan, dated December 16, 1938.

Order of Reference.

Abdul Rashid, J.—On September 17, 1938, the District Magistrate of Dera Ghazi Khan gave a notice to Khwaja Nizam-ud-Din to register his Sarai under s. 3, Sarais Act of 1867. Against this order, Khwaja Nizam-ud-Din preferred a petition for revision in the Court of the learned Sessions Judge. The learned Sessions Judge is of the opinion that he cannot interfere under s. 435, Criminal P. C. as the District Magistrate in giving notice to Khwaja Nizam-ud-Din to register his Sarai was acting as the Chief Officer charged with the executive administration of a District in criminal matters. Against this order of the learned Sessions Judge, Nizam-ud-Din has preferred a petition for revision to this Court. Under s. 3, Sarais Act, "the Magistrate of the District" can call upon the keeper of any Sarai to register his Sarai. "The Magistrate of the District" has been defined in the Act as

"the chief officer charged with the executive administration of a district in criminal matters whatever may be his designation."

Mr. Mohsin Shah, on behalf of the petitioner, urged that by virtue of s. 3 (2), Criminal P. C. "the Magistrate of the District" shall be deemed to mean "the District Magistrate" and that as the notice to register has been given by the District Magistrate, this order is subject to revision under the provisions of the Criminal P. C. Mr. Asadullah Khan on behalf of the Crown contends that the words "the Magistrate of the District" should be replaced by the words "the District Magistrate" not only in s. 3, Sarais Act, but also in the definition clause. If the words "the Magistrate of the District" in the definition clause are replaced by the word "the district Magistrate," then the 'District Magistrate' will mean "the chief officer charged with the executive administration of a district in criminal matters." The contention is that, as far as the Sarais Act is concerned, even the District Magistrate would be acting as the head of the executive administration and that his order giving a notice to the keeper of the Sarai to register the Sarai is not subject to revision under the provisions of the Criminal P. C. The point involved in this revision petition is one of great importance. Subject to the orders of the learned Chief Justice, I refer this petition for revision for decision to a Division Bench.

Mr. *Mohsin Shah*, for the Petitioner.

Chaudhuri *Asadullah Khan*, for the Advocate-General, for the Crown.

Order of the Division Bench.

Din Mohammad, J.—This order will dispose of Criminal Revisions Nos. 233 and 280 of 1939. They have been referred to a Division Bench in the following circumstances: There is a shirne at Taunsa in the District of Dera Ghazi Khan and two "Sarais" are maintained by the persons in charge of the shrine for the accommodation of pilgrims. On a report made by the Police to the District Magistrate he issued notices to Hafiz Sadid ud-Din and Khwaja Nizam-ud-Din respectively under s. 3 of Act XXII of 1867 (the Sarais Act). The two persons mentioned above appeared before him and raised certain objections. He, however, called upon them to register their Sarais under s. 3. Against this order of the District Magistrate, petitions for revisions were made to the Sessions Judge, but he declined to interfere on the ground that he had no jurisdiction to entertain the same. A further petition for revision was submitted to this Court in each case and Abdul Rashid, J. who heard these petitions, recommended to the Hon'ble Chief Justice to refer the matter to a Division Bench.

It is contended before us that inasmuch as the order complained of was made by the District Magistrate, Dera

Ghazi Khan, as such, his order can be interfered with by this Court under its revisional powers. The main ground urged in support of this contention is that sub-s. (2) of s. 3, Criminal P. C. has substituted the word "District Magistrate" for the words "Magistrate of the District" wherever they appear and that consequently the words "Magistrate of the District" as used in s. 3 mean the District Magistrate as contemplated by the Criminal P. C. and the District Magistrate under that Code is an inferior Criminal Court in relation to the High Court. In our opinion there is no substance in this argument It is true that sub-s. (2), s. 3 has enacted that wherever the words "Magistrate of the District" occur the words "District Magistrate" will be substituted, but this does not, affect the provisions of the Sarais Act in any manner. In s. 2 of that Act "Magistrate of the District" means the chief officer charged with the executive administration of a District in criminal matters whatever may be his designation. Under s. 3 it is the Magistrate of the District who is empowered to take action against the keeper of a Sarai. If the words "Magistrate of the District" as occurring in the definition as well as in s. 3 are replaced by the words 'District Magistrate' the District Magistrate as defined in s. 2 will be empowered to take action under s. 3 and the District Magistrate there is described as the chief officer charged with the executive administration of a district in criminal matters. What difference will this replacement make in the nature of the powers exercised by the District Magistrate under the Sarais Act passes our comprehension.

Section 435, Criminal P. C. clearly says that it is the record of any proceeding before any inferior Criminal Court which can be called for and examined. Under s. 436, it is only in relation to such records that further enquiry can be ordered. Under s. 438 it is only such cases as are referred to above that can be reported to the High Court for necessary action. Under s. 439 it is only in the case of any proceeding, the record of which has been called for by the High Court or which has been reported for orders, or which otherwise comes to its knowledge, that the High Court can exercise any of the powers conferred on a Court of appeal. No doubt the word "proceeding" in s. 439 is not further qualified as it is in s. 435, but on a well established principle of the interpretation of statutes this word can only be interpreted in the manner in which it is used in the foregoing sections and there, as stated above, it is confined to the proceeding before any inferior Criminal Court. The District Magistrate as the chief officer charged with the executive administration of a district in criminal matters can under no stretch of language be treated as a Court. His functions as an executive officer are poles asunder from his functions as a judicial officer and it is only in his judicial capacity that he is in our view subject to the revisional jurisdiction of this Court.

It may be added that it is not only under this Act but under various other Acts that the District Magistrate exercises his powers as such which are not open to revision by this Court. This fact is conceded by the petitioner's Counsel. He, however, contends that inasmuch as some sort of enquiry was made in this matter and certain objections were allowed to be raised the District Magistrate acted as a Court and his order should be treated as judicial and not as executive. We are not disposed to agree. The authorities relied on are not relevant to the case. In *In re Horniman* (1) it was held that a Magistrate acting under s. 113, Railways Act, exercised a judicial function and in *Emperor* v. *Devappa Ramappa* (2), a Division Bench came to the conclusion that the order passed by a Magistrate under para. 1 of s. 2, Workmen's Breach of Contract Act, 1859, was open to revision by the High Court. The present case bears no analogy to them. There the law contemplated that the powers to be exercised were judicial and here quite the contrary has been laid down in the definition of the word "District Magistrate." We accordingly hold that the order of the District Magistrate calling upon the petitioners to register their Sarais under s. 3 was not a judicial order and is consequently not subject to the revisional jurisdiction of this Court and dismiss these petitions.

D. *Petitions dismissed.*

(1) A I R 1933 Bom. 59; 141 Ind. Cas. 794; 34 Cr. L J 239; 34 Bom. L R 1666; Ind. Rul. (1933) Bom. 159.

(2) 43 B 607; 50 Ind. Cas. 492; A I R 1919 Bom. 158; 20 Cr. L J 316; 21 Bom. L R 277.

PATNA HIGH COURT

Appeal from Appellate Order No. 278 of 1940

January 30, 1941

HARRIES, C. J. AND SHEARER, J.

M. NOORUL HODA—DECREE-HOLDER—APPELLANT

versus

RAI NOHAR PRASAD VARMA—JUDGMENT-DEBTOR—RESPONDENT

Limitation Act (IX of 1908), Art. 179—Order permitting decree-holder to withdraw money awarded to him upon rateable distribution is ministerial order—Application for withdrawal is not step-in-aid—Subsequent execution petition held barred by limitation.

In execution of his decree, a decree-holder realised the decretal amount in part after the sale of certain properties. On February 28, 1936, the Court approved the schedule of rateable distribution and dismissed the execution case on part satisfaction. On March 18, 1936, the decree-holder applied for the withdrawal of the amount lying in Court. Subsequent execution petition was filed on March 18, 1939, and it was urged on behalf of the judgment-debtor that the application was barred by limitation:

Held, that the Court had on February 28, 1936, decided the matter once and for all, and all that was necessary for the decree-holder to do was to comply with the ministerial rule for allowing him to withdraw the money lying in Court. His application on March 18, 1936, and the order passed thereon was a purely ministerial order and was not a judicial order in any sense of the word. The subsequent application being, therefore, presented over three years from the termination of the earlier execution case was barred by limitation. *Sadananda Sarma* v. *Kali Sankar Bajpai* (1), followed.

A. from an order of the District Judge, Shahabad, dated June 1, 1940, affirming that of the Subordinate Judge, Shahabad, dated June 23, 1939

Mr. *M. Azizullah*, for the Appellant.

Messrs. *D. N. Varma* and *Kanhaiyaji*, for the Respondent.

Harries, C. J.—This is a second appeal in an execution matter.

The decree-holder appellant held a decree against the judgment-debtor-respondent, datad July 3, 1931. He put the decree into execution, and on February 10, 1936, the decretal amount was realised in part after the sale of certain properties. On February 28, 1936, the Court approved the schedule of rateable distribution and dismissed the execution case on part satisfaction. On March 18, 1936, the decree-holder applied for the withdrawal of the amount lying in Court.

The present execution petition was filed on March 18, 1939, and it was urged on behalf of the judgment-debtor that the application was barred by limitation. Both the lower Courts have held that the application was barred, hence this second appeal.

There can be no doubt that on February 28, 1936, a Court had finally determined the matter, it had approved of the schedule of rateable distribution, had approved of the actual sum which the decree-holder was entitled to and had approved that such a sum should be paid to the decree-holder out of the amount in Court. The Court treated the matter as at an end, because it dismissed the execution case in part satisfaction. In my view the moment this order was passed the decree-holder was entitled to the amount rateably awarded to him, and all that was necessary for him to do was to comply with the ministerial rule for allowing him to withdraw the money lying in Court. His application on March 18, 1936, and the order passed thereon was a purely ministerial order and was not a judicial order in any sense of the word. The learned Judge had on February 28, 1936, decided the matter once and for all, and all that was necessary was a ministerial order authorizing the subordinates in the office to pay out the money.

In my judgment this case is clearly covered by authority, the most recent case being *Sadananda Sarma* v. *Kali Sankar Bajpai* (1). The facts of that case are very similar to the facts of the present case, and it was held that an order permitting a decree-holder to withdraw moneys awarded to him upon rateable distribution amongst several decree-holders of proceeds realised in execution was in substance as well as in form a ministerial order. The application for withdrawal which the rules of the High Court require to be made to the Chief Ministerial Officer of the Court is not a step taken in aid of execution within the meaning of Art. 179 of Sch. II, of the Lim. Act, although it has finally to be submitted to the Judge in charge of the account department.

The application in the present case as in the Calcutta case for the payment of the money was required to be made under the General Rules and Circular Orders, and in the present case the order of the Judge was necessary before the money could be paid over. The only possible distinction that can be drawn between the two cases is suggested by Counsel on behalf of the

(1) 10 C W N 29.

appellant. He has argued that in the Calcutta case there was in the order dismissing the application in part satisfaction a direction that a certain sum should be paid to the decree-holder. The actual words were :—

"The decree-holder will get Rs. 32-10-3 from the sale proceeds of the execution case No. 103 of 1899."

In the present case the actual order is not before the Court, but the learned District Judge has summarised it by stating that the Court approved the schedule of rateable distribution and dismissed the execution case on part satisfaction. It appears to me that the order in the present case was an order that the decree-holder was to get a certain amount, and that being so there is no difference whatsoever between the present case and the Calcutta case. The Calcutta decision followed a large number of earlier decisions which are mentioned in the judgment in that case. It appears to me that this Court is bound to follow this long series of decisions, and that being so, I would hold that this application was barred by limitation in that it was presented over three years from the termination of the earlier execution case.

In the result, therefore, I would dismiss this appeal with costs.

Shearer, J.—I agree.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 2270 of 1939

December 15, 1939

LEACH, C. J. AND KRISHNASWAMY AYYANGAR, J.

K. DASARADHARAMA REDDY—PETITIONER—(CREDITOR)

versus

Syed RAHIMTULLA HUSSANI AND ANOTHER—PETITIONER No. 1—RESPONDENTS

Madras Debt Conciliation Act (XI of 1936), s. 4 (1)—Application under, by insolvent debtor without permission of Insolvency Court—Jurisdiction of Debt Conciliation Board to entertain it.

An application to a Debt Conciliation Board when the debtor is an insolvent and the Insolvency Court has not given its consent, is in direct contravention of s. 28 (2) of the Prov. Insol. Act and the Board has no jurisdiction to entertain it. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. An insolvency takes away the jurisdiction of the Debt Conciliation Board. 179 Ind. Cas. 47 (1), followed.

C. Misc. P. praying that, in the circumstances stated therein, the High Court will be pleased to issue a *writ of certiorari* calling for records in A. P. P. No. 47 of 1938 on the file of the Debt Conciliation Board, Nellore and to quash the proceedings therein dated December 13, 1938, preferred therefrom to the High Court.

Mr. *P. Chendra Reddy*, for the Petitioner.

Leach, C. J.—The rule *nisi* must be made absolute. The respondent Board has entirely misconceived the law. On March 15, 1935, one Rahimtulla Hussani was adjudicated in the Court of the Subordsnate Judge of Nellore. On June 28, 1938 he filed an application to the respondent Board for settlement of his debts under s. 4 (1) of the Mad. Debt Conciliation Act, 1936. The applicant had not obtained his discharge and is still an insolvent. The petitioner objected to the Board entertaining the application on the ground that the applicant's estate had vested in the Official Receiver. The leave of the Insolvency Court has not been obtained for the filing of the petition and the Official Receiver was not a party to it. Thereupon, the Board directed notice to be issued to the Official Receiver who replied that he could not be made a party to the application as the applicant had not obtained the consent of the Insolvency Court.

The Board overruled the objection and refused to accept the decision of this Court in *Gaddipati Venkayya* v, *Chanduru Sambayya* (1) which was in point. In that case Pandrang Row, J., held that an application to a Debt Conciliation Board when the debtor was an insolvent and the Insolvency Court had not given its consent was in direct contravention of s. 28 (2) of the Prov. Insol. Act. The applicant happened to be a creditor and the respondent Board considered that that made all the difference. This is an opinion which certainly cannot be accepted. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. The debtor's estate has become vested in the Official Receiver and the Prov. Insol Act requires that it shall be administered by the Insolvency Court. An insolvency takes away the jurisdiction of the Debt Conciliation Board.

(1) (1938) M W N 667; 179 Ind. Cas. 47; (1938) 2 M L J 93; 48 L W 246; A I R 1938 Mad. 808; 11 R M 510.

The order of the Board contains other statements which are equally open to objection but it is not necessary to discuss them. It is sufficient to say that in the circumstances the Board had no jurisdiction to accept the petition and the proceedings must be quashed. The petitioner is entitled to his costs and we fix the Advocate's fee at Rs. 50.

N.-S. *Order accordingly.*

OUDH CHIEF COURT

Execution of Decree Appeal No. 41 of 1939
February 25, 1941
AGARWAL, J.

INDERDAWAN SINGH—OBJECTOR—APPELLANT
versus
JAIRAJ SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS

Execution—Payment by judgment-debtor to one of joint decree-holders, if binding on others.

The payment made by the judgment-debtor to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or the other. 103 Ind. Cas. 75 (1), distinguished.

Ex. D. A. against the order of the Civil Judge of Fyzabad, dated April 22, 1939.

Mr. *S. N. Srivastava*, for the Appellant.

Mr. *H. H. Zaidi* holding brief of Mr. *Haider Husain*, for Respondents Nos. 1, 2, 4, 5, 6, 7, 9 and 10.

Judgment.—This is an execution appeal. The respondents Jairaj Singh and others obtained a decree for costs against the appellant Inderdawan Singh and others. Inderdawan Singh preferred an objection under s. 47 of the Civil P. C., that he had paid the entire decretal amount to one of the decree-holders Bhipraj Singh. The lower Court held that the payment made to Bhipraj Singh, even if proved, could not give a discharge in respect of the judgment debt, nor could it amount to the entire satisfaction of the decretal amount. He ordered the decree for the full amount to be executed against the appellant Inderdawan Singh.

It is argued in appeal that Bhipraj Singh, one of the decree-holders, could give a valid discharge in respect of the entire decretal amount and reliance is placed on *Jhakhri Gope* v. *Phagu Mahto*, (A I R 1927 Pat. p. 329) (1). In that case the payment was made to the *karta* of the joint family, and so it was held to be binding on all the other decree-holders who were members of the family. There is one passage in the judgment of Mr. Justice Ross which gives support to the argument of the appellant's Counsel. That passage is

"Under O. XXI, r. 15 any one of joint decree-holders can execute the whole decree. Consequently the judgment-debtor was entitled as the decree was a joint decree, to look for a valid discharge to any one of the joint decree-holders who executed the decree."

This observation must be considered to be made in connection with the facts of that case. If his Lordship meant to hold that in other cases payment made to one joint decree-holder discharges the debt of all the decree-holders I most respectfully dissent from him. I hold that the payment made by the judgment-debtors to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or the other. I agree with the lower Court that the payment made to Bhipraj Singh was not binding on the other decree-holders. It has not been argued before me that Bhipraj Singh represented the entire body of decree-holders. I, however, think that payment, if proved, is binding on Bhipraj Singh himself, if he could give a valid discharge of his own share. These points have not been gone into by the lower Court.

I allow the appeal and direct the lower Court to determine whether the payment has been proved or not, and if proved whether Bhipraj Singh could, under the law, give a valid discharge of his share, and if it comes to the finding that he could, the decree to the extent of his share should be considered satisfied. The payment made to Bhipraj Singh is not binding on other decree-holders, and the appeal against them except the portion allowed above is dismissed. Parties to bear the costs of the appeal.

S. *Appeal dismissed.*

(1) A I R 1927 Pat. 329; 103 Ind. Cas. 75; 8 P L T 708.

PATNA HIGH COURT

Civil Criminal Appeal No. 2 of 1940

October 16, 1940

DHAVLE, J.

SUBA SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 476—Perjury by contradictory statements—Prosecution for, under s. 193, Penal Code (Act XLV of 1860)—Essentials—Duty of Court—Prosecuting Court must state particular contradictions.

The fact that a witness appears to have made contradictory statements at two different stages of a case is not by itself always sufficient to justify his prosecution for perjury. The fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh all the circumstances before embarking on prosecutions for perjury on the basis of contradictions, for, it is in the interests of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate. 164 Ind. Cas. 107 (1), relied on.

It is usual, as it is so very desirable, in cases of perjury by contradictory statements for the prosecuting Court not to leave the matter at large but to specify the assignments of perjury, so that the Magistrate who deals with the case will know precisely what it is for which the accused is being proceeded against.

C. Cr. A. from an order of the Additional Sessions Judge, Gaya, dated July 10, 1940.

Mr. *Rajkishore Prasad*, for the Appellants.

The Assistant Govt. Advocate, for the Crown.

Judgment.—This is an appeal under s. 47t-B, Criminal P. C., against a decision of the Additional Sessions Judge of Gaya to prosecute the three petitioners under s. 193, I. P. C., in respect of contradictory statements made by them in course of a Sessions trial held by him and previously in the course of the commitment proceedings. The learned Judge below observed that mere perusal of the statements alleged to have been made by the petitioners in the two Courts was sufficient to show that false statements had been made, and he declined to allow any *locus poenitentiæ* apparently because of the interval between the depositions in the committing Court and those in the Court of Session. The depositions related to a case of rioting with an offence under s. 304, I. P. C. and the learned Judge said that in cases of so grave a nature it was clearly against the public interest that perjured statements should be allowed to be made with impunity.

It has been repeatedly pointed out how the fact that a witness appears to have made contradictory statements at two different stages of a case is not by itself always sufficient, to justify his prosecution for perjury. Not only do such contradictions frequently arise from such causes as mere carelessness or exaggeration due to the inability of ignorant witnesses to keep apart what they really saw from what they have since been hearing from others about the occurrence, but they may testify to the skill of the cross-examiner in inducing witnesses, notwithstanding previous stories to the contrary to tell the truth at the Sessions trial. The fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh all the circumstances before embarking on prosecutions for perjury on the basis of contradictions, for, as was pointed out in *Pragi* v. *Emperor*, 164 Ind. Cas. 107 (1).

"It is in the interests of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate."

What the learned Sessions Judge, should have considered was the character of the contradictions, and this he has failed to do. Nor has he made it clear for which particular contradictions he considered it necessary to proceed against any of the petitioners. What he did was to mark in red certain passages in the copies of the depositions given to the petitioners in calling upon them to show cause why they should not be prosecuted for perjury in respect of them, and finally to decide to prosecute without any consideration of any specific contradictions. And further, the record does not by any means make it clear what passages exactly from the depositions were so marked. I understand, however, from learned Counsel for the petitioner Suba Singh that the marked passage from this man's deposition before the committing Magistrate was :

"I remember about the last survey. My lands were recorded in the name of my father. Even at the time of survey the disputed land was in possession of Deodhari Singh."

(In the original deposition this passage is marked in blue, like one sentence in the examination-in-chief of another petitioner Kirit Singh in the Court of Session, though several sentences in cross-examination are marked in red.) At the trial, Suba Singh deposed :

"I was present at the time of survey. My father

(1) 164 Ind. Cas. 107; A I R 1936 Oudh 373; 37 Cr. L J 885; 1936 O W N 763; 1936 O L R 429; 9 R. O 34 (2); (1936) Cr. Cas. 982.

got his name recorded. I do not remember the survey. I cannot remember if I told the S. D. O., that I could remember the survey. I cannot remember in whose possession the disputed land was at the time of survey. The survey was about 26-27 years ago. I saw Deodhari in possession 18 to 20 years after the survey. I cannot remember if I deposed before the S. D. O. that Deodhari was in possession at the time of survey. I have had *kosh* since the age of 15-16 years. I cannot remember if I told the S. D. O. that I had seen Deodhari in possession since my *kosh*."

It is impossible to say from the papers before me what contradictions the learned Judge had in mind when he decided to prosecute this petitioner. Some of them are plainly not irreconcilable. The petitioner does however seem to have gone back upon one or two statements about the last survey, but that was an affair of 26 or 27 years ago. It seems to me that those contradictions are moreover, far from material, the important point being that the petitioner still continues to be a witness to Deodhari Singh's possession, though not indeed from the time of the Record of Rights. He was apparently a very young man at the time of the survey, and to expect absolute accuracy from witnesses of this kind in such matters on pain of prosecution for perjury will merely result in preventing them from admitting the truth in the Court of Session. In my opinion, the learned Judge would have been better advised in refraining from prosecuting the petitioner for perjury on the basis of such contradictions.

Coming to Naurangi Singh, this petitioner claimed to be an eye-witness to the riot and homicide (s. 304) and spoke in the commitment proceedings of two of the accused striking Deodhari Singh (the man who lost his life in the affair) with *lathis* and the latter falling down. In his cross-examination before the Magistrate he said that Rambilas Lal, one of the accused, was not on horseback but was on foot. At the trial, however, he said in examination-in-chief that Rambilas was on horse (back), though in cross-examination he had to admit that Deodhari was surrounded by a large number of men at the time of the assault and that therefore he could not see what he (Deodhari) was doing, nor what the people surrounding him were doing, nor whose *lathi* struck Deodhari. This is plainly not a case of correcting misstatements previously made through inadvertence and reverting to the truth. The man had obviously been making conscious improvements upon what he had really seen, and doing so without any excuse that can be seen at the present moment.

Petitioner No. 3, Kirit Singh, spoke in the commitment proceedings of himself and his uncle stopping the rioters from moving the ploughs. In the Court of Session, he denied obstructing any plough himself and said that he could not remember if he had told the Deputy Magistrate that his uncle and himself had obstructed the ploughs. It seems to me that this is precisely the kind of contradiction which ought not to be made the subject of a prosecution for perjury. There is also some contradiction about the *malik's* possession over some plots of land, but I do not think that anything very much turns on it. The gravamen of the proceeding against this petitioner, I take it, is the part that he assigns to the accused Mukhdeo Singh in the assault on himself. In his cross-examination he had admitted before the Magistrate that Mukhdeo Singh "is crippled from both hands." In the Court of Session however he again spoke of Mukhdeo Singh among others assaulting him with *lathis*, and in his cross-examination said "Mukhdeo wielded the *lathi* with both hands. I did not tell the Deputy Magistrate that Mukhdeo is crippled in both hands." The petitioner may or may not have remembered when deposing in the Sessions trial what exactly he had stated in the commitment proceedings, but Mukhdeo's physical disability is not a matter on which a witness of his standing could be mistaken either on one occasion or on the other. The inference is that the part he repeatedly assigned to Mukhdeo is false. The learned Judge below had Mukhdeo before him at the Sessions trial and said in his judgment that the man's hands appeared both to be crippled. No plausible explanation has been offered of how the petitioner first admitted, and afterwards, in substance went back upon, Mukhdeo's disability. There is also no reason to think on present materials that he went back upon his former statements in the interests of truth. He has therefore been rightly considered by the learned Judge below to be a man who ought to be prosecuted.

It is usual, as it is so very desirable, in cases of perjury by contradictory statements for the prosecuting Court not to leave the matter at large as has been done in the present case, but to specify the assignments of perjury, so that the Magistrate who deals with the case will know precisely what it is for which the accused is being

proceeded against. The result is that the prosecution of Suba must be quashed and the complaint, if any, made against him by the learned Additional Sessions Judge withdrawn. The appeal of the other two petitioners is dismissed.

S. *Order accordingly.*

ALLAHABAD HIGH COURT

Second Appeal No. 60 of 1939
August 23, 1940
BRAUND, J.

LACHHMI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
BAHRAICH RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS

Hindu Law—Partition—Separation in status and actual separation of assets, if different—Subsequent agreement between members to effect partition referring to previous agreement to same effect and cancelling it—Subsequent agreement held re-affirmation of intention—Joint family—De facto *manager—Mortgagee dealing with him in good faith, if protected—Manager—Finding that loan was borrowed for family benefit is one of fact—Joint family business—Transaction by manager—When supported—Principles governing transactions relating to joint family business, stated—Creditor, if must show actual benefit—Business mainstay of family, whether* prima facie *evidence that loan borrowed for business was for benefit of family—Practice—Issues—Joint family business—Transactions by manager challenged—Issues to be framed, stated.*

A separation 'in status' may well be different thing from an actual separation of assets. It is possible, that a family may have divided 'in status' notwithstanding that the physical partition of the assets was not yet complete [p 573, col. 2.]

Where a subsequent agreement between the members of a joint Hindu family to effect a partition of family property referred to a prior agreement between them to the same effect and cancelled it:

Held, that the subsequent agreement was a 'reaffirmation' rather than a 'cancellation' of any intention to separate which might be found to be contained in the earlier agreement. [*ibid.*]

A person dealing in good faith with the *de facto* manager of a joint Hindu family is not affected with notice of any defect in his *de jure* title. A mortgagee dealing with a member of a joint Hindu family acting as a *de facto* manager of the family properties until they are actually divided, cannot be defeated on the ground that such member was not *de jure* manager of the family, where there is no proof that mortgagee was aware that proposal for a partition were on foot or that he dealt with the mortgagor otherwise than in good faith and in the belief that he was also the *de jure* manager. [p. 575, col. 1.]

A finding that a loan was barrowed by the manager of the joint Hindu family for the benefit of the family is a finding of fact and when supported by evidence, is binding in second appeal even though the second Appellate Court were disposed to disagree with it.

There are two separate and distinct grounds upon which the power of a manager of a joint Hindu family can be "rightly exercised" either "in a case of need" or "for the benefit of the estate." That these grounds are separate and alternative. Where the question involves the consideration of a transaction relating to a business, the following principles apply: (1) If the business is merely the individual enterprise of any particular member or members of the family as distinct from a 'family' business, no question either of 'need' or 'benefit' can arise and the transaction can never bind the interests of the other members of the family. (2) Where the business is strictly 'ancestral', then either 'need' or 'benefit' to the estate or family will be presumed. (3) Where the business is a 'family' business but is either new or "newish" no such presumption in favour of the mortgagee arises but the question becomes one of fact whether there has been "benefit to the estate or family". In that case, when no actual benefit is positively proved, the mortgagee has to show that he made reasonable enquiries as to the purpose for which the loan was required and was reasonably satisfied that the purpose was beneficial. (4) Finally, where it is shown that the business in question is the 'mainstay' of the family, in the sense that it is all, or practically all, the family has to depend upon, then, the proposed mortgagee is entitled to accept that fact as *prima facie* evidence that a loan taken for the purposes of that business is a transaction for the benefit of the estate or family. He is not required to go further and to enquire into the technical business necessity for raising the money. 155 Ind Cas. 136 (7) and 164 Ind. Cas. 572 (10), relied on. [p. 576, cols 1 & 2; p. 577, col. 1.]

[Case-law referred to.]

In a case challenging transactions relating to joint Hindu family business in which the existence of a joint Hindu family is denied, that, of course, is a distinct issue. Where that is not disputed, the general issues which arise are these:—(1) Whether the business was 'ancestral'. (2) If the business was not 'ancestral' then whether it was a 'family' business at all or whether it was merely an 'individual' business. If it was merely an 'individual' business no question of 'need' or 'benefit' can arise. (3) If the business was not 'ancestral', but was a 'family' business, then: (*a*) Was there any 'actual' benefit or 'actual' need. If no 'actual' benefit is proved, then (*b*) whether the business was the 'mainstay' of the family; and (*c*) whether the mortgagee advanced the money in the *bona fide* belief that it was borrowed for the purpose of the 'need' of the business or for the purpose of the 'benefit of the estate or family', and (*d*) whether such belief, if any, was the result of *bona fide* inquiries which were reasonable and sufficient in the circumstances of the particular case.

S. A. from the decision of the Civil Judge, Basti, dated September 19, 1938.

Mr. *Harnandan Prasad*, for the Appellants.

Mr. *Shiva Prasad Sinha*, for the Respondents.

Judgment.—This suit is a mortgage suit brought upon a mortgage dated January 11, 1936. The mortgage was made by one Bechu Ram, in favour of the plaintiff-respondent, who is the mortgagee. Bechu Ram was himself the first defendant to this suit, but he at no point defended it and suffered a mortgage decree to be passed

against him by default. He died during the pendency of this appeal to which he was not a party but the defendant-respondent, Hari Kishan, is in fact his heir.

The question involved in this appeal is, subject to a preliminary point, the old but troublesome one relating to the power of the manager of a joint Hindu family to dispose of the assets, so as to bind the interests of the members of the family. It is sufficient for the purposes of this appeal for me to say that the remaining defendant-respondents are all members of the family, who dispute their liability, or rather the liability of their shares in the mortgaged property, upon the mortgage. They put forward a two-fold defence, the first disputing that, at the date of the mortgage, the family was a joint Hindu family at all, and the other denying that there was any consideration for the mortgage and, if there was consideration, that it was a transaction for legal necessity or for the benefit of the estate or family. On the face of it, the mortgage of January 11, 1936 purports in the clearest possible terms to have been made by Bechu Ram as the manager of the joint Hindu family, whatever his actual position may have been. It is important, I think, to begin by examining the terms of the mortgage itself. It is a unilateral document and starts with a number of recitals. It recites that Bechu Ram was indebted to various persons upon '*sarkhats*' and promissory notes in respect of which he was being pressed and it asserts that "...the said amount was borrowed for a legal necessity—allowed under the Hindu..." but is silent as to what that 'legal necessity' was. It then goes on to explain that Bechu Ram had incurred obligation in the marriage of a daughter and a niece and asserts again :"...I am the head of the joint Hindu family governed by the Hindu Mitakshara Law." Bechu Ram then proceeds to explain that he has borrowed Rs. 975 for these purposes at a rate of interest of 12 annas per cent. per mensem and again insists upon the character of the loan. He says :

"The above-mentioned debt has been borrowed for a lawful necessity allowed under the Hindu Law and the entire members of the family have been benefited therefrom."

I have set out sufficient of the mortgage to leave no room for doubt, I think, that, whatever the position of the 'family' may actually have been at the date of the mortgage and whatever the character of the transaction really was, there can be no shadow of doubt that Bechu Ram purported to be exercising his power as the manager of the joint family. The matter can be somewhat shortened at this point because it is common ground between the parties and has been conceded, that, out of the aggregate principal sum secured by the mortgage Rs. 975 the sum of Rs. 746-5-0 was borrowed to pay off an outstanding '*sarkhat*' in favour of one Mangru Ram, Rs. 218 were borrowed to pay off a promissory note held by one Jagmohan which represented the expenses of the two marriages referred to in the mortgage and Rs. 10-11-0 represented a fee paid to a Sub-Registrar in connexion with the mortgage. As to the expenses of the marriage, I understand that no resistance is now offered by the defendant-appellants and this appeal has been argued before me on the footing that the sum of Rs. 218 is to be taken to have been raised 'for the benefit of the family.' The real bone of contention is the sum of Rs. 746-5-0 which represents the money borrowed to pay off the '*sarkhat*' held by Mangru Ram. Beyond the bare recitals in the mortgage itself that "the said amount was borrowed for a legal necessity allowed by the Hindu Law," I have been able to find only one solitary piece of evidence as to the actual purpose for which it was borrowed. I have read the whole of the evidence with some care and that is all I can find. It is a passage in the evidence of Mangru Ram the holder, presumably, of the '*sarkhat*' for Rs. 746 in which he says :

"He (Bechu Ram) had gone out to purchase goods and had taken this loan from me for that purpose. The shop of all the brothers was joint. The shop-keeping business of the executant and his brothers had been started by the executant himself. It did not come down to him from his ancestors. My amount has been shown in the *khata* (accounts) of the shop of the executant and his brothers."

That, I think, is the only evidence there is as to the character of the business or the purpose of the loan taken on the '*sarkhat*' from Mangru Ram and paid off out of the proceeds of the mortgage. It is, I think, a remarkable circumstance of this case that Bechu Ram, who was better situated than anyone to explain the transaction, has given no evidence at all. He was alive at the date of the trial before the Munsif. In order that the appeal may be understood, it is necessary now to relate some further facts which are in evidence. The mortgage was executed on January 11, 1936. We then have a document of some importance in the case dated May 1, 1936, Ex. C. It is an agreement to refer to "arbitration"

certain unspecified disputes which had arisen and to submit to the arbitrators the duty to "partition" the joint property. The parties to this instrument were Bechu Ram and his brother, Mannu Ram Kandu, who, it is sufficient to say, was the parent or grandparent of the other defendant members of the joint family who were not descended from Bechu Ram himself. Exhibit C describes itself as being: ". . . . for settlement of the dispute and for partition of the shop, property, etc' as between us the executants . . ." It then contains what is, in effect, a recital that some nine or ten months previously—obviously, prior to the execution of the mortgage:

".....We appointed Sheo Balak Ram Sahu Kandu, Mallu Ram Sahu Kandu and Ram Kishan Ram Sahu Kalwar as arbitrators and Ram Deo as umpire and stipulated that any partitton, with respect to the property, etc. and shop, honestly effected by them would be admitted and accepted by us. But a period of nine or ten months has passed and the umpire or the arbitrators have not so far given any decision. We have now cancelled and invalidated the arbitration agreement aforesaid. We are now executing another arbitration agreement ....."

They then proceed to appoint a number of new arbitrators and say that:

"...Whatever they honestly effect would at all events, be admitted and accepted by us. None of the executants shall have any objection of any sort to it..."

The previous "arbitration agreement" of nine or ten months earlier is not itself in evidence. But it has not been argued in either of the Courts below or before me that the fact of its existence and its tenor as recited in Ex. C has not been strictly proved and this appeal has proceeded before me on the footing that there was an agreement to the effect recited. I shall therefore accept that position. It is common ground that the property covered by Ex. C includes the mortgaged property and that, in due course it was actually partitioned in pursuance of the agreement. When the case came before the Additional Munsif of Basti he framed two issues, the first, whether 'the mortgage deed in suit was executed for consideration and legal necessity," and the second, whether Bechu Ram and the other defendants were at the date of the mortgage joint or separate. The second of these two issues was, at any rate, a question of fact. He dealt with the second issue first and concluded that at the time the mortgage was executed the family was still joint. He considered the recital to which I have drawn attention in Ex. C as to the previous agreement of nine or ten months earlier and discarded it as "of no importance" on the ground that it was subsequently "superseded" by Ex. C and that the parties had "mutually agreed to cancel it." Had it been material for me to consider the point, I am not sure that I could have agreed with his way of putting it. It is possible that another way of looking at Ex. C is that it expresses a 'reaffirmation" rather than a 'cancellation' of any intention to separate which might be found to be contained in the earlier agreement. However that may be, the Munsif did decide that at the date of the mortgage the family was still joint. He proceeded therefore to consider the other issue and he came to the following three conclusions of fact: First, that the business was not an 'ancestral' business; secondly, no case of "necessity for the loan" had been "strictly proved" nor that it was "actually required for the family business" and, thirdly, that it had not even been shown that the money was actually spent on the business. The Munsif therefore dismissed the suit.

On first appeal to the Civil Judge of Basti, he too considered first the question whether the family was still a joint Hindu family at the date of the mortgage and, relying upon a view that, if the previous agreement had really effected a "partition of the assets of the famly" prior to May 1, 1936, there would have been no need for the subsequent agreement of that date and also upon certain general statements made by the witnesses that the family were still joint in January 1936, he came to the same conclusion as had been reached by the Munsif, that the family continued to be a joint Hindu family. Again I am not altogether sure that I should agree with the learned Judge's reasoning, as it seems to me, upon the authorities, that a separation 'in status' may well be a different thing from an actual separation of assets. It is possible, I think, that a family may have divided 'in status' notwithstanding that the physical partition of the assets was not yet complete. If separation depends on 'intention,' as most of the authorities appear to agree, that is an arguable view. The learned Judge then went on to discuss the other issue. Here he took a different view of the facts from the Munsif. He agreed that the business was not an ancestral business, but came to the conclusion that:

"In my opinion, the plaintiff is entitled to recover all the items of the mortgage bond with the exception of Rs. 10-11-0 because he has succeeded in proving that they were borrowed either for legal necessity or for the benefit of family members..... ....."

He found further, as a fact, that the firm

was "the mainstay of the family" and that the family had no other business than this. To put it briefly, he found as facts: (*a*) that the money borrowed on the '*sarkhat*' was borrowed and used for the purposes of the business and (*b*) that it was a transaction for the benefit of the family. There was evidence before the learned Judge to support such a finding. I have already drawn attention to that passage in Mangru Ram's evidence in which he says that the money borrowed from him was shown in the firm's books. There is evidence that this was the only business the family had. In conformity with these conclusions, the learned Civil Judge gave the plaintiff a mortgage decree in respect of the full amount claimed by him, less only the sum of Rs. 10-11-0.

That is the condition in which the appeal comes before me in second appeal. The first point taken by the defendant-appellants in this appeal is that both the Munsif and the learned Civil Judge have wholly misconceived the legal effect of the former of the two agreements for arbitration. I have already said that the existence and contents of this document have been accepted throughout and here. An able argument has been addressed to me by the learned Advacate appearing for the appellants to the effect that, once there is found a definite and unambiguous indication by a member or members of a joint Hindu family of an intention to separate and to enjoy his or their share or shares in severalty, then from that moment a severance 'in status' takes place quite independently of the physical division of the joint property which may take place later. It would necessarily follow as the logical outcome of this argument that, once the severance in status has taken place, the powers of the manager would lapse and not less so in a case, such as this one, in which the manager himself is one of the persons severing his connection with the joint family. I think there may be great force in this argument that 'intention is the real test': *See Syed Kasam* v. *Jorawar Singh* (1), *Balmakund Lal* v. *Sohano Kueri* (2) at p. 173 and *Harkishan Singh* v. *Partap Singh* (3). Interesting as this question is, however, I do not feel it necessary to determine it in this appeal because the point, as it arises here, can, in my opinion, be effectively disposed of on another ground altogether.

The plaintiff-respondent has contended that the question is not open at all in second appeal, inasmuch as the finding that the joint Hindu family was in existence at the date of the mortgage is a pure finding of fact. He relies upon the well-known observations of the Judicial Committee of the Privy Council in *Durga Chowdharani* v. *Jewahir Singh* (4), in which it is said that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, "however gross or inexcusable the error may seems to be." I need only say as to this that, had the matter been material to the decision of this appeal, I should have found it difficult to agree with the appellant's contention that the Munsif and the learned Judge in the Courts below had completely misapprehended the legal effect of the proved fact of the previous agreement having challenged an erroneous finding of fact at all. The error alleged is, I think, not one in the finding of the facts, but in the appreciation of the legal consequences of the facts which have been found and remain unchallenged. This however is again only of academic interest in view of the conclusion I have reached and I only mention it in deference to the arguments which have been addressed to me. For the most complete answer to this contention of the appellants we have, I think, to go back to the case which has always been accepted as the *locus classicus* in questions of this nature and of which a Bench of two Judges of this Court once found it necessary to say that we are "bound and wholly bound" by it: *Hunooman Pershad Pandey* v. *Bibooee Mundraj Koonweree* (5). Though occasions have arisen from time to time to explain the classic passage at the end of Knight Bruce, L. J's. judgment in that case, no one has yet, I think, improved upon it. The particular passage of the judgment however which is material to the point with which I am now dealing is that which is to be found at p. 412*;

"Upon the third point, it is to be observed that under the Hindu Law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for

(1) 49 I A 358; 68 Ind. Cas. 573; A I R 1922 P C 353; 31 M L T 46; 16 L W 223; 18 N L R 127; 43 M L J 676; 21 A L J 57; 25 Bom. L R 1; 37 C L J 73; 27 C W N 179; 50 C 84 (P C).

(2) 8 Pat 153 (173); 119 Ind. Cas 817; A I R 1929 Pat. 164; 10 P L T 259; Ind Rul. (1929) Pat 641.

(3) A I R 1938 P C 189; 175 Ind. Cas 332; 1938 O L R 301; 1938 A L R 519; 11 R P C 14; 4 B R 688; 42 C W N 1021; 8 L W 66; (1938) M W N 766; (1938) A L J 763; 19 P L T 591; (1938) 2 M L J 234; 1938 O W N 727; 40 Bom. L R 1068; 32 S L R 798 (P C).

(4) 18 C 23; 17 I A 122; 5 Sar. 560 (P C).

(5) 6 M I A 393; 18 W R 81; 2 Suther 29; 1 Sar. 552 (P C).

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the purpose of saving the estate or for the benefit of the estate is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* . . . ."

In my judgment, this completely disposes, in the present circumstances, of the appellants' first contention. Whatever may have been the legal effect of the first agreement to separate upon the status *inter se* of the members of the joint Hindu family of which Bechu Ram was up to that time admittedly both the *de jure* and the *de facto* manager, it is plain that no actual or *de facto* dissolution of the family, nor any distribution of the family property, took place until long after the mortgage of January 11, 1936. Whatever his *de jure* position may have been, there is nothing whatever in the evidence to suggest that he did not remain the *de facto* manager of all the family properties until they were actually divided. Nor is there any suggestion made that the mortgagee was aware even that proposals for a separation were on foot or that he dealt with Bechu Ram who was the ostensible and *de facto* manager for the family, otherwise than in good faith and in the belief that he was also the *de jure* manager. It is a salutary principle and, I think, a principle which in view of the observations of Knight-Bruce, L. J., admits of no doubt that a person dealing in good faith with the *de facto* manager of a joint Hindu family should not be affected with notice of any defect in his *de jure* title for otherwise dealings with such a family would become almost impossible. For these reasons, I think that the appellants contention that the family was not a joint Hindu family at the date of the mortgage even if that contention is well-founded does not assist them in this appeal. That brings us therefore to the second part of the case—whether the mortgage being one made by the manager of a joint Hindu family, it was within his power to make it.

It will be convenient to be reminded of the few material facts which have been found and are not now open to challenge. First, the business for which the original loan on the "*sarkhat*" was taken was not an "ancestral" business. It was a 'new' business in the sense that it had not descended from the ancestors of the present members of the family, but had been started by Bechu Ram and his brother or brothers within a comparatively recent period. Secondly, the business was the "mainstay" of the family which had no other business to look to for its support. Thirdly, it has been found as a fact (by the learned Civil Judge) that the money borrowed on the "*sarkhat*" was actually received by the firm and credited in its books and that it was borrowed and received for the purposes of the firm's business. Those, I think, are the established facts with which we have to deal and to which we have to apply the law.

The principles to be applied in cases in which dispositions by managers of joint Hindu families are called in question have been the subject of a long series of judicial decisions both of the Judicial Committee of the Privy Council and of this and other High Courts in India. Almost without exception they have taken as their point of departure the short passage at the end of the judgment of Knight-Bruce, L. J., in *Hunooman Pershad Pandey* v. *Babooee Mundraj Koonweree* (5) to which I have already referred :

"The power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law a limited and qualified power; *see Jagat Narain* v. *Mathura Das* (6). It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case unless he is shown to have acted *mala fide* will not be affected though it be shown that with better management the estate might have been kept free from debts. Their Lordships think that the lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and they do not think that under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future as respects the actual application, and the lender can rarely have unless he enters on the management the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted

(6) 26 A L J 841; 116 Ind. Cas. 484; A I R 1928 All. 454; 50 A 969 (F B).

honestly and with due caution, but is himself deceived."

It is clear from this that there are two separate and distinct grounds upon which the power of a manager of a joint Hindu family can be "rightly exercised" either "in a case of need" or "for the benefit of the estate." That these grounds are separate and alternative grounds has been emphasized time and again since then by the Courts. In 1926 *Jagat Narain* v. *Mathura Das* (6) at p. 843* two Judges of this Court said in reference to Knight-Bruce, L. J.'s judgment:

"Here we have what is to us a quite unambiguous direction. The former to charge the estate can only arise 'in a case of need' or 'for the benefit of the estate'. . . . . We have emphasized ourselves by placing the word 'or' in italics. . . "

And again in a recent Full Bench case of the Court *Ram Nath* v. *Chiranji Lal* (7) at p. 186 it has been emphasized again. The late Sir Shah Sulaiman, C. J. says:

"It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition, thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time of benefit to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family."

The distinction therefore between "a case of need" and 'benefit to the estate" is a well recognized one and has an important practical application. The next thing which, in my view, it is necessary to understand is the rule which has been repeatedly laid down that, where a transaction is defended on the ground of 'benefit to the estate" or of "benefit to the family," the mortgagee must show in a case in which he is not prepared to show any actual benefit that he made reasonable enquiries. That follows from ordinary equitable principles of long standing. This rule also has been repeatedly recognized by the authorities. It does not mean that the mortgagee is bound to prove 'actual' benefit. He may, of course, if he can or it may appear from other sources. It means only that the law allows a person who is dealing with a manager of a joint Hindu family to maintain a transaction, without showing positive benefit, if he can show that he has made "reasonable" inquiries as to the purpose of the loans and has satisfied himself that the purpose was beneficial and has not been indifferent to whether the manager is committing a fraud on the family or not. In *Ram Krishna Murarji Ratan Chand* (8) on appeal from this High Court, their Lordships have referred with approval to the statement of the law in this respect contained in *Bunooman Pershad Panday* v. *Babooee Mundraj Koonweree* (5) in which it is said:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate."

See too *Benares Bank Ld.* v. *Hari Narain* (9) at p. 570.

With the assistance of the long line of authorities which are available, I think that certain clear principles have emerged. The transaction in question may be supported either on the ground of "need", or, as it is often called or miscalled, "legal necessity" or on the ground of "benefit of the estate or family." Where the question involves the consideration of a transaction relating to a business, the following principles can I think, be deduced from the authorities:

(1) If the business is merely the individual enterprise of any particular member or members of the family as distinct from a 'family' business, no question either of 'need' or 'benefit' can arise and the transaction can never bind the interests of the other members of the family.

(2) Where the business is strictly 'ancestral', then either 'need' or 'benefit' to the estate or family will be presumed: *see Ram Nath* v *Chiranji Lal* (7) per Sulaiman, C. J. at p. 183*.

(3) Where the business is a 'family' business but is either new or "newish" [*see*

(7) (1935) A L J 177 (186); 155 Ind. Cas. 136; A I R 1935 All. 221; 57 A 605; 7 R A 880 (F B).

(8) 53 A 190; 132 Ind. Cas. 613; A I R 1931 P C 136; 58 I A 173; (1931) A L J 458; 53 C L J 390. 33 Bom. L R 988; 35 C W N 841; Ind. Rul (1931) P C 197; (1931) M W N 733; 34 L W 175; 61 M L J 665 (P C).

(9) 54 A 564 (570); 137 Ind. Cas. 781; A I R 1932 P C 182; 59 I A 300; Ind. Rul. (1932) P C 220, 36 C W N 826; 34 Bom. L R 1079; 55 C L J 583; 9 O W N 599; (1932) A L J 714; 36 L W 56; 63 M L J 92; (1932) M W N 788; 13 P L T 491 (P C).

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*Page of (1935) A. L. J.—[*Ed.*]

Ram Prasad v. *Bishambhar Nath* (10)]; no such presumption in favour of the mortgagee arises but the question becomes one of fact whether there has been "benefit to the estate or family." In that case, when no actual benefit is positively proved, the mortgagee has to show that he made reasonable enquiries as to the purpose for which the loan was required and was reasonably satisfied that the purpose was beneficial. What are, in any given case, 'reasonable enquiries,' must, I conceive, vary but I do not think that a mortgagee can be required to do more than to satisfy himself that the manager is acting *bona fide* and he is not, I think, required to prove the actual application of the money borrowed, provided he has lent it in good faith. He could not, I think, be asked to scrutinise a judgment of the manager or to substitute a judgment of his own for any *bona fide* judgment of the manager upon a question of what are the technical needs of the business, and

(4) Finally, where it is shown that the business in question is the 'mainstay' of the family, in the sense that it is all, or practically all, the family has to depend upon, then, I think, the authorities justify the conclusion that the proposed mortgagee is entitled to accept that fact as *prima facie* evidence that a loan taken for the purposes of that business is a transaction for the benefit of the estate or family. I do not think he can be required to go further and to enquire into the technical business necessity for raising the money. In these observations, I have confined myself, of course, to those transactions which relate to money raised in relation to a business and have not considered those transactions which relate to the raising of money in connection with specific property as for instance to rebuild or repair a particular house which are in the nature of cases of 'salvage' and which stand upon a different, and more obvious, footing.

Applying these principles to the present case, I think that the judgment of the learned Civil Judge is conclusive. He has held, and held as a fact that the money borrowed on the *'sarkhat'* from Mangru Ram was to use his own words "borrowed for the benefit of the family." That to my mind is the end of the matter. It is the central fact in the whole case and the finding upon it is one which there was evidence to support. It is, I think, binding on me in the second appeal, even if I had been disposed to disagree with it. The learned Judge has not, I think, in any way misled himself upon the law. He had already held that the family was in existence, as a joint Hindu family and I agree with him to the extent of thinking, at any rate, that the mortgagee was, in the circumstances, entitled to treat Bechu Ram as both the *de facto* and *de jure* manager of a subsisting joint Hindu family. He has found that the money was borrowed for the business, which was a 'family' business and not an 'individual' business. He has found that it reached the business. And he has found that that business was the 'mainstay' of the family. I am bound to accept it, therefore that the loan in question was for the 'benefit of the family' that is an 'actual' benefit to the family. No question of enquiring on the part of the mortgagee can therefore arise, as when the mortgagee accepts the onus of proving, and does prove, 'actual' benefit, it does not matter whether he inquired or not. There was benefit and that is the end of it. I do not say for a moment that he was legally required to go so far as to have proved actual benefit. It would have been, I think, quite enough, if he had said 'I dealt with the borrower in good faith, believing that the money was required for the needs of the family and my belief was based upon proper and *bona fide* inquiries made by me. I am not concerned with whether there was actual benefit or not.'

In my judgment, therefore, for the reasons I have expressed, the plaintiff-respondent in this case is entitled to the mortgage decree which he succeeded in obtaining in the Court of the Civil Judge and the appeal must be dismissed The question of the Rs. 10-11-0 has not been pressed before me nor has there been any controversy as to the sum which was raised to defray the marriage expenses of Becnu Ram's daughter and niece. The appeal must be dismissed with costs.

I desire, before parting with the case, to indicate very briefly, and in the hope that I may assist Subordinate Judges who have to try such cases as these, what the general issues, in my opinion, are which ought, subject to the requirements of each particular case, to be framed in suits of this kind. In a case, such as the present, in which the existence of a joint Hindu family is denied, that, of course, is a distinct issue. Where that is not disputed, the general issues which appear to me to arise are these :—

(10) (1936) A L J 1051; 164 Ind. Cas. 572; A I R 1936 All. 607; 1936 A L R 764; 9 R A 168.

(1) Whether the business was 'ancestral' because, if it was, a presumption may be drawn in favour of the mortgagee that the money he lent was for the 'needs' of the business or for the 'benefit of the estate'.

(2) If the business was not 'ancestral', then whether it was a 'family' business at all or whether it was merely an 'individual' business. If it was merely an 'individual' business no question of 'need' or 'benefit' can arise.

(3) If the business was not 'ancestral', but was a 'family' business, then: (a). Was there any 'actual' benefit or 'actual' need, bearing in mind that the mortgagee is under no legal obligation to prove this, if he acted *bona fide* and made reasonable inquiries. If no 'actual' benefit is proved, then, (b) whether the business was the 'mainstay' of the family; and (c) whether the mortgagee advanced the money in the *bona fide* belief that it was borrowed for the purpose of the 'needs' of the business or for the purpose of the 'benefit of the estate or family', and (d) whether such belief, if any, was the result of *bona fide* inquiries which were reasonable and sufficient in the circumstances of the particular case, bearing in mind that the mortgagee is in my opinion, under no obligation to substitute any technical judgment of his own for that of the manager of the business in any matter relating to the needs of that business. If either of the last two issues are answered in the negative, then, I think, the case is concluded against the mortgagee.

I have been asked for leave to appeal under the Letters Patent. In my view, this case raises no new, or doubtful, question of law nor are the authorities governing it either scarce or conflicting. Indeed, they set out the principles with singular uniformity. This is not, in my view, a case in which an appeal under the Letters Patent is justified.

S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 95 of 1934
March 6, 1940

R. C. MITTER AND ROXBURGH, JJ.

MIDNAPORE ZAMINDARY CO., LTD.—PLAINTIFF—APPELLANT

versus

Raja BIJOY SINGH DUDHURIA AND OTHERS—DEFENDANTS—RESPONDENTS.

River—Navigable river—Property in bed—Alluvion and diluvion — Reformation in situ **— Zamindar's *admission in road cess return that certain land is reformation* in situ *lands comprised in his* touzi, *if conclusive as to nature of that land—Admission made with view to avoid assessment to further tax — Effect of admission—Accretion—Long possession—Inference as to title — Whether proof that title rested on reformation* in situ *and not on accretion — Bengal Alluvion and Diluvion Regulation (XI of* 1825), *s.* 4—*Accretions of land to* patni *tenure, whether become increment thereto under s.* 4—*Possession of increment* —Patnidar's *right to—Absence of offer by* patnidar *to pay additional rent for increment cannot deprive him of right conferred by s.* 4 — *Deed—Construction* —Dastur rewaz — *Remark column — Non-mention of river for description of boundaries of* taraf—*Whether proves absence of river in* taraf — *Evidence Act (I of* 1872), *ss* 43, 58—*Privy Council decision — Finding showing that village was fixed place—Decision not* inter partes—*Finding, if evidence —No admission by defendant in written statement or at hearing—Plaintiff is not relieved of producing best material in support of his case—Mesne profits—Suit for possession and mesne profits — Claim for mesne profits neither tentatively valued nor court-fee paid—Prayer for amendment of plaint by valuation of claim and payment of court-fee can be granted at any stage of suit —Practice—Withdrawal of application—Courts' duty —Words and Phrases*—"Damosh Koha", *meaning explained*—"Taraf" *or* 'pergunnah", *whether signify co-terminous villages or compact area of land.***

The property in the river bed of a navigable river is in the Crown. [p. 581, col. 2.]

Where a *zemindar* makes an admission in the road cess return that a certain land is reformation in *situ* of lands comprised in his *tauzi*, the admission is almost conclusive as to the nature of that land. It has great weight unless neither explained away or shown to be wrong, but the weight of the admission is nullified, where it is proved that it was made with a view to avoid assessment to further cess. [p. 585, col. 2]

Long possession would raise the inference of title to possession, but it would afford no basis for the further inference that that title rested on reformation *in situ* and not on accretion. *Forbes* v. *Meer Mahamed Hossein* (9), *Secretary of State* v *Durbijoy Singh* (10), 1 Ind. Cas. 182 (11) and 38 Ind Cas. 379 (12), distinguished. [p. 587, col. 2.]

Accretions of land to a *patni* tenure become an increment to the tenure under s. 4, Ben. Alluvion and Diluvion Regulation. The *patnidar* has the right to possess those lands and the *zemindars*, have no right to possess in *khas*. The absence of an offer by the *patnidars* to pay additional rent for the increment to their tenure cannot, take away the rights conferred on them by s. 4. There can be no question of forfeiture where the *patnidars* have never denied that the lands were accretions. [p. 588, col. 2; p. 589, col. 1.]

A finding in a Privy Council decision cannot be relied on by a party to a suit for showing that the village in question was a fixed place, where the judgment was not *inter partes*.

The plaintiff is not relieved of producing the best materials in support of his case, where no admission has been made by the defendants either in their written statement or at the hearing. [p. 584, col. 2.]

The non-mention of the river in the remark column of a *dastur rewaz* which is only meant to contain a description of the boundaries, does not necessarily lead to the conclusion that the river was not within *taraf*. [p. 583, col. 1.]

In a suit for possession and mesne profits the plaint ought to give a tentative valuation for the claim for mesne profits and on that valuation court-fees ought to be paid. But the Court cannot dismiss

the prayer for mesne profits without giving an opportunity to the plaintiff to value the relief and to pay court-fee thereon. A prayer for valuing the claim for mesne profits separately and for payment of deficit court-fee thereon ought to be allowed at any stage of the suit. [p. 589, col. 2.]

The Court cannot take away the right of a party to withdraw any application made by him on which no orders had been made at the time.

The word '*damosh*' means a *beel* or inland pool of shallow water being a part of the deserted bed of a river. Hence the words "*damosh koha* etc." cannot include the bed of a large flowing navigable river. [p. 581, col. 2.]

The word *taraf* does not signify a collection of co-terminous villages, villages forming a compact block of land. The word means a sub-division of a *pergunah* including several villages A *pergunah* which usually covers a very large tract and means a large local division of the Muhammadan times, which corresponds in idea, though not in extent, with a district of modern times, does not convey the idea of a compact area of land with no public and navigable river cutting through it. *Rani Hemanta Kumari Debi* v. *Secretary of State* (1), relied on. [p. 582, col. 2.]

A. against the decree of the Additional Sub-Judge, Madia at Krishnagar, dated October 23, 1933.

Messrs *U. N. Sen Gupta, Manmantha Nath Das Gupta* and *Birendra N. Sen Gupta* for Mr. *A. C. Mukherjee*, for the Appellant.

Messrs. *Pramatha Nath Mitter* and *Samarendra Krishna Deb*, for the Respondents.

Mr. *Amiruddin Ahmad*, for the Deputy Registrar.

Judgment.—Touzi No. 523 of the Murshidabad Collectorate, which comprised Pergunah Goas, was permanently settled in 1793 on the basis of the Decennial Settlement of 1789. It consisted of twelve Huddas, each Hudda being sub-divided into several Tarafs of collection of villages. We are in this appeal concerned with village Udaynagore in Taraf Udaynagore which is in Hudda Ikuri. In 1799 Raja Debi Singh purchased the said *touzi* or *zemindary* at a sale for recovery of arrears of revenue. The *zemindary* ultimately devolved by succession on his descendant Raja Gopal Singh, Krishna Chandra Singh and Ram Chandra Singh. At a partition in or about the year 1830, Ram Chandra Singh got in his eight annas odd share six out of the twelve Huddas, including Hudda Ikuri. On April 8, 1835 he granted *patni taluks* of two *mehals*, to one Radhabullav Mukhopadhya (Ex. 6 *b* (1), B 148). The first *mehal*, which comprised Taraf Udaynagore with some exceptions, was let out at an annual *patni* rent of Rs. 1,852-0-11 (Sicca = Rs. 1,975-8-1 in company's coin) and the second *mehal* called Hat Jelangi at an annual *patni* rent of Rs. 1,201 (Sicca—Rs. 1,281-1-0 in company's coin). Radhabullav Mukhopadhya sold his *patni* interest on November 22, 1839 to John & Robert Watson (Messrs. Robert Watson & Co.) (Ex. 7-B 144). Robert Watson & Co in turn sold the same along with other properties to Messrs. Robert Watson & Co. Ltd., on May 26, 1890 (Ex. 27, B 272). The latter conveyed the same to one Crawford on November 29, 1902 (Ex. 27 (*a*), B 379) who in turn sold the same to the Midnapore Zemindary Co., Ltd., the plaintiff in the suit, on December 3, 1906 (Ex. 27 (*b*), B 408). The *zamindary* interest in the aforesaid six Huddas of Touzi No. 523 devolved in the following manner. From Ram Chandra Singh it passed to Robert Watson, James Dalrymple and John Watson Laidley and then to James Dalrymple and John Watson Laidley (Ex. 26, C 838). The successors-in-interest of James Dalrymple and John Watson Laidley sold the same to Rai Bishunchand and Rai Budh Singh Dhudhuria, the predecessors of the contesting defendants, on June 22, 1893 (Ex. 27 (*c*); B 285). For the purpose of deciding some of the controversies we will have to consider in some detail some of the aforesaid conveyances. In 1850-54 there was a revenue survey of villages Udaynagore and the other adjoining villages. The revenue survey map is Ex. 28 (19) [Map No. 22, M (1)]. The position of the following river Padma is shown in that map. In 1867-68 the revenue authorities again surveyed the locality and prepared a map, Ex. 28 (12) (Map No. 15-M (1)]. This map and other maps prepared at this survey will hereafter be called the Diara maps of 1867-68 and the proceedings for assessment of revenue based on the said survey of 1867-68 as the Diara proceedings of 1869.

The Diara maps of 1867-68 indicated that a good portion of what had been shown in the revenue survey of 1850-54 to be dry lands and appertaining to Touzi No. 523 had gone under the river bed, and a large block of land had emerged out of bed of the river as it flowed in 1850-54, the river having since then moved further east at the place. Proceedings were accordingly taken by the Govt. to assess to revenue what appeared to be "added land" on a comparison of the Diara survey of 1867-68 with revenue survey maps of 1850-54. Objections were filed by Messrs. Robert Watson & Co., as *patnidars* and by Sreenarayan and Harimohan Bagchis, *patnidars* of two other *Mouzas*, Poreshpore and Ramnarayanpore also appertaining to Touzi No. 523. It is unnecessary to detail the nature of those

objections which mainly related to the correctness of the boundaries between the different *mouzas* of the said estate as laid down by the Diara Survey *Amin*. Those objections were considered by the Survey Deputy Collector, Mr. Bhagaban Chandra Sen, who recorded his findings in his Robokari of August 26, 1869 (Ex. F; B 191). He gave effect to some of the objections, and directed sketch maps to be prepared of the lands which had been found by him to be an increase of area to the *mouzas* of Touzi No. 523 by the action of the river. He further directed, if the Superintendent of Survey agreed with his views, those maps to be sent to the survey office for calculating the areas.

This was done and in the *thakbust* statement, which has embodied the modifications made in the said *robokary*, the details about the increase and the decrease of area of the several *mouzas* on account of fluvial action since the revenue survey of 1850-54 are noted (Ex. P-4; B 158-163; Ex. P 5; B 164-183). The diluvion was to the extent of 21,087 *bighas*, 8 *cottas*, 14 *chittaks* in villages Atarpara, Chowmadia, Temada, Udaynagore Diara (villages appertaining to Taraf Udaynagore) and other villages. Exhibit L (1); F 2009-2011 and what was treated as accretion came up to 28,388 *bighas*, 7 *cottas* 10 *chittaks*. Out of this area, an area of 22,111 *bighas* 19 *cottas* was treated as accretion to *Mouza* Udaynagore as shown in the revenue survey map of 1850-54 [Ex 28 (19) Map No. 22 M (1)] and marked therein as "Oodaynagore 378". We will hereafter call this Udaynagore either as revenue survey Udaynagore or *asli* Udaynagore and the aforesaid area of 22,111 *bighhs*, 19 *cottas* which was treated by the Diara Officers as accretion either as Char Udaynagore or Udaynagore, Chak No. 1, the latter being the designation given to it in the Diara survey map, Ex. 28 (12) [Map No. 15 M (1)]. The said area of 28,388 *bighas*, 7 *cottas*, 10 *chittaks* was assessed to a revenue of Rs. 3,177-10-0 (Ex. L (2); F 2014-2018) from the year 1870. It was formed into a Touzi No. 512 of the Murshidabad Collectorate, and settled permanently with James Dalrymple and John Watson Laidley under the provisions of Act IX of 1847, (Ex. N (1), *kabuliat* dated August 16, 1870; B 197-200).

We may however point out, though the matter is not of great importance, that the whole of the area, which was treated by the Diara Officers as accretion to *asli* Udaynagore on the basis of the revenue survey map of 1850-54 was not so, for a good slice of land on the eastern portion of Udaynagore, Chak No. 1 represented the reformation *in situ* of the western portion of villages Atarpara, Chowmadia and Temadia as depicted in the revenue survey maps of 1850-1854. This is made clear by Mr. R. C. Sen's map [Ex. 28 (25), Map No. 28 M (1)] where the position of the revenue survey river of 1840-54 of the Diara survey river of 1867-68 and the limits of Udaynagore Chak No. 1, which was included in Touzi No. 512, are shown, James Dalrymple and John Watson Laidley obtained on their application an abatement of revenue to the extent of Rs. 4,050-2-3 on account of diluvion of the aforesaid area of land of 21,087 odd *bighas* (Ex. L (1); F 2009 and Ex. L (3) F 2010). In 1915-16 the survey and settlement proceedings under Chap. X, Ben. Ten. Act were commenced and the Records of Rights were finally published, some in 1920 and some in 1921. The lands which were found as accreted lands in the Diara proceedings of 1869 and which were then above water were recorded under Touzi No. 512 and the plaintiffs-appellants recorded as being in possession as *patnidar* under the principal defendants respondents, the Dhudhurias. Just after the final publication of the Record of Rights probably in the season 1921-22, the lands in suit together with other lands emerged out of the river. Some time after their formation, proceedings under s. 145, Criminal P. C., were started on May 6, 1926 with Raja Bejoy Singh Dhudhuria (one of the defendants' predecessor-in-interest) as first party and the Midnapore Zemindary Co, Ltd., as the second party.

The subject-matter of those proceedings was a block of 5000 *bighas* of land marked with the letters *ka*, *kha*, *ga*, *gha*, *uma*, *chà* and *chha* in a map prepared by Mr. O'Donel in the season 1924-25 (Ex. 13, C 604). This map is a part of the plaint and has been printed in the volume which we have marked as M. Those proceedings terminated in favour of the first party, the Raja, on September 12, 1927, (Ex. 12; C-617). On September 8, 1928, the Midnapore Zemindary Co., Ltd. filed the suit against Raja Bejoy Singh Dhudhuria and his co-sharers and their tenants for recovery of possession of the said block of 5000 *bighas* of land on declaration of its *patni* right and for mesne profits. The said block of land occupies a portion of the bed of the flowing river Padma as at the time of the revenue survey of the year 1850-54. The Subordinate Judge by his judgment and decree dated

October 23, 1933. has dismissed the suit. The Midnapore Zemindary Co., Ltd., have accordingly filed this appeal.

As, in our judgment, the learned Subordinate Judge has gone beyond the pleadings and has dismissed the plaintiff's case on a defence not taken in the written statement and, as the learned Advocate for the appellants made persistent attempts to go beyond the case made in the plaint, it is necessary here to summarise the cases of the parties as made in the pleadings. Three cases are made in the plaint. The first is that the lands in suit are reformations *in situ* of village Udaynagore as it had been permanently settled in 1793 along with the other villages of the 12 Huddas of Pergunnah Goas. This case which is definitely made in para. 21 of the plaint is rested on the broad foundation laid in the preceding paragraphs of the plaint. Therein it is stated that Touzi No. 523, the permanently settled estate, comprised twelve Huddas which comprised several compact blocks of land called Tarafs, each Taraf being made up of several co-terminous villages, para. 2. Taraf Udaynagore in Hudda Ikuri was a Taraf which included co-terminous villages, Udaynagore, Temadia, Chowmadia, etc., para. 6 from before the permanent settlement, para. 8. At the time of the Decennial Settlement and Permanent Settlement the flowing river Padma was not within Touzi No. 523 at all (para. 4) but some time before the revenue survey of 1850-54, the river came inside the *touzi*, passed through the villages of Taraf Udaynagore and separated them on both its banks, para. 8. Soon thereafter the river Padma receded and large tracts of land reformed *in situ* of the villages Udaynagore, etc. Those lands were assessed to revenue by the Diara authorities in 1867-68 on an erroneous view of law and formed into a separate estate. Touzi No. 512 thus illegally and erroneously created was settled with the then proprietors of Touzi No. 523. In fact the whole of Touzi No. 512 represented the reformations *in situ* of the lands of Touzi No. 523.

The second case made in the plaint is the case of estoppel that the principal defendants cannot say that the lands of Touzi No. 512 are not the reformed lands of Touzi No. 523 or question the *patni* right of the plaintiff over the so called lands of Touzi No. 512. This plea is taken in paras. 13 and 14 of the plaint, though not in the precise form in which estoppel ought to be pleaded. The third case is an alternative case pleaded in para. 24. The plaintiff company claims the right to recover *khas* possession on the ground that the lands of Touzi No. 512 were accretions to the lands of Touzi No 523 meaning thereby that portion of Touzi No 523 in which it had *patni* rights. As we read the plaint it is not the plaintiff's case that the flowing river Padma was within the ambit of Touzi No. 523 and that its bed had been assessed to revenue and so included in the said *touzi* at the time of the Decennial and Permanent Settlements. The reference to assessment of revenue made in the last part of para. 4, cannot, in view of what has been stated before and after, in our judgment, be construed to mean assessment to revenue and inclusion of the bed of flowing river Padma, which was a big public navigable river, within the *zamindary*, Touzi No. 523. The property in the river bed of such a river is in the Crown and it would require more specific pleading to raise such a case. The word '*damosh*' means a *beel* or inland pool of shallow water being a part of the deserted bed of a river, the words 'Koha Padma' mean the bank of the river and the words, etc. which follow the phrase cannot, in view of the preceding sentence of the said paragraph, include the bed of a large flowing navigable river.

In their written statement the contesting defendants deny all the material allegations in the plaint on which the case of reformation *in situ* of the lands of Touzi No. 523 had been rested. They deny the fact that Taraf Udaynagore at the time of the Decennial and Permanent Settlements consisted of co-terminous villages and that the flowing river Padma was outside Touzi No. 523. They further state that the lands in suit were outside the said estate, being then in the bed of the flowing river Padma. They further aver that they are not estopped from asserting that Touzi No. 512 represented accreted lands or from questioning the plaintiff's *patni* right in the lands in suit. They however admit that the lands of Touzi No. 512 were accretions to Touzi No. 523 but attempt to meet the plaintiff's alternative case based on the right of accretion by the defence set out in para. 10, a defence which we will have to consider in detail when dealing with the merits. In para. 21 they state that the plaintiff did not purchase the *patni* right, if any, in the lands of Touzi No. 512, which were entirely distinct and separate from the lands of Touzi No. 523. By an application for amendment of the written statement made

on May 12, 1930, and granted on May 31, 1930 (O. No. 34, A-8), para. 10 of the original written statement as also some other paragraphs were amended. An additional defence was also taken, namely of adverse possession. In this state of the pleadings we can at once state that the learned Subordinate Judge was not right in dismissing from consideration the plaintiff's case of accretion on the footing that the lands which were formed into Touzi No. 512 in 1869 had risen in the river bed as an island *chur* with unfordable channels all round. Similarly during the course of the hearing before us we stopped the learned Advocate of the appellant from urging in alternative form that the flowing river Padma was inside Touzi No. 523 at the time of the Decennial and Permanent settlements and that its bed had been assessed to revenue and so made a part of Touzi No. 523, on the ground that not only such a case has not been made in the plaint but that it is a case inconsistent with and contradictory to the case made therein.

We would now proceed to consider the arguments advanced before us and record our findings thereon. To establish his case that the lands in suit are reformations *in situ* of *asli* Udaynagore, Mr Sen Gupta, the learned Advocate for the appellant, has addressed us on three main lines. He says, first, that the villages of Taraf Udaynagore formed a compact block of land at the time of the Decennial and Permanent Settlements. The revenue survey river of 1850-54 as shown in the revenue survey map [Ex. 28 (19) Map 22 M (1)], which shows some villages of the said Taraf, namely Udaynagore, Diara, Ramnaravanpur and Udaynagore on the western bank of the river and the remaining villages, namely Atarpara, Chowmadia and Temadia on the eastern bank, was not there at the Decennial or Permanent Settlement. To support this contention he relies upon : (*a*) the meaning of the word Taraf; (*b*) the area of Taraf Udaynagore as given in the *rokbabandi* (Ex. 1, B 8) and the area thereof at the time of the revenue survey of the year 1850-54, (*c*) some entiries in the *dastur rewaz* (Exs. 2 to 2 (9); B 52 to 110), (*d*) the terms of the *patni potta* of April 8, 1836 (Ex. 6 (*b*) 1, B 148), (*e*) some entries in the *mahal wari* register (Ex. 25; C 750-836), and (*f*) the judgment of Morris and Prinsep, JJ. in 1880 (Ex. 12 (4) B 260).

The second line of argument is directed to show that either the river Padma was entirely outside Pergunah Goas, that is outside Touzi No. 523, at the time of the Decennial and Permanent Settlements, or, if that was not so, the block of land in dispute was firm land then, being a portion of the island of Nipara as shown in Rennel's and Colebrook's map.

To support this contention he relies upon : (*a*) Rennel's map of 1780 (Ex Z, Map 50 M (2), (*b*) Colebrook's map of 1796-97 (Ex. 28 (1), Map 4 M (1), (*c*) a passage at p. 297, Vol II of the fifth report on the affairs of the East India Company (Reprint in 1917 by R. Cambray p. 337 of the original edition) ; a passage at p. 21, Vol. VIII of Hunter's Statistical Accounts of Bengal on the judgment of Morris and Prinsepp, JJ. of the year 1880 (Ex. 12 (4), B 260) and on the Map 2 M (1), which was made a part of that judgment, (*d*) the plaints in the two suits brought respectively by the *patnidars* of Sagarpara and the *mukarari mourasidars* of Chak Mathuranath against Robert Watson & Co. (Ex. 16; B. 244, Ex. A (*a*) B 248) and the judgment passed in the last mentioned suit (Ex. Y, B 250), (*e*) admissions made by the contesting defendants and their predecessors-in-interest and (*f*) the Record of Rights prepared and published under Chap. X, Ben. Ten. Act in 1920 and 1921. In dealing with this part of the case, Mr. Sen Gupta attempted to explain away the *robakary* of Mr. Bhagban Chandra Sen of 1869 and the act of James Dalrymple and John Watson Laidley in accepting the settlement of Touzi No. 512 from the Govt. on the footing that it was an accreted estate. The last line of argument is based on the fact of long possession as *patnidars* by Robert Watson & Co. and their successors-in-interest of the lands which were designated by Touzi No. 512.

Mr. Sen Gupta contends that the word Taraf signifies a collection of co terminous villages, villages forming a compact block of land. There is nothing to support him. The word means a sub-division of a Pergunah including several villages. This is the meaning given in Wilson's Glossary, p. 511 and is the meaning adopted by the Judicial Committee in *Rani Hemanta Kumari Debi* v. *Secretary of State* (1). A Pergunah which usually covers a very large tract and means a large local division of the Muhammadan times, which corresponds in idea, though not in extent, with a district of modern times, does not convey the idea of a compact area of land with no public and navigable river cutting through it.

(1) 3 C L J 560; 1 M L T 175 (P C).

Moreover, in the province of Bengal in many cases such a river cuts through a Pergunah. The idea of compactness is not conveyed by the word Pergunah and so necessarily not by the word Taraf, which is only a sub-division of a Pergunah.

We do not accordingly see any force or substance in Mr. Sen Gupta's argument. (His Lordship discussed the evidence relating to whether the suit lands were reformations *in situ* of Touzi No. 523 and proceeded.) At one stage of the argument Mr. Sen Gupta referred to the boundaries of Taraf Udaynagore as given in the *Dastur Rewaz* (B-105-107) and submitted that the entries in the last column indicated that there was no river there. Section 7, fifth of Regn. V of 1816 casts the duty upon the *kanungo* to compile informations regarding the local boundaries of estates and Pergunahs in the District of Katak and Pataspore. Regulation I of 1819 authorized the appointment of *kanungos* throughout the province of Bengal. By Regn. II of 1817 the reform of the officer of *patwaris* was made. Section 16 required them to keep registers and accounts relating to villages and to deliver such accounts to the *kanungo* every six months. The *Dastur Rewaz* filed in this case seems to be the statement of account, village by village, furnished by the *patwaris* to the *kanungos*. It does not seem clear whether a *kanungo* or a *patwari* was required to note the existence of a public river when such a river did not form the boundary either of an estate, Pergunah, Taraf or village, but went through them. The non-mention of the river in the remark column which was only meant to contain a description of the boundaries does not necessarily lead to the conclusion that the river Padma was not within Taraf Udaynagore. It moreover appears to us that the boundaries of Udaynagore as given at B-105-107 cannot be satisfactorily interpreted. The boundary marks mentioned therein can be traced in Smart's map of Pergunah Goas prepared in 1853-54 [Ex. 28 (43)-Map 46 M, (2)]. But then according to the *Dastur Rewaz*, Taraf Udaynagore would occupy the place which looks like South Africa, a position which would be far away, about 10 miles to the south-west of its actual site. It would further appear from the boundaries of Taraf Ikuri, which is admittedly to the north and west of Taraf Udaynagore that the river Bara Padma (flowing river Padma) was partly on its eastern and partly on its southern boundary. Having regard to relative position of the two Tarafs and the case of the appellant that the two Tarafs formed also a compact block of land the conclusion would be that the said river was then flowing through Taraf Udaynagore (we read as Mr. Sen Gupta suggests the words "to the west" as "to the west of" etc.) When we pointed out these things to Mr. Sen Gupta in the course of his argument he admitted that from the entries of the *Dastur Rewaz* he cannot say that in 1819-20 the flowing river was not inside Taraf Udaynagore. The terms of the *patni potta* of April 8, 1836 (Ex. 6 (b) 1; B. 148) do not in our judgment support the contention of Mr. Sen Gupta Taraf Udaynagore, as we have already pointed out does not signify a compact block of land not intersected by a river. The villages making up the said Taraf were known and a grant of the said Taraf would only mean a grant of the said villages. In such document the express mention of the river Padma would not be necessary or required. So from the mere non-mention of the river we cannot safely infer that the river was not in the Taraf. On the other hand, the mention of and inclusion in the grant of two ferry *ghats* would indicate that the flowing river was there. It would only help Mr. Sen Gupta if the ferry *ghat* of Atarpara was on the eastern limits of the said village. If it was on its western limits the river must have been flowing in between Atarpara on the east and the other villages of Taraf Udaynagore on the west. Everything indicates that before 1850-54 the river was not so far to the east as to the quite outside of and to the east of village Atarpara. This document is accordingly of no help to Mr. Sen Gupta. (His Lordship further discussed the evidence relating to whether the suit lands were reformations *in situ* of lands of Touzi No. 523 and proceeded.)

A reference was made by Mr. Sen Gupta to Rennel's map and Colebrook's map Ex. Z-Map No. 50 M (2); Ex. 28 (1) Map. No. 4). He contends that the disputed lands were in the island of Nipara as shown therein. He first submitted that the village Surdah is a fixed village which has not undergone any change in site. It has brick built ancient buildings which are still there. (District Gazeteer of Rajshahi, p. 185.) The village Harisanker in the south is also a fixed place. For showing this he relies upon the findings of the Judicial Committee of the Privy Council in *Naresh Narayan*

Roy v. *Secretary of State* (2), at p. 456. That is not an *inter partes* judgment and so that finding cannot be evidence in this case. But assuming that Harisanker is a village that has never undergone any change in site, the appellant's case on the point is not advanced. What he wishes us to do is to superimpose by reference to Harisanker and Surdah, Rennel's and Colebrooke's map on Smart's map of 1853, which practically agrees with the revenue survey map of 1850-54 (Map. No. 46). Harisanker is not shown in Smart's map but he asks us to put it on Smart's map by measuring the distance from Surdah and from Jellanghy. He even goes to the length of saying that it would serve his purpose if we superimpose the maps by reference to Surdah only keeping in with the north line. We cannot allow him at this stage to proceed in the fashion. If his case was that the disputed land was a part of the island of Nipara he ought to have asked for a local investigation in the lower Court and to have the relay done by a Commissioner from a satisfactorily established fitting point. When we indicated this view in the course of the argument his reply was that as there were admissions, for instance in Ex. 11 (G-1), by the defendants that the lands of Touzi No. 512 were reformations *in situ* of the lands of Touzi No. 523, he was relieved of the duty of applying for local investigation and for having the relay done by an expert and it was for his opponent to do so. We do not think that this is the correct position. The plaintiff company is not relieved of producing the best materials in support of its case, as no admission had been made by the defendants either in their written statement or at the hearing : s. 58, Evi. Act. For the purpose of superimposition copies of the relevant maps have been made in this Court on the same scale. Their superimposition from Surdah would however indicate that a good portion of the disputed land may fall within the island of Nipara, as shown in Rennel's map but the major portion would fall outside that island as shown in Colebrooke's map.

We are however of opinion that it would not be safe to come to a conclusion in favour of the appellant on such a comparison. The former map has been prepared on a small scale. In both only the village sites are shown, and then only approximately. For instance the relative positions of Surdah and Jellanghy are different in the two maps. Mahuddypore is shown at different places in the two maps. The extent of the villages are not shown. Whether in view of these factors even a relay of these maps by an expert Commissioner would not have afforded a safe and sure criterion, we are unable to say, but if the appellant company wished to rely on the maps for the purpose of determining with the maximum degree of determining with the maximum degree of precision the exact position of the 1789-1793 river in relation to the disputed land it was for it to have enlisted the services of an expert. We accordingly cannot hold that the disputed land was within the island of Nipara as depicted in these maps. We are however of opinion that the position of the river at this part in 1793 can, by this method of rough comparison, be determined with sufficient accuracy for us to say that it was not substantially different from its position at the time of the revenue survey in 1850 1854. (His Lordship resumed discussion of appellants' evidence that suit lands were reformations in situ and proceeded.) On the basis of the Diara Survey of 1867, the lands *in situ* together with other lands were held as accretions to the lands of Touzi No. 523. A new Touzi was formed and assessed to revenue. James Dalrymple and John Watson Laidley who were also partners of Robert Watson & Co. took a permanent settlement of the said *touzi* on the footing that it was accretion. From the very beginning the lands which formed Touzi No. 512 were thus treated not as reformation *in situ* but as accretions to Touzi No. 523.

The appellant seeks to explain away the effect of the Diara proceedings of 1869 by saying that the lands were treated in fact as reformation *in situ* of the lands of Touzi No. 523, but on an erroneous view of the law then prevailing were held by the Diara authorities to be accretions or 'added lands,' for the law of reformation *in situ* was only correctly formulated and properly understood after the judgment delivered in 1870 in *Lopez* v. *Muddun Mohun Thakoor* (3). The contrary view held the field up to 1870 as is apparent from the Full Bench decision in *Katteermonee Dossee* v. *Rinee Manmohinee Dabee* (4), and from the obser-

(2) 28 C W N 453 (456); 77 Ind. Cas. 1048; A I R 1923 P C 1; 50 I A 121; 50 C 446; 32 M T T 162; (1923) M W N 511; 45 M L J 444 (P C).

(3) 13 M I A 467; 14 W R 11; 5 Beng. L R 521; 2 Suther 336; 2 Sar. 594 (P C).

(4) 3 W R 51; Beng. L R Sup. Vol. 353 (F B).

vations of the Judicial Committee in *Secretary of State* v. *Krishnamoni Gutpa* (5), at p. 117 which implies that *Lopez* v. *Muddun Mohun Thakoor* (3), brought about a change in the view of the law on the subject. There is however nothing to show that Mr. Bhagaban Chandra Sen proceeded upon that footing (Ex. F-B 191). The *kabuliat* (Ex. M (1)-B 197) executed by James Dalrymple and John Watson Laidley is sought to be explained on the basis that at that time it was thought that a proprietor was liable to pay additional revenue for the lands which were found on comparison of the revenue survey map and the Diara map to have been inside the river as depicted in the former, though they may have been lands actually included at the Permanent Settlement of 1793. For the purpose of showing what was understood as the law up to 1886, reference was made to *Sarat Sundary* v. *Secretary of State* (6), and to the Full Bench decision in *Fahamidannissa Begum* v. *Secretary of State* (7), affirmed in *Secretary of State* v. *Fahamidannissa Begum* (8), which overruled *Sarat Sundary* v. *Secretary State* (6). This argument assumes that James Dalrymple and John Watson Laidley knew in 1870 that the lands of Touzi No. 512 were in fact parts of the permanently settled estate No. 523. Of this there is no evidence. The evidence furnished by the Diara proceedings and by the conduct of James Dalrymple and John Watson Laidley who were also partners of Rober Watson & Co., the predecessors of the appellant is accordingly against the contention of the appellant.

The *patnidars* Robert Watson & Co., however, treated their *patni* with a rental of Rs. 1,975 odd as extending over the lands of both the Touzi Nos. 523 and 512 (Ex. 27 B 272 at 281). In the conveyance by which the Dhudhurias purchased from the successors-in-interest of James Dalrymple and John Watson Laidley, the assets were calculated on the basis that the said *patni taluk* included the lands of both the Touzis Ex. 27 (c) B-285 and 297 and 298. In the conveyance, however, the two *touzies* were dealt with as separate entities, each as an independent item of property, and Touzi No. 512 was expressly stated to comprise accreted lands (B-290). The Dhudhurias applied for registration and caused their names to be registered in the Collector's register in respect of both the Touzi Nos. 523 and 512 (Ex. 3-B) 313, Ex. S-(3) C 849, Ex. S, C 840 and Ex. S (1) C 843). At this time and up to 1903 they did not treat Touzi No. 512 to be merely a part of Touzi No. 523. On May 5, 1904, however, they made an application to the Collector for excusing them from filing a separate road cess retun for the lands of Touzi No. 512 (Ex. 11-G-1). In that application they stated that Touzi No. 512 had been created in 1870 by taking the lands of Touzi No. 523, that Touzi No. 512 was another appearance of Touzi No. 523, and all its lands were really lands of Touzi No. 523. This application contains a clear admission by the Dhudhurias that the lands of Touzi No. 512 were the reformations *in situ* of the lands of Touzi No. 523. This application was apparently granted and the Dhudhurias filed one cess return for both the *touzis* on September 6, 1904, (Ex. 10 (*a*)-C 730). At p. 748 a statement was made that all the lands of both the *tauzis* had been let out in *patni*. Khem Chand Churiar (there is a misprint of the name at p. 748) who was one of the *ammuktears* of the Dhudhurias and who verified the return has been examined for the purpose of explaining away the return (A. 112). The explanation which he has attempted, that he did not know of the contents of the return, as neither he nor the other *ammuktear* Joshi could read Bengali is unbelievable as in cross-examination he admits that he can read Bengali. The return must have been written by the filing *muktear* on the instructions of a responsible agent of the Dhudhurias.

On March 5, 1907, another road cess return was filed by the Dhudhurias (Ex. 10-B 428). In it also an unequivocal admission was made to the same effect as in Ex. 11. These admissions (if they had been the only items of evidence) would have been almost conclusive against the defendants. They would have great weight unless either explained away or shown to be wrong. The purpose of filing one return with a statement that Touzi No. 512 had no assets apart from those of Touzi No. 523 was to lighten their liability for cess. In our judgment the weight of these admissions has been nullified by the explanation furnished by the full evidence which we have as to the formation of Touzi No. 512 in 1870. The Dhudhurias were concerned to avoid assessment to further cess, by pointing out

(5) 29 I A 104 (117); 29 C 518; 6 C W N 617; 8 Sar. 269 (P C).
(6) 11 C 784.
(7) 14 C 67 (F B).
(8) 17 C 590; 17 I A 40; 5 Sar. 391 (P C).

that all the assets of Touzi No. 512 were included in those of Touzi No. 523. Their further statements are unsupported by the history of the facts and have no foundation. The only way in which it could finally have been determined, if at all, that the lands of Touzi No. 512 were actually the lands of Touzi No. 523 was by exact ascertainment of the position of the 17-9-1793 river (we have already seen that the position cannot be determined on the evidence before us with sufficient precision). To know that it is a nice question as to what would be the final result of an exact determination of it. It is to be remembered too that the Dhudhurias were subsequent purchasers and were not in possession necessarily of the same full information as to this matter as their predecessors or as the appellant for that matter. Even as late as the year 1921 the appellant proceeded upon the basis that the revenue survey map of 1850-54 correctly delineated the villages of Taraf Udaynagore of Touzi No. 523 (paras. 2, 4 and 6 of the plaint of Suit No. 21 of 1921 Ex. U, C-492). The settlement records no doubt record the lands both of Touzi Nos. 512 and 523 as within the plaintiff's *patni* but as the lands thereof were kept separate and distinct and expressly recorded either as within the one or the other *tauzi* we do not think that those records afford any evidence on the question as to whether the lands of Touzi No. 512 were reformations *in situ* of the lands of Touzi No. 523. We accordingly overrule this line of argument.

There can be no doubt that Robert Watson & Co., were in possession of the lands of Touzi No. 512 since their formation on the assertion of their *patni* rights. That fact is recorded in the Diara map of Udaynagore of 1868 [Ex. 28 (12), Map No. 15 M (1)]. There is no evidence that the said company abandoned its possession subsequently and that the then proprietors James Dalrymple and John Watson Laidley, took possession. There is no documentary evidence in the shape of *kabuliats* or other papers to show that the latter settled tenants or possessed any portion in *khas*. In the conveyance which Robert Watson and Co., executed in favour of Robert Watson & Co., Ltd. on May 26, 1890 (Ex. 27, B-272) the vendors' possession of the lands of Touzi No. 512 on an assertion that they were within their *patni* Taraf Udaynagore is shown (B 281). In the conveyance by which the Dhudhurias purchased in 1893 the *zamindary* interest in Touzi Nos. 512 and 523, the assets are calculated on the basis that the said *patni* covered the lands of both the *touzis* (Ex. 27 (C), B 285 at 297 298). The income of the *zamindars* from Hudda Ikuri which includes Taraf Udaynagore is stated to be Rs. 2,171-5-7½ (B 297). The *hastabud* of the *patni* comprising the said Hudda is stated to be Rs 8 899-11-2. The *sudder jama* (revenue) payable by the *zemindars* in respect of the said Hudda is calculated at Rs. 6,728-5-7½. The figure is not stated in the relevant column at p. 297 but the calculations are in the next two pages The balance of Rs. 2,171-5-7½ was accordingly mentioned as the profits The calculation at p. 298 is significant. The *hastabud, i. e., patni* rent payable, of the several *patnis* in Hudda Ikuri is mentioned in detail. The total comes to Rs. 8,899-11-2. There is a mistake no doubt with regard to the *patni* rent of Udaynagore. It ought to be Rs. 1,975 odd and not Rs 2,055-9-1. The mistake crept in by not converting the *patni* rent of Rs. 1,201 (*sicca*) of Jelanghy Hudda as mentioned in Ex 6 (*b*, (B 148) into Compay's coin. But that mistake is not material for the point we are considering. The figure, Rs. 6,728-5-7½ which was mentioned as the revenue of the said Hudda Ikuri must have been derived in the following manner :

Rs	A.	P.	
7,583	3	9½	(Revenue assessed at the Permanent Settlement, the sum mentioned in *Rokhabandi*, that is, Rs. 7,111-0-6½ *sicca*) converted into Compay's coin (Ex. 1, B 14-16).
3,177	10	0	Revenue assessed on Touzi No. 512 (Ex. M B. 197).
Total 10,760	13	9½	
less 4,032	2	3½	Remission of revenue granted in 1870 on account of diluvion of the lands of Touzi No. 523 (Ex. L 3-F., 2009-2011).
6,728	9	6½	

The difference is about 4 annas which may, however, have been due to a little miscalculation. This indicates that the *patnis* were treated as covering the lands not only of Hudda Ikuri within Touzi No. 523, but also the lands of Touzi No. 512 and that the *patnidars* were in enjoyment of the last mentioned lands. In the cess returns Exs. 10 (*a*) and 10 (C 730 and B 428) the Dhudhurias admitted that all but 13 *bighas*, 14 *cottas*, 8 *chittaks* of land, were in the possession of the *patnidars*. The settlement records prepared under Chap. 10, Ben. Ten. Act, and finally published in 1920 and 1921 record the possession of the appellant as *patnidar* in such portions of the lands

of Touzi No. 512 as were then dry. It has accordingly been conclusively proved that the appellant and its predecessors were all along in possession as *patnidars* of the lands of Touzi No. 512 and were paying to the Dhudhurias a *patni* rent of Rs. 1,975-8-1. Whether the appellant Company would be liable to pay additional rent for possessing the lands of Touzi No. 512 as part of its *patni* over *asli* Taraf Udaynagore is a question outside the scope of this suit. We cannot also believe the defendants' case that the lands of Touzi No. 512 so far as Udaynagore was concerned went under the river immediately after their formation in 1867-68 and continued to rise up, and go down under the river bed at short intervals. This case is to some extent against para. 10 of their written statement as amended and is moreover not supported by any evidence.

The evidence of Kefatulla Sarkar (A. 94) on which the respondents have relied deals not with the diluvion of village Udaynagore but of portions of the village Atarpara in or about 1869 or 1870. From this long possession the appellant's Advocate wants us to draw an inference not of fact but of law to the effect that the lands of Touzi No. 512 were but lands of Touzi No. 523. For this purpo e he relies upon *Forbes* v. *Meer Mahamad Hossein* (9), *Secretary of State* v. *Durbijoy Singh* (10), *Haidar Khan* v. *Secretary of State* (11) and *Secretary of State* v. *Radha Kisshore Manikya* (12). These cases do not support him. The first case laid down the proposition that long possession is proof of title. There the question was whether the *jalkar* in question was a part of a tenure which had been created before the Permanent Settlement and so protected from the attacks of the purchaser of the *zemindary* at a revenue sale. It was held to be so on the ground that the tenure-holder was possessing it as such for a long period. In the second case the question was whether the lands in suit had been included in the previous *inter partes* decree. The decree had not defined with precision the lands decreed. It was held that possession of the lands in suit given to and taken by the decree-holder and retained for a long time on the basis that it was included in the said decree was relevant for the purpose of defining the lands so decreed. In the third case the question was whether Regn. III of 1891 (Assam) could be enforced in respect of the *jhum* lands in suit. That could be done only if the said lands were at the time of the Permanent Settlement beyond the limits of the estate so settled but its assets had been taken into consideration on account of *jhum* cultivation. If however the said lands were included within the limits of the estate permanently settled the said Regulation which was exproprietary in nature could not be invoked. The Judicial Committee held that long possession coupled with other important evidence furnished by the proceedings of 1842 and 1843 raised the inference that the said lands had been included within the limits of the respondent's permanently settled *zemindary*. In the fourth case the question was whether a long strip of land between two hilly spurs had been included in the respondent's permanently settled estate. That portion had not been shown in the revenue survey of 1859 as part of the respondent's estate. On this fact Govt. contended that it was not part of the respondent's *zemindary*. It was established in fact that it was not subjected to survey operations at all in 1859, being strip of jungle land on the borders of the British territory and the territory of an independent Chief. In those circumstances it was held that long possession by the respondent outweighed the negative evidence furnished by the revenue survey map. These cases are of no help to the appellant company. Long possession would raise the inference of its title to possession, but it would afford no basis for the further inference that that title rested on reformation *in situ* and not on accretion. We overrule all the three lines of argument advanced by the appellant's Advocate to establish that the lands in suits are reformations *in situ* of the lands of Touzi No. 523 as permanently settled in 1793.

We find that the lands in suit are not reformations *in situ* of Touzi No 523; (*a*) because the case made in the plaint that the river was outside Taraf Udaynagore at the time of the Decennial and Permanent Settlement has not been proved; (*b*) because the case that they were within the island of Nipara has not been proved, as the precise position of the river in 1709 has not been established and (*c*) because the admissions made by the Dhudhurias in Exs. 11

(9) 20 W R 44; 12 Beng. L R 210; 3 Sar. 264 (P C).
(10) 19 C 312; 19 I A 69; 6 Sar. 113 (P C).
(11) 36 C 1; 1 Ind. Cas. 182; 35 I A 195; 8 C L J 436; 12 C W N 1095 (P C).
(12) 21 C W N 291; 38 Ind. Cas. 379; A I R 1916 P C 141; 44 C 328; 43 I A 303; 25 C L J 425; (1917) M W N 25; 14 A L J 1205; 18 Bom. L R 1027; 5 L W 570 (P C).

and 10 have been explained by the contesting defendants.

The case of estoppel has been presented before us by the learned Advocate for the appellant under two heads : (1) that defendants cannot be allowed to show that the lands of Touzi No. 512 are not the reformed lands of Touzi No. 523 and (2) that the defendants cannot be allowed to show that the plaintiff has no *patni* right in the lands of Touzi No. 512 and so in the disputed area.

The second head need not be considered in view of what we would hold on the plaintiff's alternative case based on accretion. We do not think that the defendants are estopped from asserting that the lands of Touzi No. 512 are not reformations *in situ* of the lands of Touzi No. 523 Between 1870, when the new Touzi was created, and 1890, the *zemindars* were James Dalrymple and John Watson Laidley or their successors-in-interst and the *patnidars* were Messrs. Robert Watson & Co. During this period there is no evidence of any representation made by the *zemindars* to the effect that Touzi No. 512 was created out of the lands of Touzi No. 523. Over and above this, Robert Watson & Co., knew that the lands of Touzi No. 512 were treated as accretions and were settled with Dalrymple and Laidley on the basis that they were accretions. The *zemindars* between 1890 and 1893 were the representatives of James Dalrymple and John Watson Laidley who were then dead. In 1890 the *patni* interest passed from Robert Watson & Co., to Robert Watson & Co., Ltd. There is no evidence of such a representation being made by the *zemindars* in this period. In 1893 the Dhudhurias became the *zemindars* and in 1902 Crawford purchased the *patni*. During this period there was also no representation by the *zemindars*. A statement to the effect that Touzi No. 512 was formed out of the lands of Touzi No. 523 was made by the Dhudhurias for the first time on May 5, 1904 in their application (Ex. 11) made to the Collector for the purpose of being excused from filing a separate road cess return for Touzi No. 512 In the cess return however (Ex. 10 (*a*), C. 730) filed by them on September 6, 1904 no such statement was made. The appellant company purchased the *patni* from Crawford, along with other properties from others by a conveyance dated December 3, 1906. At that time the other road cess return, Ex. 10 (B. 428), which contained a statement similar to the statement made in Ex. 11 (G 1) had not been filed. Sivadass Dutt (A 75) has deposed that he was an officer of Messrs. Andrew Yule & Co., who were the managing agents of Robert Watson & Co. Ltd. and also became the managing agents of the appellant company. He says that just before the purchase of the appellant company he called from the *muffasul* road cess returns filed by the Dhudhurias. This story is improbale, because those returns would not be necessary either for the investigation of title or for preparing the conveyance. Even if the story be true, the relevant road cess return then available would be Ex. 10 (*a*). By that return no representation would be conveyed to the appellant that the lands of Touzi No. 512 were reformations *in situ* of Touzi No. 523, because no such statement was made in Ex. 10 (*a*). There is also no evidence that the appellant company completed its purchase on the faith of any thing contained in the road cess return, Ex. 10 (*a*). The said witness does not say anything with regard to Ex. 11. That the existance of Ex. 11 was unknown to the appellant company at or before its purchase, and so it had not acted upon any representation made therein, is quite apparent from the manner in which Ex. 11 was exhibited in the case. The document was not in the appellant's list of documents. It was not called by the appellant from the Collector. Some other papers were called from the latter by the appellant and the bundle sent was found the application and it was at once proved : Judgment of the Subordinate Judge—A 138 l. 10 to 20. We accordingly hold that no case of estoppel has been made out by the appellants.

The defendants admit that Touzi No. 512 was created for lands which had accreted to Touzi No. 523 (para 9 of the written statement). They do not plead, as has been supposed by the learned Subordinate Judge, that those lands first formed as an island *chur* with unfordable channels all round. Under s. 4 Regn. XI of 1825 those lands became an increment to the *patni* tenture of Messrs. Robert Watson & Co., the *patnidars* at the time, and if the rights of Messrs. Robert Watson & Co., had been ultimately conveyed to the appellant, the latter would have the right to possess those lands and the *zemindars*, the contesting defendants, would have no right to possess in khas. The right so given by law to Messrs. Robert Watson & Co., is sought to be defeated on the pleas taken in para. 10 of the original written statement as amended and in para. 1 of the supplementary statement. The pleas are : (*a*) that Messrs. Robert Watson & Co., relinquished the right given to them by.

Regn. XI of 1925; (*b*) that they forfeited those rights by denying the legality of the settlement of Touzi No. 512; (*c*) that their rights under the regulation had been extinguished as the *zemindars* were in *khas* possession for more than twelve years during which the lands remained above water after formation in 1867-68.

In our judgment none of the pleas have been made out by the defendants. In an earlier part of our judgment, we have considered the question of possession in details and have found that Messrs. Robert Watson & Co.. and their successors-in-interest were all along in possession in assertion of their *patni* right. The absence of an offer by them to pay additional rent for the increment to their tenure cannot, in our judgment, take away the rights conferred on them by s. 4 of Regn. XI of 1825. There can be no question of forfeiture as Messrs. Robert Watson & Co., never denied the legality of the creation of Touzi No. 512 on the basis that the lands thereof were accretions. All the evidence that is on the record shows that they and their successors instead of relinquishing or abandoning their rights were asserting and maintaining the same. The second line of defence is that even if Messrs. Robert Watson & Co., and Messrs. Robert Watson & Co. Ltd. had *patni* right over the lands of Touzi No. 512, the same was not conveyed either to Crawford or the appellant. The contention depends upon the construction of the conveyances [Ex. 27 (*a*) (B 379) and Ex. 27 (*b*) (B. 40)]. In the recitals of the former conveyance the vendors Messrs. Robert Watson & Co., Ltd., declared their intention to convey to the purchaser Crawford the Rajapore concern together with all *zamindaris patnis* etc., belonging to the said concern. The vendors actually conveyed to the purchaser all their interest in the "said Rajapore concern" and in the *zemindaris* and all other landed immovable property held therewith or belonging thereto

"all which premises are more particularly described in the schedule annexed.....and all other kinds of *jotes*... and all other lands and tenure of every description held or belonging to the said concern."

In the schedule the *patni mehal* is described as "Taraf Udaynagore appertaining to the Murshidabad Collectorate Touzi No. 523". The respondents' Advocate bases his argument on the description given in the schedule and says that the *patni* in Touzi No. 512 did not pass to the purchaser. The conveyance however expressly conveys to the purchaser not only what was described in the schedule but all the landed property, *zemindaris*, *patnis* and other tenures which were being then held as belonging to the Rajapore concern. The *patni* over the lands of Touzi No. 512 was then undoubtedly held as appertaining to the said concern. This is indicated by the statement made in the schedule to the conveyance executed by Messrs. Robert Watson & Co., in favour of Messrs. Robert Watson & Co., Ltd., (Ex. 17, B. 272 at p. 281). The conveyance Ex. 27 (*b*), (B. 408) in favour of the appellant substantially takes the same form as the conveyance 27 (*a*). Several indigo concerns including the Rajapore concern were conveyed to the purchaser

"together with all other property whatsoever and wheresoever which the vendors or any of them were entitled in connection with the said concerns. (B. 41 para. 4)."

Schedule 5 annexed to the conveyance puts the matter beyond doubt. Whatever was conveyed to Crawford by Ex. 27 (*a*) was being conveyed to the appellant. We accordingly overrule this defence also. The appellant company is accordingly entitled to recover possession of the lands in suit on the basis, and on that basis only, that the lands in suit are accretions to its *patni* in Taraf Udaynagore.

The next question is whether the appellant is entitled to mesne profits. In the plaint the appellant claimed mesne profits from September 12, 1927 till re-delivery of possession. No court-fee was however paid on the claim for mesne profits but a statement was made that court-fee on that relief would be paid when ordered by the Court. The plaint ought to have given a tentative valuation for the claim for mesne profits and on that valuation court-fees ought to have been paid. But as the plaint stood the Court could not have dismissed the prayer for mesne profits without giving an opportunity to the plaintiff to value the relief and to pay court-fee thereon. Even if the suit was confined to a claim for mesne profits only, the plaint could not have been rejected without the plaintiff being given an opportunity to put the matter right [O. VII, r. 11 (*c*)]. The appellant has made an application before us for valuing the claim for mesne profits separately and has tendered the deficit court-fee. The first technical difficulty in the appellant's way has been now removed by our granting that portion of the prayer made

in that application. The reason which led us to grant the prayer was that such an amendment ought to be allowed at any stage of the suit. The second objection of the respondents is that the prayer for mesne profits had been withdrawn by the plaintiff Company in the lower Court by its application dated May 18, 1933. On that day it applied for permission to withdraw the prayer for mesne profits with leave reserved to bring a new suit for the same. The withdrawal of the prayer required an order from the Court as leave to bring a suit was prayed for. The Court did not pass any order on that date but stated in the order sheet that the petition for withdrawal be kept with the record for orders at the time of the judgment (order No. 112, A. 26). No doubt no order was ultimately necessary on the petition in view of the fact that the suit was entirely dismissed. On our reversal of the decree of the lower Court for possession it would have become necessary for us to pass an order on that petition, but before we could do so, when the matter was pending judgment the appellant Company filed an application before us for allowing it to withdraw the application made by him in the lower Court on May 18, 1933 and we granted that application. We cannot take away the right of a party to withdraw any application made by him on which no orders had been made at the time. The prayer for mesne profits accordingly stands and the technical defect has now been removed.

On May 8, 1933 the lower Court however re-framed the issues and the issue on mesne profits previously framed was left out. In our judgment that issue ought to be now framed and decided. We accordingly direct the lower Court to start an inquiry for mesne profits but in the course of the inquiry the Court must also consider the question as to whether the contesting defendants ought to be made liable at all for mesne profits. That question was sought to be argued before us by the respondents' Advocate, but we intimated that we should have the views of the lower Court on the matter. As an inquiry for mesne profits will have to be started and as proceedings for granting mesne profits are entirely distinct proceedings we thought that was an additional reason why the views of the lower Court on that point ought to be ascertained. We accordingly set aside the judgment and decree of the lower Court and decree possession to the appellant. The Court below is directed to take proceedings for determining whether the defendants are liable for mesne profits, and if it answers that question in the plaintiff's favour, then to start an inquiry for ascertaining the amount.

The question of costs will now have to be determined. More than three-fourths of the time that the hearing lasted had been taken by the appellants' Advocate in arguing the question of reformation *in situ* and of estoppel on which he has lost. We think that in these circumstances although the appeal has succeeded, each party ought to bear the costs incurred by it or them at the hearing, that is no hearing fee ought to be allowed to any. The appellant must have the costs of the court-fee stamps affixed on the memorandum of appeal and the fee payable for drawing the memorandum of appeal. As regards the paper book, we are of opinion that it has been unnecessarily increased in volume. Only three maps No. 46, 50 and 52 out of Part II, Vol. II of the map volumes were referred to at the time of the argument and nearly half the number of maps of Part. II, Vol. I was not opened. Only a few settlement records were necessary and were referred to at the time of the hearing but three volumes, D, E and F have been padded with them. Only the last few pages of Volume F beginning with 2006 were necessary. In these circumstances and having regard to the failure of the appellant Company on the point of reformation *in situ* we think that it ought to have no costs for printing the maps, except of Colebrooke's map (Map No. 4), *Thagbust* of Udaynagore (Map No. 15), revenue survey map of Goas (Map No. 22), R. C. Sen's map (Map No. 28), Smart's map (Map No. 46) Rennel's map (Map No 50) and O'Donel's map; and only one-fourth of the other printing costs. It would also have the costs of the lower Court from the contesting defendants.

D. *Order accordingly.*

MADRAS HIGH COURT

Appeal No. 123 of 1939.
February 15, 1940
KING, J.

M. R. RANGANATHA AIYAR—
APPELLANT
versus
JAYAVELU MUDALIAR AND ANOTHER
—RESPONDENTS

Oaths Act (X of 1873), s. 11—Scope—Section relates to proceedings in which evidence was given and not to all possible proceedings—Evidence on special oath in proceeding under O. XXI, r 100 Civil Procedure Code whether conclusive proof in suit under r. 103.

Primary meaning of s. 11 Oaths Act must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil P. C., itself shows that there is an essential difference between the two. The claim proceeding is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider. Therefore any evidence given under the special provisions of the Oaths Act in a proceeding under r. 100, O. XXI, cannot be conclusive proof in any suit under r. 103.

A. against the appellate order of the District Court, North Aroct, dated January 12, 1939.

Mr. *K. V. Ramachandra Aiyer*, for the Appellant.

Messrs. *K. Bhashyam Ayyangar* and *T. R. Srinivasan*, for the Respondents.

Judgment.—The appellant in this appeal claims title to the western half of a certain house. The respondent was a decree-holder against a cousin of the appellant, who, according to the appellant, owned the eastern half. In execution of the decree, the respondent took delivery of the entire house. There was then an application under O. XXI, r. 100 by the appellant asking the Court to re-deliver to him the western half of this house. During the progress of the inquiry into that application, the respondent challenged the appellants in the following words:

"If the petitioner swears on oath that the western half of the suit house belongs to him solely and that he himself built it and at the time when the plaintiff went for taking delivery it was in his possession, then to the extent of the western half, the petition may be allowed."

The appellant accepted the challenge and gave evidence on special oath in the affirmative on all the three points put to him by the respondent. This oath was of course followed by the allowing of the appellant's petition. The respondent then filed a suit under r. 103 against the appellant and his brother and they took the objection that no suit would lie because of the evidence which the appellant had given on oath. This preliminary objection was upheld by the District Munsif. On appeal, the learned District Judge of Vellore found that the oath was no bar to the suit and accordingly remanded the suit for disposal after trial on the other issues. Against that order of remand, the present appeal has been filed. The main question to be decided in this appeal is the interpretation of s. 11, Oaths Act. Section 11 which refers to evidence given on special oath runs as follows:

"The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

And the question which I have now to decide is whether this section relates to the proceeding in which the evidence was given alone or whether it relates to all possible proceedings in which the subject-matter of the evidence given on oath may be involved In favour of the latter view is no doubt the fact that in s. 11 no specific statement is made restricting the particular proceedings in which the evidence shall be conclusive proof. On the other hand, ss. 8 and 9 obviously refer to some judicial proceeding, and it seems to me the only proper method of interpreting s. 11 is to interpret it in conjunction with ss. 8 and 9, and that its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. This seems to me clear from the expression "the evidence so given." It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered.

It is however argued on behalf of the appellant that although the suit under O. XXI, r. 103 may not in one sense be the same proceeding as a petition under r. 100 it is, nevertheless, a continuation of, or in the nature of an appeal from that form of proceeding and therefore any evidence given under the special provisions of the Oaths Act in a proceeding under r. 100

must be conclusive proof in any suit under r. 103. In support of this argument, I have been referred to a decision in *Krishnappa Chetty* v. *Abdul Khader Saheb* (1), in which it has been held that a suit of this kind is a continuance of a claim petition with regard to the doctrine of *lis pendens*. In *Krishnappa Chetty* v. *Abdul Khader Sahib* (1) an alienation which took place between the disposal of a claim petition and the institution of a suit was held to be affected by the doctrine of *lis pendens*. Again in *Phulkumari* v. *Ghanshyam Misra* (2) the Privy Council dealing with a question of court-fee, has pointed out how a suit of this nature to set aside an order in a claim petition is in the nature of an appeal or a review and therefore comes within a particular provision of the Court Fees Act and is chargeable with a particular sum as court-fees. It does not seem to me that these rulings afford much guidance in the decision of the present appeal. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil P. C., itself shows that there is an essential difference between the two. The claim proceeding is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider. It seems to me impossible to hold that unless it is clearly present to the minds of the parties that the evidence which is going to be given in the claim petition is in no manner to be challenged in or by a subsequent suit, an oath in those claim proceedings must relate to the claim proceedings themselves and to them alone

If we go back to the terms of the challenge in the present case, we find no doubt that the appellant was called upon to repeat on oath his contention that he was the owner of the western half of the suit house. It does not seem to me reasonable to argue that because the appellant was called upon to make that statement, the respondent was setting the whole question of title in issue between himself and the appellant or that the respondent had in mind a complete promise never to proceed against the appellant in the Civil Courts under r. 103. The limitation within which the challenge was made is clearly to be seen in his own words "that if the appellant makes the statement on oath then the petition may be allowed". All that that means, it seems to me, is that the respondent has no objection to the appellants being put in immediate possession of the western half of the house, if he be resolute enough to restate his contentions by taking a special oath. This is in itself a very real concession and, it seems to me, that on the language of the challenge itself, all that the respondent meant was that the particular petition in which he was engaged might be decided unfavourably to himself. Of course, he has not in so many words reserved in the challenge any right to file a suit. But, it seems to me, that the burden lies upon the other side to establish that the challenge was intended to have any effect upon any possible civil suit which might be filed under r. 103. The only way in which the evidence given in the claim petition could be used to defeat the respondent seems to me to be, if the doctrine of *res judicata* were to apply to the subsequent proceeding. Obviously, in the present case, the doctrine of *res judicata* cannot apply because the order on a claim petition is specifically made subject by the provisions of Civil P. C. itself to the result of a suit under s. 103 and the appellant's learned Advocate did not attempt to rely upon the doctrine of *res judicata*. I am accordingly of opinion that the order of the learned District Judge remanding this suit was correct and that this appeal must fail. It is accordingly dismissed with costs. Leave granted.

N.-D. *Appeal dismissed.*

(1) 38 M 535; 25 Ind. Cas. 11; A I R 1915 Mad 495; 26 M L J 449.

(2) 35 C 202; 35 I A 22; 7 C L J 36; 12 C W N 169; 10 Bom L R 1; 14 Bur L R 41; 5 A L J 10; 17 M L J 618; 2 M L T 506 (P C).

PATNA HIGH COURT

Civil Revision Application No. 557 of 1940

January 28, 1941

CHATTERJI AND MEREDITH, JJ.

JUGAL PRASAD MISSIR AND OTHERS —DECREE-HOLDERS—PETITIONERS

versus

JADUBANS NARAYAN MISSIR AND OTHERS—JUDGMENT DEBTORS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLI, r. 6 (2)—Appeal from mortgage decree directed only against interest decreed, pending—Executing Court, if can stay sale of mortgaged property on taking security from judgment-debtor.

An order passed by the executing Court under O. XLI, r. 6 (2), Civil P. C., in execution of a mortgage decree which is not separable, staying the sale of the mortgaged property pending disposal of the appeal directed only against the interest dec-

reed by the trial Court, on condition that the judgment-debtor should furnish security for further interest, is not without jurisdiction and cannot be interfered with in revision. 138 Ind. Cas. 847 (1), dissented from.

C. R. App. from an order of the Subordinate Judge, Darbhanga, dated August 27, 1940.

Messrs. *Khurshed Husnain* and *G. P. Sahi*, for the Petitioners.

Messrs. *B. N. Mitter* and *Ajit Kumar Mitter*, for the Opposite Party.

Chatterji, J.—This application in revision is directed against an order passed under O. XLI, r. 6 of the Civil P. C. staying sale of the mortgaged property in execution of a mortgage decree. The mortgage decree is for Rs. 15,534-10 6. The defendant has preferred an appeal to this Court against this decree, valuing it at Rs. 3,151-2-6 only, that is to say, the appeal is directed against the interest decreed by the Court below.

The executing Court has stayed sale of the mortgaged property pending disposal of the appeal on condition that the judgment-debtor should furnish security for further interest for one year. Security has been furnished in accordance with this order.

Mr. Khurshed Husnain on behalf of the petitioners contends that the appeal being directed not against the entire decree but only against a part of it, the Court below should not have stayed the sale of the entire mortgaged property. This argument overlooks the fact that the mortgage decree is not separable. Order XLI, r. 6, cl. (2) of the Civil P. C. runs as follows :

"Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of."

Mr. Khurshed Husnain contends that the Court was not bound to stay the sale, and in support of this contention he relies upon a decision of a Single Judge of the Allahabad High Court in *Har Narain Sahi* v. *Sadhu Govind Rai* (1), Kendall, J. in that case held that O. XLI, r. 6 (2) of the Civil P. C. was not intended to impose on the Court which ordered the sale an obligation to stay the sale pending an appeal from the decree, merely because the property which is to be sold is immovable property and security is given. With all respect to the learned Judge, I must say that this is against the express provision of the rule itself, which says that the sale shall be stayed.

Having regard to the fact that the Court below has taken security for one year's further interest and that the mortgage decree is indivisible, I do not consider I should interfere in revision with the order of the Court below. I would accordingly dismiss the application, but in the circumstances without costs.

Meredith, J.—I agree. In my view, the order passed by the Court below cannot in any circumstances be said to be without jurisdiction. There is, therefore, no scope for any interference with it in revision.

S. *Application dismissed.*

(1) 54 A 874; 138 Ind. Cas. 847; (1932) A L J 603; Ind. Rul. (1932) All. 503; A I R 1932 All. 551.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision No. 152 of 1940
October 31, 1940
MIR AHMAD, J.

MUNICIPAL COMMITTEE, PESHAWAR
DEFENDANT—PETITIONER
versus
ABDULLAH JAN MIAN AGHA JAN—
PLAINTIFF AND OTHERS—DEFENDANTS
—RESPONDENTS

Punjab Municipal Act (III of 1911), s. 93—Fire brigade, if agent of Municipal Committee — It is independent unit under Crown

The fire brigade maintained by the Peshawar Municipal Committee is not the agent of the Peshawar Municipal Committee. The fire brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Peshawar Municipal Committee pays for it does not make it liable for its acts or omissions.

C. R. from an order of the Additional Judge, Peshawar, dated February 6, 1940.

Mr. *Nur Ilahi Khan*, for the Petitioner.

Lala *Wazir Chand*, Messrs. *Abdur Rauf Khan* and *Sher Khan*, for Respondents Nos. 1, 2 and 3 respectively.

Order.—On the night between June 6, and 7, 1937 the fuel collected by Abdullah Jan at his brick kiln outside Lahori gate caught fire. The fire brigade under the leadership of Arbab Attaullah Khan went to the spot but they did not take any steps to extingnish the fire and returned. The A. S. P. City, who is in fact the Officer Commanding of the Fire Brigade, was informed at the club. He rushed to the scene of fire and took the fire brigade a second time and threw water on the smouldering heap that remained of the fuel. Abdullah Jan, the

owner of the fuel, has brought this suit for recovery of Rs. 875 as damages for the loss he has sustained on account of the failure of the fire brigade to take active steps on arrival at the scene of fire. He impleaded the Peshwar Municipal Committee, Mr. Field, A. S. P., Mir Nawaz, S. I. Fire Brigade and the Crown through Collector. The Municipal Committee pleaded that the fire brigade was not its agent and the Municipal Committee was, therefore, not responsible for the acts or omissions of that brigade. It so happened that the plaintiff withdrew his case against the Crown at the time when the issues were framed. One of the issues framed was: "Is the Municipal Committee liable for the negligence of the fire brigade?" and the onus was placed on the plaintiff, Abdullah Jan.

The trial Judge found that the fire brigade was guilty of negligence in refusing to extinguish the fire when they arrived at the scene on the first occasion, that the fire brigade was the agent of the Peshawar Municipal Committee and that therefore the Municipal Committee was liable for the damages. He relied on the report of a Municipal Commissioner in assessing the quantum of damages. The Municipal Commissioner had assessed it at Rs. 400. The Judge found that Mr. Field had done his duty and was therefore not liable and that Mir Nawaz was under the order of Arbab Attaullah Khan and was consequently not responsible for what happened. He exonerated them from all liability. The Judge passed a decree against the Municipal Committee only for the payment of Rs. 400 and dismissed the suit with costs against the other two defendants. An appeal was preferred to the Court of the District Judge by the Municipal Committee, Peshawar. The Additional Judge came to the same conclusion as the trial Judge about the negligence of the fire brigade. With respect to the liability of the Municipal Committee he referred to the statement of the secretary of the following words:

"It is admitted and proved from the evidence of the Secretary, Municial Committee, that the Fire Brigade is maintained at the expense of the Municipal Committee, but the control is not with the Committee but under the A. S. P. City and in his absence the City Inspector."

He did not definitely find whether the Municipal Committee was liable for the acts or omissions of the fire brigade. In the result, however, he dismissed the appeal with costs. The Municipal Committee has come up on revision to this Court. The learned Counsel for the Municipal Committee has adverted to the statement of the secretary which has been summarized in the paragraph quoted from the appellate judgment above. He also pointed out that Mr. Field said that he used his discretion in the matter of putting out fire. He stated that Mr. Field was admittedly an A. S. P. under the Crown and Arbab Attaullah Khan was also a servant of the Crown being an Inspector of Police. He contended that there was consequently no doubt that the personnel of the fire brigade was under these officers and the Municipal Committee had no control over their activities. The mere fact that the Municipal Committee maintained the brigade did not, in the opinion of the Counsel, necessarily mean that its members were controlling the actions of the brigade and were therefore responsible for its mistakes or negligence.

The learned Counsel for the respondent relies on s. 93, Punjab Municipal Act, which enjoins that the Municipal Committee should establish and maintain a fire brigade. I cannot feel persuaded to agree with the learned Counsel for the respondent that the fire brigade is the agent of the Peshawar Municipal Committee. The fire brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Peshawar Municipal Committee pays for it does not make it liable for its acts or omissions. Consequently, I hold that the two Courts below have committed a material irregularity in passing a decree against the Peshawar Municipal Committee which has nothing to do with the loss sustained by the plaintiff-respondent. The petition is accepted and the suit is dismissed. As the litigation was due to a false legal notion regarding the position of the Peshawar Municipal Committee which the plaintiff could not comprehend I direct that the parties shall bear their own costs throughout. This shall not affect the order of the trial Judge that Abdullah Jan, plaintiff, shall pay the costs of Mr. Field and Mr. Nawaz.

D. *Petition accepted.*

LAHORE HIGH COURT

Criminal Appeal No. 1018 of 1939
May 29, 1940
YOUNG, C. J, AND SALE, J.
EMPEROR—PROSECUTOR
versus
ASHRAF-UD-DIN AND ANOTHER—CONVICTS —RESPONDENTS

Penal Code (Act XLV of 1860), ss. 97, 103, 302—

Accused during altercation disarming deceased and stabbing him to death—No right of private defence can be claimed—Offence held murder.

There was an altercation between the accused and the deceased who was armed with hatchet. The accused first wrested the hatchet from the hands of the deceased and then stabbed him to death while the other accused held the deceased:

Held, that the accused were not acting in the exercise of the right of private defence but were guilty of murder.

Cr. A. from an order of the Additional Sessions Judge, Rawalpindi, dated July 12, 1939.

Mr. *M. Sleem*, Advocate-General, for the Crown.

Mr. *Farrukh Hussain*, for the Complainant.

Mr. *Iqbal Singh*, for the Respondents.

Sale, J.—Two brothers, Ashraf-ud-Din and Gul Kher-ud-Din, have been convicted by the learned Additional Sessions Judge, Rawalpindi, under ss. 304-I, I. P. C. and 304 (1) read with s. 109, I. P. C. respectively for causing the death of Shah Mir at about 8-45 A. M. in Rawalpindi city on February 12, 1939 and sentenced each to ten years' rigorous imprisonment. The two accused were committed for trial charged under s. 302-34, I. P. C. but the learned Sessions Judge held that the act of Ashraf-ud Din was governed by exception (2) of s. 300, I. P. C. in that he had a right of private defence, but exceeded it "in a most brutal manner" while Kher-ud-Din was held guilty under s. 304 (1), I. P. C. read with s. 109, I. P. C. because he held the deceased while his brother stabbed him. Neither accused has appealed from this conviction and sentence. But an appeal has been preferred by the Crown against the acquittal on the murder charge. We have been asked by the learned Advocate-General to hold that no right of private defence has been established in this case and to alter the conviction to one under s. 302, I. P. C. as charged.

The facts are that there was enmity between the deceased Shah Mir and the two accused arising out of the fact that 20 years ago the deceased abducted one of their sisters, while 4 years ago the brother of the deceased abducted another sister. Both the deceased and the two accused in this case are milk-vendors; and the evidence is that about 8-45 A. M. on the morning of February 12, the deceased had gone with Lal Mir P. W. No. 3, to the shop of Kesar Mal, P. W. No. 5, to settle an account. The deceased went on to a tea-shop near the shop of Kesar Mal (P. W. No. 5) when he was attacked by the two accused. Gul-Kher-ud-Din held him by the arm, while Ashraf ud-Din inflicted a number of stab-injuries with a knife. The eye-witnesses are Lal Mir (P. W. No. 3) who saw the occurrence from the shop of Kesar Mal, Kesar Mal himself (P. W. No. 5) and also Ahmad Gul (P. W. No. 6), Gulzari Lal (P. W. No. 7) and Mohammad Ali (P. W. No. 8). All these witnesses agree in saying that Ashraf-ud-Din accused stabbed the deceased while his brother Gul Kher-ud-Din held him by the arm. This fact is established beyond doubt and is not now challenged by the convicts.

It is common ground in this case that the deceased at the time of the attack had a hatchet. In his evidence before the Sessions Court Ahmad Gul (P. W. No. 6) after stating in his examination-in-chief that "Ashraf accused was stabbing with quick succession and violently" deposed in reply to a Court question that he had seen Shah Mir deceased aim a blow with his hatchet at Ashraf-ud-Din which the witness thought "struck him on the arm. Ashraf-ud Din—he says—then caught hold of the hatchet with one hand and began to stab him with the other, while accused No. 2 was holding him from behind." It appears from the medical evidence given by Dr. Udho Das (P. W. No. 2) that Ashraf-ud-Din when arrested was found to have two superficial incised injuries, one on the back of the right middle finger and the other on the back and middle of the left arm one inch above wrist joint. It is on the testimony of Ahmad Gul, read with the medical evidence, that the learned Sessions Judge appears to have come to the finding that Ashraf-ud Din exceeded his right of self-defence "in a most brutal manner". This argument is repeated by learned Counsel for the respondent accused in this Court who urges that on this evidence the finding of the learned Sessions Judge is right.

The learned Advocate-General has argued that, even conceding that Shah Mir deceased had a *kulhari* and that in the course of the quarrel which led to this killing Shah Mir might have threatened Asnraf accused with his *kulhari*, no right of private defence accrues in the circumstances of this case. The onus of proving that the case comes within one of the Exceptions in the I. P. C. is laid by s. 105, Evi. Act, on the accused and the Court "shall presume" the absence of circumstances that would bring

the case within the Exception sought to be made applicable. Ashraf in this case pleaded private defence and the question is whether on the evidence, this onus can be said to have been discharged. In addition to the testimony of Ahmad Gul already cited, there were two defence witnesses, who say that in the course of an altercation arising about the settling of accounts between Ashraf-ud-Din and Shah Mir the two started abusing each other; Shah Mir raised a hatchet to strike Ashraf-ud-Din, the latter ran away, but the deceased ran after him with the hatchet, and when Shah Mir attempted to strike a second blow, Ashraf caught hold of the hatchet and stabbed the deceased with his knife. This story about the deceased pursuing Ashraf is not pleaded by Ashraf himself who merely says in his statement that as a result of an altercation Shah Mir attacked him with a hatchet and Ashraf stabbed him with a knife in self-defence. The learned Sessions Judge has rejected this defence evidence holding that neither of the defence witnesses are reliable. Admittedly, though claiming to be eye-witnesses, neither appeared before the Police to make any statement, and both have clearly improved on the accused's own plea. We agree, therefore, with the learned Sessions Judge in rejecting their evidence.

It remains to consider whether on the statement of Ahmad Gul read with the medical evidence the plea that the accused had a right of self-defence can be sustained. As regards the evidence of Ahmad Gul it is necessary to point out that his statement that Shah Mir struck Ashraf-ud-Din with a hatchet did not appear in his examination-in-chief or in his first cross-examination but was made for the first time in reply to a Court question; and this statement does not appear in the evidence which Ahmad Gul had himself given before the committing Magistrate which was transferred by the learned Sessions Judge to the Sessions file under s. 288, Criminal P. C. We are of opinion therefore that the evidence of Ahmad Gul on this point is not reliable. None of the other prosecution witnesses says that the deceased Shah Mir started the fight by striking at Ashraf-ud-Din with his *kulhari*. The injuries proved to have been sustained by Ashraf-ud-Din are consistent with the prosecution story that the accused attacked Shah Mir and in order to make sure that Shah Mir did not use his *kulhari*, first wrested it from him; and then while one accused held him by the arm, the other stabbed him.

In any event, even if it be assumed for the sake of argument that Shah Mir may in the course of an altercation have threatened Ashraf-ud-Din with a *kulhari* the circumstances of this case do not justify a plea of self-defence. Ashraf-ud-Din might have been justified in wresting the *kulhari* from Shah Mir or even in striking Shah Mir to prevent an attack on his person by Shah Mir, but the evidence in this case is that accused first wrested the *kulhari* from the hand of Shah Mir and then that Kher-ud-Din seized the deceased by the arm while Ashraf-ud-Din repeatedly stabbed him inflicting as is proved by the medical evidence as many as ten serious incised injuries including a deep penetrating wound into the abdomen. These circumstances show that even giving every possible consideration to the plea of the accused this was not an act committed in the exercise of the right of self-defence but an act of revenge. Ashraf-ud-Din would under s. 97, I. P. C. have had the right to defend his body against a possible attack by Shah Mir (provided of course Ashraf-ud-Din had not himself provoked the attack); but under s. 102, I. P. C. the right of private defence would continue only so long as the apprehension of danger continues.

It is obvious that once the weapon had been seized from Shah Mir the apprehension of danger did not continue; and when thereafter Kher-ud-Din held Shah Mir and Ashraf-ud-Din repeatedly stabbed him in the abdomen they were not acting in the excercise of the right of private defence but committing murder. Nor was Kher-ud-Din "abetting" the act as understood by s. 109, I. P. C. He was acting as a principal in furtherance of a common intention and he should have been convicted under s. 302-34, I. P. C. as charged. Both the accused are therefore guilty under s. 302, I. P. C. But this is not a case for the imposition of the capital sentence. We do not know the immediate cause of the attack, or the circumstance immediately preceding it. It may well be there was some provocation; especially as the deceased was himself armed with an axe and had to be disarmed. We therefore accept the appeal by the Crown against the acquittal of the respondents under s. 302, I. P. C. We convict both accused under s. 302, I. P. C., but for the reasons stated impose on each a sentence of transportation for life.

D. *Appeal allowed.*

MADRAS HIGH COURT

Appeal No. 230 of 1936
August 28, 1939

VENKATARAMANA RAO AND ABDUR RAHMAN, JJ.

MIDDE SAMPATIRAYUDU—
APPELLANT
versus
SONTI VENKATARATNAM—
RESPONDENT

Court Fees Act (VII of 1870), s. 7 (iv)(f)—Suit for accounts dismissed—Appeal must be stamped according to full amount of valuation in plaint—Government Securities Act (of 1920), s. 5—Object—Question of assignor's beneficial ownership in war bonds and Government promissory notes deposited with Government by assignee, if affected by s. 5.

The plaintiff whose suit for accounts is dismissed is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint. 178 Ind. Cas. 159 (3), relied on, 141 Ind, Cas. 602 (1), held overruled in, 175 Ind. Cas. 470 (2).

Section 5, Govt. Securities Act, was enacted only for the protection of the Govt, who can get a due discharge from the person who is the holder of the note. The question as to the benefical ownership of the assignor in the war bonds and Govt. promissory notes deposited by the assignee with the Govt., is not affected by s. 5.

A. against the decree of the Sub-Judge, Masulipatam, dated April 22, 1936.

Mr. *P. Satyanarayana Rao*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondent.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Masulipatam dismissing the plaintiff's suit. The plaintiff claimed two reliefs in the suit : (1) an account of a certain *arrack* business alleged to have been carried on by the plaintiff in the name of the defendant, and (2) a declaration that the plaintiff is the owner of certain war bonds and Govt. promissory notes described in the schedule to the plaint. The case for the plaintiff is that the defendant was his son-in-law and therefore he allowed the *arrack* business to be carried on in his name and as security for the said business he had the Govt. promissory notes and war bonds deposited therefor. The learned Subordinate Judge is of opinion that the plaintiff has not made out his case that the defendant was only a *benamidar* in respect of the arrack business. In regard to the war bonds and Govt. promissory notes, the learned Judge is of opinion that by virtue of s. 5, Govt. Securities Act, the defendant being the holder of the promissory notes and bonds by virtue of the transfer in his favour, he must be deemed to be the owner. The plaintiff preferred this appeal and he claimed both the reliefs again in his memorandum of appeal. He valued the relief as to account at the sum of Rs. 1,000 on the ground that he was entitled to put his own valuation on the strength of the ruling in *In re Venkatanandam* (1) of Ramesam and Mockett, JJ. which has since been overruled by a Full Bench case which is reported in *In re Dhanukodi Nayakkar* (2). Under the latest ruling *Narayanan Chetty* v. *Periapoan* (3), the plaintiff is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint. If this ruling is given effect to, the plaintiff ought to have paid the duty on Rs. 10,000 not on Rs. 1,000. When confronted by this ruling Mr. Satyanarayana Rao under instructions from his client is not prepared to pay the deficit court-fee and abandoning the claim in respect thereof. Therefore the appeal so far as the relief for account is concerned must be dismissed with costs.

He has only pressed the claim with regard to the relief relating to war bonds and Govt. promissory notes. The war bonds are evidenced by Exs. C, D E, F and L series and the Govt. promissory notes by Ex. M series. The documentary evidence in support thereof completely bears out the plaintiff's case. In respect of every one of these war bonds and promissory notes the plaintiff has paid money and become the owner thereof but he deposited them in 1929 as security for the *arrack* business which was being carried on by the defendent having regard to the relationship with him. Therefore there can be no question that the beneficial ownership in the suit bonds and promissory notes is in the plaintiff and the defendant in his deposition admitted that these bonds and promissory notes belonged to the plaintiff but he set up a claim that he become the owner thereof by

(1) 56 M 705; 141 Ind. Cas. 602; A I R 1933 Mad. 330; 64 M L J 122; 37 L W 106; (1933) M W N 36; Ind. Rul. (1933) Mad. 143.

(2) I L R (1938) Mad. 593; 175 Ind. Cas. 470; A I R 1938 Mad. 435; (1938) 1 M L J 628; 47 L W 488; (1938) M W N 373; 10 R M 781 (F B.)

(3) I L R (1938) Mad. 1031; 178 Ind. Cas. 159; A I R 1938 Mad. 887; (1938) 2 M L J 557; (1938) M W N 946; 48 L W 454; 11 R M 414 (F B).

virtue of a transfer from the plaintiff in consideration of a sum of Rs. 3,000 paid by the defendant to the plaintiff. As remarked by the learned Subordinate Judge, there is no evidence to prove that the defendant paid the sum of Rs. 3,000. Therefore if this story of transfer is not to be believed the plaintiff's title to the suit war bonds and Govt. promissory notes remains. In our opinion s. 5, Govt. Securities Act, has no bearing on the case, because this section was enacted only for the protection of the Govt. who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership is not affected by s. 5. The plaintiff's appeal with regard to the suit war bonds and promissory notes has therefore to be allowed. We therefore set aside the decree of the learned Subordinate Judge in regard thereto and give the declaration asked for. The respondent will pay the costs of the appellant so far as this claim is concerned.

N.-P. *Order accordingly.*

NAGPUR HIGH COURT

Miscellaneous Appeal No. 225 of 1936
October 3, 1939
STONE, C. J. AND BOSE, J.
RAO BHIMSINGH—APPELLANT
versus
GANGARAM AND OTHERS—RESPONDENTS

Hindu Law—Impartible estate—Bhamgarh estate in Nimar District—Holder's right to alienate—Succession to ancestral impartible estate in joint Hindu family is governed by Mitakshara — Civil Procedure Code (Act V of 1908), ss. 53, 2 (11)—Suit for specific performance—Decree for alternative remedy of compensation—S 53, if applies — Suit for specific performance of contract to alienate part of impartible estate against holder — Decree for compensation and not specific performance—Holder dying—In execution property attached in hands of his son—Son held legal representative.

The holder of an impartible estate (Bhamgarh estate in Nimar District) governed by custom of primogeniture has a power to alienate the estate. *Sartaj Kuari* v. *Deoraj Kuari* (3), followed.

The successor to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara is designated by survivorship although he holds the estate according to the custom of impartibility. The estate devolves on the successor. 60 Ind. Cas. 534 (8), followed. [p. 600, col. 1.]

Where a decree has been passed in a suit for specific performance for the alternative equitable remedy of compensation in lieu of specific performance, the decree may be regarded as creating a debt of record without its being a decree on a debt and consequently s. 53, Civil P. C., has no application. [p. 601, col. 2.]

In a suit for specific performance of a contract against the holder of an impartible estate who had contracted to alienate a part of the estate, a decree for compensation instead of specific performance was passed. After his death the estate devolved on his son as his successor and the estate in his hands was attached in execution of the decree:

Held, that the decree was passed against the deceased in his representative capacity and that his successor was his legal representative within the meaning of s. 2 (11), Civil P. C.

Misc. A. from an order of the Court of the District Judge, Nimar, dated September 7, 1936.

Mr. *J. Sen* with Mr. *A. Razak*, for the Appellant.

R. B. *D. N. Chaudhari* with Mr. *S. C. Dutt Chaudhari*, for the Respondents.

Order.—This is an appeal arising out of execution proceedings. The decree that it is sought to execute was one passed by their Lordships of the Judicial Committee who had before them, on appeal, a claim made against one Rao Kishoresingh in a suit claiming *inter alia* specific performance. There were other alternative claims but they do not arise as under the main prayer it was decided that although specific performance should not be decreed compensation should be decreed. The compensation was in lieu of specific performance and was granted instead of specific performance because their Lordships held that the circumstances were such that the plaintiffs could be adequately compensated in money.

The circumstances were that Rao Kishoresingh was litigating as to the impartibility of the estate. In that litigation, the facts of which will be found in the opinion of the Judicial Committee reported in *Kishore Singh* v. *Gahena Bai* (1), Rao Kishore Singh was the plaintiff and was suing for a declaration that he was the sole heir of one Rao Himmat Singh. His claim raised and depended upon the question whether the Hindu joint family of which he, Rao Himmat Singh, and the defendants to that suit were, prior to Rao Himmat Singh's death, members, was governed by a custom of primogeniture. If primogeniture applied then Rao Kishore Singh took the estate subject to certain family rights; if it did not the estate passed by survivorship in the usual way.

To finance that litigation Rao Kishore Singh entered into the agreement specific performance of which was sought in the

(1) 15 N L R 176; 53 Ind. Cas. 630; A I R 1919 P C 100; 37 M L J 562; 17 A L J 1077; 26 M L T 494; 1 U P L R (P C) 94; (1920) M W N 82 (P C).

subsequent suit which also went to the Privy Council and is reported in *Ramji Patel* v. *Kishore Singh* (2). The prayers are set out at pp. 122*, 123. The first prayer was for specific performance, the second in the alternative for refund of the money advanced with interest, the third for costs and other relief as the Court thinks fit. The second prayer did not arise, for, as above stated the decree gave compensation in lieu of specific performance. The compensation was fixed at Rs. 20,000. We do not understand this to have been given under the second prayer (which also asked for compensation). We understand it to have been given because although the suit for specific performance in substance succeeded actual specific performance was not decreed because the equities were sufficiently met by compensation.

The money decree thus obtained for Rs. 20,000 with interest thereon at 6 per cent. until realization and for costs had to be executed.

The decree in the specific performance case was in favour of the plaintiff Ramji Patel and has now passed to the respondents to the appeal, Gangaram and others. The date of the decree is about May 9, 1929.

The estate which it was declared in the earlier suit was subject to a custom of primogeniture is known as the Bhamgarh estate and has been in the same family for many hundreds of years.

Apparently Rao Kishore Singh died in 1930 and was succeeded by Rao Bhimsingh who admits that, under pressure from his father Rao Kishore Singh, he signed the "mortgage" (by which we understand the contract in respect of which the compensantion was decreed). Rao Baimsingh "obtained the *gadi* (throne or seat) in 1930". The estate was under attachment before 1930.

When execution was sought to be effected by a sale of part of the estate Rao Bhimsingh took the point that the estate was inalienable and could not therefore be reached. Among the issues settled was also one: "Is the property in suit an asset of Kishore Singh in the hand of the objector(Rao Bhimsingh)?" That is answered in the affirmative by the trial Court. That finding was based on the view that this estate was not inalienable. That was the question debated before the lower Appellate Court. Before us that was the first point taken but later the matter was alternatively argued on the basis of s. 53 of the Civil P. C.

The question relating to inalienability were it one of first impression, would undoubtedly be one of difficulty. Mr. Sen with his usual ability marshalled the logical difficulties in the way of the conclusion arrived at by the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (3). He pointed out that the fact that an estate was impartible did not result in the conclusion that it was not governed by Hindu Law ideas but that it had a special custom engrafted on it for a limited purpose but that outside this purpose, and alienability was outside it, the Hindu Law conception remained in full force. We do not consider any useful purpose would be served by going once again through all the cases. They are, save the most recent, all to be found in Ramesam, J.'s judgment reported in *Annadana Jadaya* v. *Konammal* (4). The argument addressed to us was crytallized into a sentence by one of us (Stone, J. as he then was) in *Pirumal Sethurayar* v. *Subbalakshmi* (5):

> "It might, of course, have been thought this inroad *Sartaj Kuari* v. *Deoraj Kuari* (3), was being referred to upon the normal right to partition created by custom in the case of impartible estates was not merely in the interest of the holder of the *samin* but was derived from the very nature of the case which imposed an equal obstacle in the way of the holder of the *samin* compelling separation by unilateral act."

But as was pointed out on the same page in that judgment

> "It *Sartaj Kuari* v. *Deoraj Kuari* (3) is, however, not merely binding on us but, as was stated in *Collector of Gorakhpur* v. *Ramsundar Mal* (6), has been in force so long that it cannot now be disturbed."

Perumal Sethurayar v. *Subbalakshmi* (5): is a case which went to the Privy Council. *see Perumal Sethurayar* v. *Subbalakishmi* (7),

(2) 25 N L R 121; 117 Ind. Cas. 1; A I R 1929 P C 190; 56 I A 280; 33 C W N 893; (1929) A L J 780; 31 Bom. L R 883; 57 M L J 205; 50 C L J 197; (1929) M W N 452; 30 L W 443 (P C).

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(3) 10 A 272; 15 I A 51; 5 Sar. 139 (P C).

(4) 17 L W 107; 71 Ind. Cas. 533; A I R 1923 Mad. 402; (1923) M W N 15.

(5) 71 M L J 1 (23); 168 Ind. Cas. 753; A I R 1936 Mad. 721; 44 L W 168; 9 R M 636.

(6) 56 A 468; 150 Ind. Cas. 545; A I R 1934 P C 157; 61 I A 286, 7 R P C 1; 11 O W N 889; 40 L W 217; (1934) A L J 779; 67 M L J 274; 15 (P. L T 531; 60 C L J 67; (1934) M W N 751; 36 Bom. L R 867; 38 C W N 1101 (P C).

(7) A I R 1939 P C 95; 180 Ind. Cas. 773; (1939) O W N 378; 11 R P C 197; 5 B R 530; 1939 O L R 225; 49 L W 621; 43 C W N 594; (1939) 1 M L J 812; 41 Bom. L R 718; (1939) M W N 576; 69 C L J 516, I L R (1939) Mad. 143; 66 I A 134; I L R (1939) Kar. 192 (P C).

Before their Lordships *Sartaj Kuari* v. *Deoraj Kuari* (3), was relied on (see at p. 97*). It was in no way cut down. We regard this as concluding this branch of the case.

The next branch of the argument is founded on the fundamental point that in the case of a Hindu impartible estate succession, subject to the custom of primogeniture, is as in an ordinary joint family: *see Baijnath Prasad Singh* v. *Tej Bali* (8), *Pratap Chandra Deo* v. *Jagadish Chandra Deo* (9), *Konammal* v. *Annadana Jadaya Goundar* (10), *Shiba Prasad Singh* v. *Prayagkumari Debee* (11) and *Collector of Gorakhpore* v. *Ram Sundar Mal* (6). Thus it is said that in all such cases we are really dealing with survivorship not heirship.

It is, however, to be noted in passing that as was pointed out in *Venkata Mahipati Gangadhara Rama Rao* v. *Raja of Pittapore* (12), citing with approval *Bachoo* v. *Mankorebai* (13), it is of the essence of impartibility that no co-parcenary exists.

In view, however, of *Baijnath Prasad Singh* v. *Tej Bali* (8), we take it as settled that the successor to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara is designated by survivorship although he holds the estate according to the custom of impartibility.

It is accordingly argued that Rao Bhimsingh in this case is not a "legal representative" of Rao Kishore Singh within the meaning of that term as defined in s. 2 (11) of the Civil P. C.

If he is not the legal representative he cannot be made liable in execution of a decree passed against the deceased unless it be under s. 53, Civil P. C. Section 53, it is said, does not apply because what is sought to be executed is not a decree passed in a suit on a debt but a decree passed in a suit for specific performance of a contract.

It is first desirable to advert to s. 2 (11) of the Civil P. C. which defines "legal representative." The definition is as follows:

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Here Rao Bhimsingh does not represent the estate of the deceased person because that person had no estate. The estate Bhamgarh belonged to a joint Hindu family. For similar reason there is no question here of Rao Bhimsingh intermeddling with the estate of the deceased. But was not Rao Kishore Singh sued in a representative capacity and is not Rao Bhimsingh the person on whom the estate "devolves" on the death of Rao Kishore Singh?

Before discussing this question we pass to the other point which relates to the true construction of s. 53, Civil P. C. That is a section that has caused some trouble in India. It has been construed in *Ganesh Sakharam* v. *Narayan Sri Ram* (14) and *Meyyappan Servai* v. *Mayyappan Ambalam* (15), in a way which with respect we find it difficult to follow. The learned Judges in *Ganesh Sakharam* v. *Narayan Sri Ram* (14), appear to have felt themselves driven to go to s. 53 because they held that a surviving co-parcener was not a legal representative in any case.

Much weight was placed, especially in Spencer, J.'s judgment in *Mayyappan Servai* v. *Mayyappan Ambalam* (15), upon the reference in s. 53 to ss. 50 and 52. We apprehend, however, that s. 53 is creating a fiction for purposes. The purposes are the purpose of s. 50 and the purpose of s. 52. Section 50 gives to the decree-holder the right to execute the decree not only against the judgment-debtor but also against the judgment-debtor's legal representative (to the extent of the deceased's a assets in his hands) should the judgment-debtor die after decree. Section 52 deals with the position where the death occurs before decree and the decree is passed after the

(8) 43 A 228; 60 Ind Cas. 534; A I R 1921 P C 62; 48 I A 195; 19 A L J 317; 33 C L J 388; 40 M L J 387; (1921) M W N 300; 25 C W N 564; 2 P L T 257; 23 Bom. L R 654; 3 U P L R (P C) 35; 29 M L T 358 (P C).

(9) 54 C 955; 102 Ind. Cas. 599; A I R 1927 P C 159; 54 I A 289; 53 M L J 30; 25 A L J 628; 29 Bom. L R 1156; (1927) M W N 513; 4 O W N 650; 31 C W N 943; 39 M L T 1; 46 C L J 136; 8 P L T 623 (P C).

(10) 51 M 189; 108 Ind. Cas. 354; A I R 1928 P C 68; 55 I A 114; 27 L W 497; 5 O W N 411; 54 M L J 504; 47 C L J 488; 9 P L T 347; 26 A L J 642; 30 Bom. L R 802; (1928) M W N 252; 32 C W N 983 (P C).

(11) 59 C 1399; 138 Ind. Cas. 861; A I R 1932 P C 216; 59 I A 331; Ind. Rul. (1932) P C 263; 63 M L J 196; 9 O W N 691; 36 C W N 1046; 56 C L J 92; 36 L W 266; (1932) M W N 923; (1932) A L J 919; 13 P L T 659; 34 Bom L R 1567 (P C).

(12) 45 I A 148 (153); 47 Ind. Cas. 354; A I R 1918 P C 81; 41 M 778; 35 M L J 392; 24 M L T 276; 16 A L J 833; 28 C L J 428; 5 P L W 267; 20 Bom. L R 1056; 23 C W N 178; (1918) M W N 922 (P C).

(13) 29 B 51; 6 Bom. L R 268.

(14) 55 B 709; 134 Ind. Cas. 961; A I R 1931 Bom. 484; 33 Bom. L R 1144; Ind. Rul. (1931) Bom. 454.

(15) A I R 1924 Mad. 571; 83 Ind. Cas. 985; 46 M L J 471; 19 L W 484; 34 M L T 209.

*Page of A. I. R. (1939) P. C.—[*Ed.*]

legal representative has been brought on record.

Either Rao Bhimsingh was or was not a "legal representative" of Rao Kishore Singh. If he were he could have been brought on record had Rao Kishore Singh died before decree, or the decree could have been executed against him (Bhimsingh) if Rao Kishore Singh had died, as he did, after the decree. Had he been joined as legal representative before decree he would, of course, only be liable to the extent of the assets of Rao Kishore Singh in his hands, apart from s. 53.

What is the position where either the person is not legal representative or the property is not the property of the deceased? In either such case, apart from suit, there are only two ways of executing the decree against that property. One way is provided by s. 53. The other is where s. 2 (11) applies, *i. e.* where the deceased was sued in a representative capacity and the estate devolves on the legal representative. Section 53 can be used because it creates a fiction. The fiction is that in certain circumstances property, not the property of the deceased and not therefore in *A* as the deceased's personal representative, shall be deemed to be property held by *A* as a legal representative. In finding out what those circumstances are we find that neither s. 50 nor s. 52 affords any guide whatever. We have to look at s. 53 and there we find a difficulty due to the curious use of the the definite and indefinite articles.

Property of a class (*viz*, property which is liable under Hindu Law for the payment of "the debt") in the hands of one of a class (*viz*. a son or other descendant) in an event (*viz*. if "a decree" has been passed on the debt) is made the subject of a fiction. The fiction is twofold: The property is deemed to be the property of the deceased (which it is not in cases where s. 53 is involved being joint family property), and the son or other descendant is deemed to be a "legal representative" which he is not in respect of the property in question in many cases. The usual case is that he gets the property in his own right by survivorship. It is not a case of *A's* property being inherited by *B*, but of property belonging to a co-parcenary, *A* plus *B*, becoming solely *B's* by *A's* death.

It seems to us to be plain that if "the debt" means the debt in respect of which the decree being executed was passed s. 53 is limited to cases where the decree that is being executed is a decree passed in a suit on a debt.

But it will be observed that the words are " . . . property . . . liable . . . for the payment of the debt . . . in respect of which a decree has been passed". One would expect the words "for the payment of a debt . . . in respect of which the decree has been passed" at any rate "for the payment of the debt . . . . in respect of which the decree has been passed." "A decree" suggests any decree *i. e.* in respect of which a decree could have been passed, it also suggests any debt because of course only one decree could be passed in respect of one debt.

The generally accepted view in practice here has been, we believe, that this section makes liable joint family property where the ancestor has been sued on a debt for which the sons are liable under the pious obligation rule. There are difficulties even in this view because the section says "son or other descendant" and the pious obligation rule is limited to son, grandson and great-grandson which obviously does not exhaust the class comprised within the words "son or other descendant."

Of course if the true construction is "property . . . . which is liable . . . . for the payment of the debts of the deceased ancestor" when in the hands of a son, grandson or great-grandson one has made liable all joint property (as under the pious obligation rule) in respect of all decree whether on debts or not. One has also re-written the section. We can make nothing of the words "in respect of which a decree has been passed" except that it relates to a debt and means that this two-fold fiction comes into operation where:

(1) property is liable for the debt

(2) it has come into the hands of a son etc.,

(3) a decree has been passed in a suit on the debt.

Then that son etc., is deemed to hold that property as that deceased debtor's personal representative.

Here no decree has been passed either for a debt or the debt. A decree has been passed in a suit for specific performance for the alternative equitable remedy of compensation in lieu of specific performance. The decree may be regarded as creating a debt of record without its being a decree on a debt.

We feel therefore compelled to conclude that short of a fresh suit their Lordships'

decree is going to be evaded or the appellant must be brought within the definition of "legal representative". Should this be impossible we should exercise our powers and treat the proceedings, which are under s. 47 of the Civil P. C., there being no objection as to limitation or jurisdiction, as a suit.

Quite clearly, in view of *Baijnah Prasad Singh* v. *Tej Bali Singh* (8) and the several Privy Council decisions which follow that case Rao Bhimsingh took by survivorship and he does not therefore represent the estate of the deceased. He can only be brought within s. 2 (11) if, in the specific performance case Rao Kishore Singh was sued in a representative capacity and the estate "devolved" on Bhimsingh.

That the estate devolved on Bhimsingh we do not doubt. See *Kachi Kalyana Rungappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (16) quoted in *Baijnah Prasad Singh* v. *Tej Bali* (8). See also the latter case at p. 210*.

The difficulty arises from two facts: (1) it is said that the decree is a personal decree; (2) it is not easy to see who Rao Kishore Singh represented in the suit which resulted in the decree under execution.

As to the first point it must be borne in mind that the defence founded on the argument that the decree is not executable against Bhimsingh because Bhimsingh is not a legal representative and that s 53 does not apply was not taken in the notice of appeal. Ground No. 4 which states that the decree was a personal decree relates to the effect of impartibility. On the other had ground No. 12 takes up the position that Rao Kishore Singh was in the position of a manager of a joint Hindu family. As a result of the point now under consideration being taken for the first time before us the facts are not clear. Rao Bhimsingh in his evidence says: "I am judgment-debtor".

There is some mention in the trial Court's judgment and (as above noted) in the notice of appeal that the decree passed against Rao Kishore Singh was a personal decree. The learned trial Judge says:

"His (Rao Bhimsingh's) story is that the decree in question was a personal decree against the late Rao Kishore Singh."

There is, however, nothing in Rao Bhimsingh's evidence to this effect and the decree is not before us, and its nature is not clear from the Privy Council judgment in the case in question.

The fourth issue "Is the property in suit an asset of Kishore Singh in the hand of the objector?" seems to have been argued on the basis that it would be if the estate was alienable and would not be if it were inalienable.

If the property is alienable and the custom of impartibility and primogeniture applies then this is a case where a joint Hindu family estate passes on death to one, at one time Rao Kishore Singh now Rao Bhimsingh. Either, while in enjoyment of this estate could sell it or any part of it, or mortgage it or otherwise alienate it. In any such transaction the person in enjoyment represented in a most complete way the family. No one suing upon any contract such as the one sought to be specifically enforced in the case reported in *Ramji Patel* v *Kishare Singh* (2) could possibly sue anybody save the person in enjoyment. He is not merely manager. He represents the family in all things. If he gave the whole estate away the family could not complain. Any contract to mortgage or sell the entire estate or any part thereof could only be made by him for he alone would have power to mortgage or sell. Any suit on such a contract could only be brought against him. But although he alone could be sued because he alone could alienate and although there is here no managership, no co-parcenary in the ordinary, or indeed in any sense, behind him all the time is the family one male of which will eventually succeed by survivorship subject to the custom of primogeniture.

If such a person is sued on such a contract as was before their Lordships in *Ramji Patel* v. *Kishore Singh* (2) is not he sued in a representative capacity? In this particular case it would seem from Rao Bhimsingh's evidence in this present matter that he, Rao Bhimsingh, was a party to the contract (which he calls a mortgage) upon which Rao Kishore Singh was sued. As to this, however, owing to this point not having been raised in the Court of first instance or in first appeal the facts are not clear. It seems to have been admitted that Rao Bhimsingh was the representative of Rao Kishore Singh.

In *Sheo Shankar Ram* v. *Jaddo Kunwar* (17) the managing member of a joint

(16) 32 I A 261; 28 M 508; 15 M L J 312; 8 Sar. 855 (P C).

(17) 36 A 383; 24 Ind. Cas. 504; A I R 1914 P C 136; 41 I A 21*; 18 C W N 968; 16 M L T 175; (1914) M W N 493; 1 L W 645; 20 C L J 282; 12 A L J 1073; 16 Bom. L R 810 (P C).

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Hindu family was sued on a mortgage and a foreclosure decree was passed. Members of the family later resisted execution and claimed to redeem. The question was whether the manager was sued in a representative capacity so as to cause the decree to bind members of the family not parties. It was held that he was.

In this case Rao Kishore Singh was in a much more representative position as regards the estate than the manager of a joint Hindu family. He was solely in enjoyment of the estate. He could have given it away or alienated it in any way. He made a contract to alienate a part. That contract was sued on and instead of ending in a direction to convey it ended in this decree. That decree, we feel, was made against him at least as much in a representative capacity as if he had been sued on a mortgage as manager of a joint Hindu family.

We are accordingly of the opinion that Rao Bhimsingn is a legal representative within the definition contained in s. 2 (11).

As to the third point it is said that the tenure here is such that the person in enjoyment could not alienate. Sir Reginald Craddock's Note on the Statuts of the Zamindars of the Central Provinces is relied on. See paras. 137 to 139, 141, 142, 164 and 165. This Note was produced in 1889. It clearly regards impartibility and alienability as connected so that that which is impartible is inalienable (see for example para. 139). *Sartaj Kuari* v. *Devraj Kuari* (3) had been reported in 1888 and altered what had hitherto been thought on this subject. It is not likely that when he wrote his Note Sir Reginald Craddock, then a comparatively young executive officer, would have known of this change. So far as it goes, however, the Note shows that in Sir Reginald Craddock's opinion

"It must at once be conceded that these Zamindars never had any transferable rights in their estates until they were given proprietary rights."

He was speaking of Bhandara, Balaghat, and Raipur Zamindars. We are here concerned with a Nimar Zamindar. There is about 300 miles between these Districts and their historical development is distinct.

Further in this case we have the grant. This grant (Ex. D-9) shows that Rao Doulat Singh in 1865 was given a quit-rent tenure with full power of alienation. We are not disposed in this case to restrict the right of this family to those conferred by this *Sunnad*. We are prepared to assume that if we looked behind it to the ancient rights we should find something different from a quit-rent holding. We should find a joint Hindu family with an impartible estate devolving by a custom of primogeniture. But we can find nothing to show that this estate was inalienable. On the contrary for many years past the person in enjoyment has alienated.

We are accordingly of the opinion that the appeal should be dismissed with costs.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Suit No. 881 of 1939
May 21, 1940
LORT-WILLIAMS J.

GOALDAS DAGA—PLAINTIFF
versus
MANICKLAL BAITY—DEFENDANT

Contract Act (IX of 1872), s. 30—Broker acting for customer—Customer gambling — Whether can set up plea of gaming and wagering against broker's claim.

Where a broker acts on behalf of his customer and the customer gambles the customer cannot set up a plea of gaming and wagering against the broker's claim. *Thacker* v. *Hardy* (1), relied on.

Messrs. *N. C. Chatterjee* and *G. K. Mitter* for the Plaintiff.

Mr. *J. C. Sett*, for the Defendant.

Judgment.—The plaintiff is a broker and a member of the East India Jute Association Ltd., The defendant also is a broker. The plaintiff's claim relates to a number of transactions in jute carried out by the plaintiff for and on behalf of the defendant and upon his instructions. These resulted in a sum of Rs. 16,511-15-0 becoming due to the plaintiff upon January 28, 1939. On January 30, 1939, defendant paid to the plaintiff Rs. 5 000 on account leaving a balance of Rs. 11,511-15-0. Adding to this interest amounting to Rs. 153-9-6, the plaintiff's claim is Rs. 11,665-8-6. Under the rules of the association future contracts of purchase or sale of jute are made between members of the association only, that is to say, the association only recognizes its members in these transactions. They are forward contracts and are made for a period of three months and each week during the period of the three months a clearing rate is fixed by the board of control of the association and periodical payments of margins have to be made on the basis of the difference between the contract rates and the clearing rates. At the end of the period of three months, if the contract

has not been adjusted meanwhile delivery has to be made. Some members of the association both act as brokers and enter into contracts direct as principals with their customers. Other members act only as brokers and never make any such direct contract.

The plaintiff never acts otherwise than as a broker and this is confirmed by a mass of documentary evidence. For his services he charges commission and this is all that he gets out of any business which he does on behalf of his customer. The method of doing such business is as follows: The customer either rings up the plaintiff on the telephone or goes to see him at his office. He instructs him either to sell or purchase so many bales of jute on behalf of the customer. Thereupon the plaintiff goes downstairs into the exchange and makes an appropriate contract with a member of the association. He then returns to the telephone or to his office and tells his customer what he has done. In the evening, in some cases, he goes to see the customer and obtains confirmation of the deal so as to avoid any mistake. The transaction is then entered in his books. Another rule of the association is that one member does not pay or receive directly from the other member; he pays or receives from the association itself, and the association pays or receives from the other party to the contract. The result is that in all such transactions the member makes himself liable to the association for the business which he has done on behalf of his customer.

In the present case the result was that the plaintiff had to pay to the association out of his own pocket the sum of Rs. 16,511-15-0, and all that he has received up to the present from the defendant is the Rs. 5,000 to which I have referred, and commission which he earned on the various transactions. A further condition of the transactions was that interest at six per cent. would be calculated on the periodical margins and would run in favour of either party after the closing of the transaction. It is admitted that the plaintiff has been acting for the defendant for a number of years and that all dealings and transactions between them up to January 13, 1939 were adjusted and paid except an outstanding sale of 1500 bales by the defendant at Rs. 36-12-0. From that date up to January 21, there were a number of other transactions which are set out in the annexure to the plaint. Thus, sales on behalf of the defendant were made to the extent of 2250 bales and purchases on his behalf to the extent of 3750 bales and they resulted in the loss which is represented by the amount paid by the plaintiff to the association. The plaintiff's brokerage was originally at the rate of six pies per bale, and subsequently three pies per bale.

The defendant alleges that there never was any intention on behalf either of himself, or of the plaintiff, or in fact of any members of the association either to take or give delivery of jute, and that in respect of all such transactions no one contemplated anything except that the differences in the prices of jute should be paid. He admits however that the plaintiff was entitled to commission at the rate of three pies per bale on the closing of each transaction. He admits also that the various purchases and sales were as stated by the plaintiff, but he alleges that on January 18, 1939 he asked the plaintiff to purchase the 1500 bales and the 2250, bales which I have mentioned, against the subsisting contracts for sales in respect of the same number of bales by the defendant, instead of which, according to the defendant, the plaintiff failed and neglected to close the various contracts for sale on January 18, and subsequently closed the transactions on the 21st contrary to the defendant's directions, and the defendant therefore refused to be bound by what he termed the unauthorised act of the plaintiff.

Further, he alleges that on January 30 the accounts were adjusted on the basis of the instructions actually given to the plaintiff and were settled for the sum of Rs. 5,000 which the defendant paid and the plaintiff accepted in full satisfaction of his claims in respect of all transactions outstanding. Further, the defendant alleges that all the transactions were gambling transactions and therefore illegal and inoperative. It will be observed at once that the defendant relies upon inconsistent allegations. He alleges on the one hand that contracts in respect of differences only, and therefore gambling transactions, were made between him and the plaintiff acting as a principal, yet, in the same breach he talks of asking the plaintiff to purchase certain bales from him, and alleges that the plaintiff failed and neglected to carry out the defendant's instructions and closed the transactions contrary to his directions, and therefore committed acts which were unauthorised by the defendant. Further, that the accounts were adjusted upon the basis of the instructions actually given.

Every one of these statements is wholly

inconsistent with the story that the plaintiff was acting as a principal. They are consistent only with and appropriate to the allegations of the plaintiff that he acted throughout only as an agent and broker. Obviously, instructions cannot be given to a principal, nor can the principal be charged with failing and neglecting to carry out instructions. With regard to the plaintiff's closing of the transactions on January 21 instead of 18th, I accept his evidence rather than that of the defendant. He struck me as a reliable witness and everyone of his statements is corroborated by entries in his books. On the other hand, I am not at all satisfied with the evidence of the defendant. Obviously he has been unfortunate, has been gambling and has lost and as so often happens in such cases he has set up a plea of gaming and wagering.

Upon the assumption therefore that the plaintiff was acting only as a broker it is obvious that he had no interest whatever in postponing the closing of the transaction from January 18 to 21. Upon whichever date, all that he could expect to receive was his brokerage. In fact the defendant accepted this position and could give as the only reason for the plaintiff's failure to carry out his instructions on the 18th that he had forgotten to make the necessary contracts and close the deals. After careful consideration, I do not think that this is likely to have occurred because, in the absence of written orders and instructions the plaintiff makes a practice of making the contracts with members of the association immediately after he has received instructions from his customer. With regard to the alleged settlement on January 30, I am satisfied that the plaintiff's story is true and that Rs. 5 000 was only a payment on account, the defendant being at that time unable to settle the whole of the claim. He said that he had suffered much loss and he asked the plaintiff to pay the sum due to the East India Jute Association, that is to say, the balance of the defendant's losses, and that he would pay the plaintiff later on.

Subsequently, there was an attempt to settle the claim between the plaintiff and the defendant made by a mutual friend or business acquaintance named Dawlal Singh. The defendant upon that occasion said that he had not got the money and though he was willing to pay the full amount he could not pay in cash, but was willing to execute a *hundi* for that amount. The plaintiff said that no settlement could be arrived at unless a cash payment was made, and so the matter ended.

I am satisfied that the plaintiff acted throughout as a broker and made nothing out of these transactions except his brokerage. It is true that the defendant never intended to give or take delivery and was simply gambling in differences. But there is nothing whatever to show that the plaintiff was a party to those gambling transactions. It takes at least two to make a gaming and wagering contract and while the defendant no doubt never had any intention except to gamble I am satisfied that the plaintiff was no party to any gaming or wagering contract and simply carried out his instructions as a broker. Whether the defendant gambled or not was no business of his. It was immaterial to him what the defendant chose to do, so long as he received his brokerage or commission on each transaction.

There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim.

In *Thacker* v. *Hardy* (1) "the plaintiff a broker, had been employed by the defendant to speculate for him upon the stock exhange; to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences would be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant upon which the plaintiff became personally liable, and he sued the defendant for indemnity against the liability incurred by him and for his commission as broker.

Held, that the plaintiff was entitled to recover, for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict C. 109, s. 18."

The facts in that case are almost upon all fours with the facts of the present case and in a sense it was a much stronger case in favour of the defendant because there

(1) (1879) 4 Q B D 685; 48 L J Q B 269; 39 L T 595; 27 W R 158.

the broker had full knowledge of the intentions of the customer and engaged himself to carry out speculation on behalf of that customer.

In the present case the facts are quite different. I am satisfied that any question of speculating on behalf of the defendant never arose, nor was there any discussion about differences between the plaintiff and the defendant. The plaintiff being in the position of a broker only did not care one way or another whether the defendant gambled or not.

In these circumstances there can be no answer to this claim. There must be judgment for the plaintiff for the amount claimed with costs.

D. *Suit decreed.*

ALLAHABAD HIGH COURT

Miscellaneous Case No. 295 of 1937
September 24, 1940
COLLISTER AND BAJPAI, JJ.

GANESHILAL CHHAPPAN LAL
—ASSESSEE—APPLICANT
versus
COMMISSIONER OF INCOME-TAX—
OPPOSITE PARTY

Income Tax Act (XI of 1922), s. 13, Proviso—Income-tax Officer exercising his judgment and not acting arbitrarily – Interference with discretion—Assessee doing business of selling gold and silver served with notices under ss.22 (4) and 23 (2)—Books of account accepted in respect of transactions in silver and s. 13, Proviso applied in respect of transactions in gold—Income-tax Officer held justified in doing so.

The language of the proviso to s. 13 makes it clear that discretion is vested in the Income-tax Officer; but obviously it was not the intention of the Legislature that such discretion should be arbitrary. What the Court has to consider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of accounts; if he did exercise his judgment and did not act arbitrarily, then having regard to the language of the proviso, his discretion cannot be interfered with. 172 Ind. Cas. 1 (3), relied on. 177 Ind. Cas. 36 (1), referred to. [p. 607, col. 2, p 608, col. 1.]

An assessee who was doing a business of selling gold and silver was served with notices under ss. 22 (4) and 23 (2), Income Tax Act. The *munib* of the assessee was specifically asked about the profits from the transactions in gold and silver. In respect of the transactions in gold the Income-tax Officer applied Proviso to s. 13:

Held, that the income-tax authorities were justified without giving notice to the assessee, in applying the proviso to the s. 13 in respect to transactions in gold while accepting the books of account in respect to transactions in silver. [p. 609, col. 1.]

Misc. Case from the reference submitted by Commissioner of Income-tax, Central and United Provinces, dated February 29, 1940.

Messrs. *M. N. Agarwala* and *Brij Lal Gupta*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

Collister, J.—This is a case which has been stated under s. 66 (3), Income Tax Act. The assessee is a firm at Aligarh named Ganeshi Lal Chhapan Lal. The firm does *sarrafa* business and its main activity consists in buying ornaments and selling the gold and silver which is obtained from them. The firm melts the ornaments and converts them into gold and silver bars and these it sells in the market, some locally, but the bulk at Bombay. The bars are all tested at the Mint in Bombay and the quantity of dross is there imprinted on each bar and thereafter the bars are sold in the market at a discount which corresponds with the percentage of dross as certified by the Mint. The assessee's account books are maintained according to the mercantile accountancy system. They are regularly kept, and up to the year 1934-35 tax was assessed upon their basis: but in that year the profits in gold transactions, as revealed by the books of the firm, were only 2½ per cent. and this was not accepted as correct by the income-tax authorities, who applied the proviso to s. 13 of the Act and assessed the income of the firm in respect to these transactions upon a 5 per cent. basis. For the year 1935-36 the assessment year with which we are now concerned, it was found that the profits from transactions in gold were only 0.2 per cent. on a turnover of Rs. 5,56,411, and the Income-tax Officer, for reasons which he has given and which we shall discuss hereafter, again applied a flat rate under the proviso to s. 13. He applied a rate of 3 per cent. in respect to the sales at Bombay and 5 per cent. in respect of local sales. He accepted the books of account as regards silver transactions.

There was an appeal to the Assistant Commissioner of Income-tax and he agreed with the Income-tax Officer that the profits of gold transactions as shown in the books of the firm, were "ridiculously low" and were not acceptable; but he reduced the rate of profits from 3 to 2½ in respect to the sales which were effected at Bombay. The assessee then applied to the Commissioner of Income-tax for review under s. 33 of the Act, and in the alternative he requested that officer to refer certain questions of law to this Court under s. 66 (2). The Commissioner declined to exercise

his powers of review under s. 33 and also declined to state a case under s. 66 (2). Thereafter, the assessee applied to this Court under s. 66 (3) and a Bench of this Court, of which one of us was a member, by its order dated September 1, 1939 directed the Commissioner of Income-tax to state a case for the decision of this Court. The question or rather the questions of law, as formulated by the assessee and as now referred to this Court, are as follows:

"Whether under the circumstances of this case the provisions of s. 13, Income Tax Act, at all come into play, and whether there was any legal evidence on the record to justify the order of the income-tax authorities in accepting the book profits of on commodity and rejecting the same for transactions of the other commodity without giving notice."

The opinion of the Commissioner of Income-tax is that the two questions involved should be answered in affirmative. We shall first consider whether the proviso to s. 13 of the Act was in the circumstances applicable. Learned Counsel for the assessee contends that the Income-tax Officer erred in expressing the opinion that the profits of the firm were not deducible from its books; he says that if that officer had applied certain tests, the correctness of the profits as revealed in the books of account would have become manifest. We shall discuss at a later stage the tests which are suggested by the learned Counsel. Meanwhile, we propose to state the view which is taken by the Commissioner and to discuss the law on the subject. The Commissioner says:

"The real point arising in this case, therefore, is whether the method of accounting employed in respect of the transactions in gold is such that the income, profits and gains can properly be deduced thereform. As to this point, I respectfully submit that the words of the section itself show that it is for the Income-tax Officer, and the Income-tax Officer alone, to decide as a question of fact whether the method of accounting reflects the true profits. This position has been repeatedly maintained by the High Courts in India. The only question of law involved is whether there were materials upon which the Income-tax Officer could find as a fact that the method of accounting employed for the gold transactions did not reflect the true profits."

He then refers to the case in *Messrs. Ganga Ram Balmokand* v. *Commissioner of Income-tax* (1), and he goes on to say:

"According to this decision the Income-tax Officer was not bound to accept the profits disclosed by the books, but there was no onus on him to prove that those profits were not the real profits. On the other hand, the burden was on the petitioners to show that those profits were in fact the real profits. This burden was not discharged by the petitioners, as their accounts contained no details as to purchases to enable a check to be made of the purchases shown. There were therefore I submit materials for the Income-tax Officer's finding of fact."

The Commissioner then relies upon the case in *Badri Shah* v. *Commissioner of Income-tax, Punjab* (2). In that case also the assessee did business in bullion. The rate of profits as disclosed by their books for the year then in question was 0.19 per cent. which was held to be below the average expectation of profits from such transactions in gold. The income-tax authorities accordingly added a lump sum of Rs. 6,000 as additional profits, and the High Court of Lahore held that there was justification for rejecting the accounts inasmuch as there were no vouchers or other material which would have enabled the authorities to verify the correctness of the accounts. The language of the proviso to s. 13 makes it clear that discretion is vested in the Income-tax Officer; but obviously it was not the intention of the Legislature that such discretion should be arbitrary. We may refer in this connection to a decision of the Privy Council, *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Sarangpur Cotton Manufacturing Co Ltd., Ahmedabad* (3). In that case the Assistant Commissioner had expressed the opinion that the discretion which vested in the Income-tax Officer was absolute; but this view was not endorsed by the Judicial Committee. The assessee had a regular method of accounting, and at p. 51* their Lordships say:

"It is the duty of the Income-tax Officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced thereform, and to proceed according to his judgment on this question. It is clear that the Income-tax Officer acted on the same view as that expressed by the Assistant Commissioner, and did not perform the duty above stated."

In *Pioneer Sports Ltd., Sialkot* v. *Commissioner of Income-tax* (4), a Bench of the Lahore High Court observed as follows:

"It is true that it has frequently been held by this Court that the Income tax Officer is the sole arbiter for determining under the proviso to s. 13 how the profits are to be computed. But it is a question of law, into which this Court is entitled to in-

(1) 5 I T R 464; 177 Ind. Cas. 36; A I R 1937 Lah. 721; 39 P L R 1028; I L R (1938) Lah. 10; 11 R L 52.

(2) 10 I T C 5; A I R 1936 Lah. 856.

(3) (1938) A L J 46; 172 Ind Cas 1; A I R 1938 P C 1; 1937 O W N 1225; 10 R P C 121; 1937 O L R 611; 1937 A L R 978; 4 B R 171; 42 C W N 194; 47 L W 9; 1938) M W N 152; (1938) 1 M L J 1; 40 Bom. L R 257; 66 C L J 411; I L R (1938) Bom. 239; 65 I A 1; 32 S L R 225 (P C).

(4) A I R 1934 Lah. 876; 158 Ind. Cas. 1122; 16 L 489; 8 R L 339 (2); 37 P L R 740.

*Page of (1938) A. L. J.—[Ed.]

quire, whether there is any evidence on which the Income-tax Officer could come to the decision that the method of accounting is such that the gains could not be computed except by the arbitrary method contemplated by the proviso. If there was no evidence to justify the Income-tax Officer's rejection of the method of accounting in this case, it is clear that the assessment should have been made under the first part of s. 13 and not under the proviso."

In that case a low rate of profits was revealed by the books of account and there was no stock register, nor had the company ever kept such a register. The Court held that there was no sufficient justification for invoking the proviso to s. 13. This view was not altogether approved by another Bench of the same High Court in *Messrs. Ganga Ram-Balmokand* v. *Commissioner of Income-tax* (1), which is one of the cases referred to by the Commissioner. At p. 476* Din Mohammad J., who delivered the judgment, says:

"In *Pioneer Sports Ltd., Sialkot* v. *Commissioner of Income Tax* (4), a Division Bench of this Court has held that the mere fact that a company shows a low rate of profit was no reason for the Income-tax Officer to reject the total profits nor was the absence of a stock register, which the company had admittedly never used before, and that the use of the proviso to s. 13 for the purpose of introducing an arbitrary manner of computing the profits was not justified in my view, this judgment proceeds on a wrong basis when it criticises adversely the reasons of the Income-tax Officer for rejecting the accounts Whether the account-books are reliable or not is a question of fact to be determined solely by the Income, tax Officer, and when he gives reasons for doing so, which are not apparently capricious or injudicial-it is not possible to disturb his finding merely on the ground that the material in support of those reasons is meagre or insufficient."

It seems to us that what we have to consider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of accounts; if he did exercise his judgment and did not act arbitrarily, then having regard to the language of the proviso, his discretion cannot be interfered with. The first thing that the Income-tax Officer noticed was that the profits from the gold transactions were excessively low. This fact by itself of course would not necessarily prove anything, for there can be no assumption that a *sarrafa* business must show profits; but it would naturally put the Income-tax Officer upon inquiry as to the reason for the remarkable disparity between these profits and the profits from the transactions in silver. In this connexion he, not unnaturally, took account of the fact that in the previous year also when the gold profits were 2½ per cent., as disclosed by the books, a flat rate had been applied under the proviso and the assessee had submitted to it. There may of course have been various reasons why the assessee chose to submit to that assessment; but there are other considerations also which weighed heavily with the Income-tex Officer. In the assessee's books of account there are no details either as regards the nature of the ornaments purchased or as regards the persons from whom they were purchased, and, therefore, verification as regards the amount and price of gold purchased was impossible. In para. 11 of an affidavit which was sworn on April 5, 1937, the assessee stated:

"The applicant emphatically asserts that, the names of sellers and names of ornaments are never recorded by any dealer of this description in the whole of the province; and in the method of accounting employed by the petitioner such details were never recorded."

There is no counter affidavit and, therefore, we must accept this assertion as correct. But the difficulty remains, and the circumstance that it is not customary to give details of ornaments purchased does not necessarily justify the practice. Moreover, it seems improbable that a *sarraf* would not keep a separate book or memorandum showing such details, if only to protect himself in the event of a Police inquiry as regards ornaments which might still be in his hands and unmelted. Learned Counsel for the assessee has given us a translation of an extract from his client's account books and it shows, as learned Counsel rightly points out, the weight in *tolas* and *mashas* of the ornaments purchased each day and the rate per *tola* which the assessee paid. But in the absence of details as to the nature of the ornaments and who had owned them, no clue was available as to the amount of gold contained in each such article and no facility was offered for verification as to whether the price paid had or had not been overstated. The Income-tax Officer then went on to consider the state of the gold market. He says:

"I have noted the market conditions and find that the price of gold rose from Rs 31-2-0 in *Pus* to Rs. 32-2-0 in *Magh* and Rs. 34-7-0 in *Phagun*. In the months of *Chait* and *Baisakh* there was a slight fall as the price ranged from Rs 33-14-0 to Rs 33-9-0. After this from *Jeth* onwards the market was steady at the higher rate of Rs. 34-4-0 till *Sawan* and rose to Rs. 35-1-0 in *Asoj*. In the last month of *Kartik* the price of gold was also no less than Rs. 34-10-0. It would thus appear that the market was quite favourable and the assessee must not have only a negligible profit as shown in the books."

The value of the opening stock was

*Page of 5 I. T. R.—[*Ed.*]

Rs. 9,408. Purchases during the year amounted to Rs. 5,49,694. The extract from the assessee's *rokar*, to which we have already referred, shows that in the last six months of the year the sales amounted to Rs. 2,48,061-7-6, and learned Counsel for the assessee argues from this that a large proportion (actually less than half) of his purchases were made when gold was dear and. therefore, he incurred a less. Possibly the assessee did not invariably sell at a profit, but for the most part the market had an upward tendency, and it is hardly conceivable that in this favourable state of the market the assessee's profits would have been as law as 0.2 per cent. We may mention here that the basis of the Assistant Commissioner's decision in appeal was that the price of the gold exported to Bombay was not known and that the market was favourable, which shows that he approved the two main grounds on which the Income-tax Officer founded his opinion.

Learned Counsel for the assessee contends that there are certain tests which the Income tax Officer should have applied, but did not apply. One of these we have already mentioned and discussed; it is consideration of the fact that purchases amounting to Rs. 2,48,061 out of Rs. 5,49,694 were made in the second half of the year. We have already said what we have to say in respect to this matter. The other test that the learned Counsel says that the Income-tax-Officer ought to have applied is this: The gold which the assessee send to Bombay was found to contain 5 per cent. of dross and Counsel pleads that the Income-tax Officer should have looked at the books of other *sarrafs* whose gold had 5 per cent. of dross and, if their profits were very low, there would be no ground for suspicion as regards the books of the assessee. For aught we know to the contrary, the Income-tax Officer may have looked at such books if any such were available he certainly mentions having looked at regular account books of other firms in respect to local sales. But even assuming that 5 per cent. of dross was found in the gold exported to Bombay by other *sarrafs* and that the Income-tax Officer did not examine such books in respect to sales at Bombay, the fact that the Income-tax Officer omitted to apply a particular test suggested by Counsel will not render his opinion ineffective.

Having given the matter our best consideration, we have arrived at the conclusion that the Income-tax Officer did not act arbitrarily, but exercised his judgment, and that there was material before him which was reasonably capable of supporting the opinion which he formed. In this view of the case he was justified in not accepting the firm's books of account as disclosing the true income, gains and profits of the firm. As regards the second question, what we have to consider is whether the income-tax authorities were justified without giving notice to the assessee, in applying the proviso to the s. 13 in respect to transactions in gold while accepting the books of account in respect to transactions in silver. Notices were issued to the assessee under s. 22 (4) and 23 (2) of the Act and the assessee's *munib* was specifically questioned in respect to the profits from the gold and silver transactions. There was no obligation on the authorities to serve any other kind of notice upon the assessee and we do not see that he has been in any way prejudiced.

Our answer to the questions referred to us is as follows: (1) In the circumstances of this case the proviso to s. 13 of the Act came into operation. (2) There was no necessity for the income-tax authorities to issue a notice to the assessee before accepting the book profits in respect to transactions in silver and rejecting the same in respect to transactions in gold. A copy of this judgment under the seal of the Court and the signature of the Registrar will be sent to the Commissioner of Income-tax. The assessee will pay the costs of this reference. Counsel for the Department is entitled to a fee of Rs. 200.

S. *Answer accordingly.*

NAGPUR HIGH COURT

Second Appeal No. 335 of 1938
July 8, 1940
NIYOGI, J.

Seth CHAMPALAL—PLAINTIFF—APPELLANT

versus

VILLAGE PANCHAYAT, SEMRI—DEFENDANT—RESPONDENT

C. P. Village Panchayat Act (V of 1920), ss. 12 (1), 15 (1) (c)—C. P. Local Self-Government Act (IV of 1920), s 20, applicability of, to village panchayat—Panchayat, if can control market—If can levy taxes on shops in market—Reference to District Council, if essential.

Section 23 of the C. P. Local Self-Government Act has no application to the village *panchayat*.

Section 12 of the C. P. Village Panchayat Act confers a discretionary power on *panchayats* to undertake the control and administration of certain matters specified in that section. That section does not expressly mention markets but there can

be no doubt that holding of a market being a measure of public utility would be a matter falling under the head (1) of s. 12 (1). The contention that the village *panchayat* cannot undertake control of a market without reference to the District Council must fail for the reason that there is no mention of the District Council in that section and a Court of Law cannot insert that expression when it is not there.

The holding of a market is a measure of a public utility and as such the village *panchayat* can undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. Where the *panchayat* has assumed control of the market by a formal resolution, it has power to levy fees on persons exposing goods for sale in that market under s. 15 (1) (c) with the approval of the District Council.

S. A. from a decree of the Court of the Additional District Judge, Narsinghpore, dated March 28, 1938.

Mr. *K. C. Jain*, for the Appellant.

Messrs. *R. S. Dabir* and *K. B. Tare*, for the Respondent.

Judgment.—This is a plaintiff's appeal from a differing judgment of the Additional District Judge, Narsinghpore, in Civil Regular Appeal No. 43-A of 1937, decided on March 28, 1938.

The appellant filed the suit out of which this appeal arises against the village Panchayat of Semri Harchand for a decree of premanent injunction restraining the village Panchayat from recovering the market fees from him and for refund of Rs. 16-7-6 already recovered from him under coercive process.

It is common ground that up to 1930 Semri market used to be held on the Hoshangabad-Sohagpore road and that it was removed to its present site which is *malguzari* plot No. 272 at the instance of the Deputy Commissioner Mr. D. J. N. Lee. The plaintiff admittedly keeps his shop in that market on every Monday when a market is held. His contention is that the village Panchayat, *viz.*, the defendant has no power to impose any tax or levy fees from any person having a shop in the market as the market was held on a site which is the private property of the *malguzar*. This contention was overruled in the lower Appellate Court. It is urged here that the village Panchayat would have the power to levy fees from the shop-keepers in the market only if the control of the market had been vested in the Panchayat by any notification of the Prov. Govt. as contemplated in s. 23 of the Local Self-Govt, Act. It is further contended that the Panchayat could not under s. 12 (1) of th e Village Panchayat Act, 1920, undertake the control and administration of a private market without the permission of either the District Council or the Prov. Govt. I see no force in these contentions. Section 23 of the Local Self-Govt. Act is altogether irrelevant as it has no application to the village Panchayat. It is because the Contral Provinces Local Self-Govt. Act, 1920, does not directly confer on the District Councils the right of levying fees and tools and of control in any market that it vests the Prov. Govt. with power to confer such rights by means of a notification, but s. 12 of the Village Panchayat Act confers a discretionary power of Panchayats to undertake the control and administration of certain matters specified in that section. That section does not expressly mention markets but there can be no doubt that holding of a market being a measure of public utility would be a matter falling under the head (1) of s. 12 (1). The contention that the village Panchayat cannot undertake control of a market without reference to the District Council must fail for the reason that there is no mention of the District Council in that section and a Court of Law cannot insert that expression when it is not there. In fact there was a provision like what is contended for here in the section as enacted originally but the reference to the District Council was deleted by the C. P. Act IX of 1935.

I have no doubt that the holding of a market is a measure of public utility and as such the village Panchayat could undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. The Panchayat assumed control of the market by a formal resolution; Ex. D-1. It had, therefore, power to levy fees on persons exposing goods for sale in that market under s. 15 (1) (c) with the approval of the District Council. The procedure as laid down in that section relating to imposition of any tax, toll or fees was followed in this case and no contention is raised in that behalf.

There is no substance in this appeal which is, therefore, dismissed with costs in all Courts.

D. *Appeal dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 324 of 1937
January 23, 1941
BENNETT AND GHULAM HASAN, JJ.
CHHEDI SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Deed—Construction—Gift—Principles of construction—Consistency with law—Evidence Act (I of 1872) s. 92—Gift deed—Construction—Conduct of parties—Relevancy.

The cardinal rule of construction of deeds is to ascertain the intention of the donor as disclosed from the language used in the deed. It is also a well-understood rule of construction that such intention should be effectuated so far and as nearly as may be consistent with the law to which the donor was subject. [p 613, col. 1.]

Where a childless Hindu made a gift of his property to the sons of one of his brothers and the grandsons of another brother:

Held, that in the absence of any special indication in the deed of gift itself, the donor must be taken to have intended that the donees should take *per capita* and not *per stirpes* because the property would have been so divided under the Hindu Law if the donees had all been persons of the same relationship to the donor. [p. 613, col 2.]

Where the language of the deed is clear and free from ambiguity, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point. [p 614, col. 1.]

(Case-law discussed.)

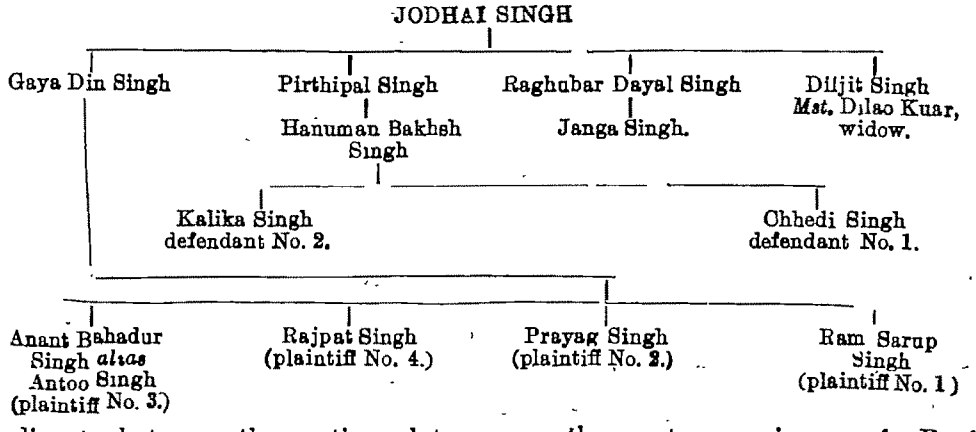
S. C. A. against the order of the Civil Judge of Sultanpur, dated April 30, 1937.

Mr. *Akhtar Husain*, holding brief of Mr. *Bhagwati Nath*, for the Appellants.

Mr. *P. N. Chaudhri*, for Respondents Nos. 1 to 3.

Judgment—This is a second civil appeal against the judgment and decree dated April 30, 1937, passed by the learned Civil Judge of Sultanpur setting aside in first appeal the judgment and decree dated January 22, 1937, passed by the learned Munsif of Amethi at Sultanpur, dismissing the plaintiffs' suit.

The suit was brought by the four sons of one Gaya Din Singh against the two sons of Hanuman Bakhsh Singh who was the son of Pirthipal Singh, brother of Gaya Din Singh, for possession over certain property. The pedigree material to the case is given below:


JODHAI SINGH
Gaya Din Singh
Pirthipal Singh
Raghubar Dayal Singh
Diljit Singh
Mst. Dilao Kuar, widow.
Hanuman Bakhsh Singh
Janga Singh.
Kalika Singh defendant No. 2.
Chhedi Singh defendant No. 1.
Anant Bahadur Singh alias Antoo Singh (plaintiff No. 3.)
Rajpat Singh (plaintiff No. 4.)
Prayag Singh (plaintiff No. 2.)
Ram Sarup Singh (plaintiff No. 1)

The dispute between the parties relates to the property of Raghubar Dayal Singh who died in 1932. His son had predeceased him. There had been a separation amongst the sons of Jodhai Singh, each becoming owner of one-fourth share in his property. On the death of *Mst.* Dilao Kuar, widow of Daljit Singh who died issueless Raghubar Dayal succeeded to the whole of Daljit Singh's share in the ancestral property as next reversioner, his brothers Gaya Din Singh and Pirthipal Singh being dead at that time. Raghubar Dayal Singh thus became the owner of a half share in the ancestral property. In addition he had acquired some other property. It is not disputed that the plaintiffs are the next reversioners of Raghubar Dayal Singh, and as such would be entitled to the whole of his property if no valid disposition of his property otherwise had been made by Raghubar Dayal Singh. It was on this basis that the suit was brought by the four sons of Gaya Din Singh, mutation having been effected on the death of Raghubar Dayal Singh in respect of a half share in the property in the names of the defendants Kalika Singh and Chhedi Singh. A copy of the order of the Assistant Collector in the mutation case is on the record. It shows that the case came before him on the basis of succession, and that the parties, namely, the four plaintiffs on the one side and the

two defendants on the other, were in possession in equal shares. Mutation was accordingly ordered on the basis of possession.

The defendants' case was that Raghubar Dayal Singh executed a will in 1928 providing that after his death the plaintiffs and the defendants should be owners in equal shares. Subsequently on October 17, 1929, he executed a registered deed of gift to the same effect. The defendants obtained possession on the basis of this deed of gift, and, therefore, the plaintiffs were not entitled to any relief.

A replication was filed by the plaintiffs to the effect that they had no knowledge about the execution of this deed of gift, and if any deed of gift were proved they did not accept it; it had not been acted upon and no right accrued to the defendants under it. During the proceedings of the case, however, the plaintiffs' Counsel admitted the genuineness of the deed of gift, Ex. A-10, on which the defendants relied.

The Munsif found that Raghubar Dayal Singh had executed the will as alleged in 1928, but the original will was not produced, only a copy, and the document had not been registered. The loss of the original was not proved and the copy could not, therefore, be admitted in evidence. Moreover the Munsif thought that the deed of gift amounted to a revocation of the will.

The Munsif found that under the deed of gift the plaintiffs and the defendants were each given a moiety in the property of Raghubar Dayal Singh, and they took possession accordingly during his life time. On this finding he dismissed the plaintiffs' suit.

In first appeal the Civil Judge apparently accepted the finding that the will had not been proved, and thereafter considered certain arguments put forward with regard to the deed of gift. Unfortunately he has referred in numerous places in his judgment to the will where apparently he intended to refer to the deed of gift. We take it, however, that he found that the will was invalid and that the deed of gift was valid. He agreed with the Munsif that the defendants were entitled to the property gifted to them by Raghubar Dayal Singh, but did not agree with him that Raghubar Dayal Singh had gifted his property to the parties in equal shares, that is, a half share to the four plaintiffs and the other half share to the two defendants. He observed that according to the deed of gift the donor gave his property to these six persons without indicating that he was giving a half share to the first four and the other half share to the other two. He could find no justification for the Munsif's construction that the donor was gifting his property *per stirpes*. In his opinion, in the absence of anything to the contrary, the gift must be taken to have been made *per capita*. He accordingly held that the plaintiffs were entitled to a two-thirds share and the defendants to a one-third share in the property gifted.

The Civil Judge then considered a matter which had been brought to his notice namely, that the deed of gift did not include all the property in dispute, certain *khatas* being omitted. He thought, however, that these *khatas* were *shamilat khatas* the ownership of which would go with the ownership of the parent *khatas*. There was, however, another Khata No 229 of Keshopur which was not a *shamilat khata* and which was not included in the deed of gift. Consequently the defendants were not entitled to possession of any portion of this *khata*, and the plaintiffs were entitled to a decree for possession of a half share in it, being already in possession of the other half.

The Civil Judge accordingly allowed the appeal of the plaintiffs in his Court, awarding them a decree for possession of a one-sixth share in respect of the entire property in dispute except as regards Khata No. 229 of Keshopur in which they were given a decree for possession to the extent of a half share. The Civil Judge did not, however, express himself at all clearly, for he first said that he gave the plaintiffs a decree for possession of a one-sixth share in respect of the entire property in dispute, and added afterwards that he gave them a decree for possession to the extent of half share in Khata No. 229. We, have, however, no doubt that he intended to award a decree for possession of one-sixth share in the property in dispute excluding the property in Khata No. 229 of Keshopur in respect of which he awarded a decree for possession to the extent of a half share.

This second appeal has been preferred by the defendants Chhedi Singh and Kalika Singh. The grounds of appeal suggest that they rely rather on the will than on the deed of gift. The reason for this is clearly that under the will they

were expressly entitled to a half share in the property, while the deed if gift, considered by itself, indicates rather that it was intended to give them only a third share. At the same time it was urged in one of the grounds of appeal that as the possession of the parties was in accordance with the deed of gift, the lower Appellate Court was in error in holding that the gift must be taken to have been *per capita*. It was also contended by the appellant that s. 233-K of the Land Revenue Act was applicable to the facts of the case, and that the plaintiffs should not have been awarded a half share in Khata No. 229 of Keshopur.

Cross-objections were filed by the respondents contended that they should have been given a larger share in certain *khatas* which were not included in the deed of gift.

The principal question that arises for determination in this case is whether upon a construction of Ex. A-10 the deed of gift, the donor intended that the donees mentioned therein should take *per stirpes* as contended for on behalf of the defendants-appellants or *per capita* as contended for on behalf of the plaintiffs-respondents. The learned Munsif accepted the contention of the defendants, while the learned Civil Judge has accepted the contention of the plaintiffs. We have carefully considered the language of the deed of gift and we have no doubt whatever that the construction placed upon the deed by the lower Appellate Court is perfectly justified and must be maintained. It is well-settled that the cardinal rule of construction of deeds is to ascertain the intention of the donor as disclosed from the language used in the deed. It is also a well-understood rule of construction that such intention should be effectuated so far and as nearly as may be consistent with the law to which the donor was subject. It is clear from the circumstances that had the donor died without making any disposition of his property by a gift *inter vivos*, the plaintiffs alone would have been entitled to inherit his property to the exclusion of the defendants, inasmuch as under the Hindu Law the plaintiffs, who are nephews of Raghubar Dayal, would come in preference to the defendants who are the grandsons of another brother of Raghubar Dayal. It may be taken for granted that by executing the deed of gift and including the defendants therein as objects of his bounty in conjunction with the plaintiffs the donor wanted to avoid the exclusion of the defendants which would have inevitably resulted had he not chosen to make a gift. There is, however, no rational ground for thinking that the donor would wish to divide his property between the descendants of his two brothers *per stirpes* and not allow them to take a share equally. Under the Hindu Law persons of the same relationship to the deceased take *per capita*, that is, the estate of the deceased is divided into as many shares as the number of heirs, each heir taking one share, and the exception is confined only to two cases of sons, grandsons and great-grandsons of a deceased male Hindu on partition, and to sons' sons, daughters' sons and daughters' daughters succeeding to *stridhan* (*vide* Mulla's Hindu Law, p. 24, 1940 Edition). Even if the defendants had been of the same relationship to the deceased as the plaintiffs, namely, that if they had been also nephews instead of being grand nephews, they would not have been entitled to take *per stirpes* under the Hindu Law. There is, therefore, no good ground for holding, in the absence of any special indication in the deed of gift itself, that the donor intended the plaintiffs and the defendants to take *per stirpes* and not *per capita*. If the donor did really intend to divide the property *per stirpes* upon the parties, there was nothing to prevent him from expressing that intention in clear and unambiguous words. We are, therefore, of opinion that the contention advanced on behalf of the defendante-appellants has no substance and must be rejected.

The learned Munsif on this part of the case observes :

"Further it is clear from the sworn testimony of D. W. No. 1 that half of the property was gifted in favour of the plaintiffs and the other half was gifted in favour of the defendants. Exhibit A-4 which is the report of the Naib Tahsildar also shows that the plaintiffs and the defendants were in possession of half of the property of Raghubar Dayal Singh each during the lifetime of Raghubar Dayal Singh."

It has been urged on behalf of the defendants-appellants in this Court that the evidence of D. W. No. 1 and the conduct of the parties as evidenced by Ex. A-4 should be taken into consideration in interpreting the deed of gift. As regards the evidence of D. W. No. 1, we have no doubt whatever that that evidence is clearly excluded from consideration in view of the provisions of s. 92

of the Indian Evi. Act. As regards the conduct of the parties, namely the possession of the property half and half by the plaintiffs and defendants during the lifetime of the donor, we are of opinion that as against the plain construction of the deed of gift which we have adopted, the so-called conduct—assuming that it were admissible to take it into consideration—affords no reliable or strong indication that such possession was in pursuance of the deed of gift or with the consent of the plaintiffs. Exhibit A-4 is the report of the Naib Tahsildar made to the Sub-Divisional Officer and Ex. 10 is the order of the Sub-Divisional Officer. It appears from both these documents that the application for mutation was made by the defendants upon the basis of succession and no claim was made on the basis of the deed of gift. The Naib Tahsildar reported that the parties were in possession of the property half and half and they were also the legal heirs of the deceased. The Sub-Divisional Officer agreeing with his report ordered mutation on the ground of possession. If the plaintiffs did not dispute the right of the defendants to a mutation of half the property in their favour on the ground that the deed of gift awarded the property to them half and half, it was scarcely necessary to go into the question of possession or legal heirship to the deceased. The very fact that evidence was recorded itself shows that the plaintiffs must have contested the right of the defendants to mutation of half of the property, although there are no other documents on the record to show what the position precisely was.

In this view of the matter it is not necessary to consider whether the conduct of parties as shown by their possession of property half and half during the lifetime of the donor and after his death is admissible for the purpose of construing the deed of gift. We are nevertheless of opinion that where the language of the deed is clear and free from ambiguity, as in the present case, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point. Reference may be made in this connection to 34 Halsbury's Laws of England, p. 165, para. 217, where it is stated that

"extrinsic evidence is not to be resorted to except for the purpose of proving a fact which makes intelligible something in the will which without the aid of such evidence, would not be intelligible."

In the leading case of *Balkishen Das* v. *Legg* (L. R. 27 I. A., 58), (1), it was laid down by their Lordships of the Judicial Committee that oral evidence of intention is inadmissible for the purpose either of construing the deeds or of proving the intention of the parties: see s. 92 of the Indian Evi. Act, 1872. It was observed by Lord Davey:

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts."

These observations were made in an appeal from the Allahabad High Court and the question involved was whether the deed in question was a mortgage by conditional sale or an out and out sale with a condition of repurchase.

This view was confirmed by their Lordships of the Privy Council in *Maung Kyin* v. *Ma Shwe La* (L. R. 44 I. A., 236) (2).

In *Baraboni Coal Concern Co., Ltd.* v. *Servitors and Shabaits of Sree Sree Gopinath Jiu* (L. R. 61 I. A., 35) (3), the question was whether in a mining lease executed by four *shebaits* of a family deity of the idol's interest in a village, one of them could alone maintain a suit against the lessee for a fourth share in the royalties reserved. Their Lordships answered the question in the negative. It was contended that the conduct of parties, after the lease was signed, in accordance with which each lessor for a time accepted separate payments of royalties, controls the stipulations in the lease, and vouches an agreement between parties to vary its terms. Their Lordships rejected the contention and observed:

"The facts do not support it. Nay, more: it sins against the familiar principle affirmed in the

(1) 27 I A 58; 22 A 149; 4 C W N 153; 7 Sar. 601; 2 Bom. L R 523.

(2) 44 I A 236; 42 Ind. Cas. 642; 15 A L J 825; 33 M L J 648; 3 P L W 185; 6 L W 717; 22 C W N 257; 23 M L T 36; 27 C L J 175; 20 Bom. L R 278; (1918) M W N 300; 45 C 320; 9 L B R 114; 11 Bur. L T 21.

(3) 61 I A 35; 147 Ind. Cas. 884; 6 R P C 85; 11 O W N 225; A I R 1934 P C 58; 29 L W 291; 38 C W N 325; (1934) A L J 295; 36 Bom. L R 390; 66 M L J 399; (1934) M W N 300; 18 R D 112; 61 C 313; 59 C L J 257 (P C).

case of the *North Eastern Railway Co.* v. *Hastings* (4), that where the words in a deed are clear, as they are in this case, the subsequent conduct of parties is an irrelevant consideration".

In a case decided by the Allahabad High Court in *Mst. Dhanpatti* v. *Badri Singh* (A. I. R. 1935 Allahabad, 729) (5), it was held relying upon the authority of decisions in L. R 27 I. A., 58, (1) and L. R. 44 I. A., 236, (2), that so far as the interpretation of a document is concerned the subsequent conduct of the parties cannot be taken into account.

It is not necessary to multiply authorities on the point. Reference has, however, been made on behalf of the defendants-appellants to 1. *Ma Thaung* v. *Ma Than* (I. L. R. 51 Cal., 374 P. C.=L. R. 51 I. A., 1) (6). 2. *Hanif-un-nisa* v. *Faiz-un-nisa* (L. R. 38 I. A., 85) (7). 3. *Gangaram* v. *Mst. Kanchanbai* (A. I. R. 1936 Nagpur, 168) (8), 4. *Narayan Sakharam Patil* v. *Co-operative Central Bank, Malkapur* (A. I. R. 1938 Nagpur, 434), (9), 5. *Appa* v. *Kachai Bayyan Kutti* (A. I. R. 1932 Madras, 689) (10), 6. *Aya Ram* v. *Rup Chand* (1937 O. W. N. 1084. P. C. (11).

It was observed by their Lordships of the Privy Council in *Ma Thaung* v. *Ma Than* (I. L. R. 51 Cal. 374 at 382) (6), that

"the conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings",

but the question in the present case is whether the document is open to different meanings.

In *Hanif-un-nissa* v. *Faiz-un-nisa* (L. R. 38 I. A., 85) (7), their Lordships held that under s. 92 of the Indian Evi. Act extrinsic evidence is admissible to show that a deed which was in form a deed of sale with a receipt for the consideration was in reality intended to operate as a deed of gift. In this case the Allahabad High Court had held that the defendants were precluded by s. 92 from giving such evidence, considering that it was evidence "to vary a deed the language of which is plain and unambiguous". Their Lordships merely observed that the decree appealed from could not be sustained and remitted the case to the High Court to be dealt with on the evidence.

The cases of *Gangaram* v. *Mst. Kanchanbai* (A. I. R. 1936 Nagpur, 168) (8), *Narayan Sakharam Patil* v. *Co-operative Central Bank, Malkapur* (A. I. R. 1938 Nagpur, 434) (9) and *Appa* v. *Kachai Bayyan Kutti* (A. I. R. 1932 Madras, 689) (10), do not take us much further, as they merely lay down that where an ambiguous document is to be construed the Court is not confined to the narrow limits of its uncertain terms: it has to look wider and view the surrounding circumstances and gather the intention from the subsequent conduct and acts of the parties.

In *Aya Ram* v. *Rup Chand* (1937 O. W. N. 1084, P. C.) (11), the question was whether the sale of certain land 'with external and internal rights' included the *shamilat* or village common land of which at the date of sale no division had been effected. Their Lordships held upon a construction of the language of the sale deed that the words "external and internal rights for ever" were quite appropriate to include a right in respect of the *shamilat* land and observed :—"There could be no more emphatic words of divestiture". No doubt in the concluding portion of their judgment their Lordships expressed agreement with the view taken in *Shahamad* v. *Ibrahim* (57 P. R., 1915) (12), that the conduct of the vendor in quitting the village and showing no more interest in the property might be regarded as an important indication of the intention and they added,

"In their Lordships' opinion regard may be had to such considerations in construing the unsophisticated conveyancing of which the deed before them is an example and to which it would be unreasonable to apply the rigid canons of interpretation appropriate to the finished products of Lincoln's Inn."

We are of opinion that the aforesaid observations must be read in the light of the facts and circumstances of the particular case decided by their Lordships.

(4) 69 L J Ch. 516; (1900) A C 260; 82 L T 429.
(5) A I R 1935 All. 729; 156 Ind. Cas. 53; (1935) R D 303 (2); 7 R A 1031.
(6) 51 C 374; 80 Ind. Cas. 1031; 51 I A 1; A I R 1924 P C 88; 19 L W 477; 46 M L J 618; (1924) M W N 662; 3 Bur. L J 333; 29 C W N 559 (P C).
(7) 38 I A 85; 11 Ind. Cas. 398; 8 A L J 373; 13 C L J 510; 13 Bom. L R 391; 21 M L J 1126; 15 C W N 521; 10 M L T 23; (1911) 2 M W N 370; 38 A 340 (P C).
(8) A I R 1936 Nag. 168; 164 Ind. Cas 792; I L R (1936) Nag. 60; 9 R N 34.
(9) A I R 1938 Nag. 433; 178 Ind. Cas. 293; I L R (1938) Nag. 604; 1938 N L J 82; 11 R N 219.
(10) A I R 1932 Mad. 688; 137 Ind. Cas. 458; 35 L W 444; Ind. Rul. (1932) Mad. 389; (1932) M W N 975.
(11) (1937) O W N 1084; 169 Ind. Cas. 661; 1937 O L R 403; 1937 A L R 631; 10 R P C 35; 3 B R 688; (1937) 2 M L J 267; 39 P L R 687; 66 C L J 49; I L R (1937) Lah. 662; (1937) M W N 1316; 31 S L R 646 (P C).
(12) 57 P R 1915; 134 P W R 1915; 60 P L R 1916.

The above case, therefore, does not advance the case of the defendant-appellants at all.

The ground of appeal taken by the appellants with regard to s. 233-K of the Land Revenue Act was not pressed by their Counsel.

The position in regard to the property which was not expressly the subject of the deed of gift is not at all clear. The appellants argued in their seventh ground of appeal that a half share in Khata No. 229 of Keshopur had been decreed arbitrarily to the respondents while the respondents claimed that they should have been given a larger share in the property in certain *khatas* which were not included in the deed of gift. Learned Counsel were not able to throw much light on these points. Apparently the mutation order related to the whole property of Raghubar Dayal, although the deed of gift did not expressly do so. Certain *khatas* are not referred to in the deed of gift, and the lower Appellate Court, as already noted, thought that these were *shamilat khatas* which would go with the parent *khatas* which were included in the deed of gift. We do not, however, know what the parent *khatas* were, and Counsel have not been able to say. We consider that in these circumstances the burden lay on the respondents to show that the mutation entry was wrong, and we are unable to find that they have succeeded in doing so. The position, however, with regard to Khata No. 229 of Keshopur does seem to be different in that this *khata* is neither mentioned in the deed of gift nor is it a *shamilat khata*. It apparently stands by itself and we are unable to see how the defendants-appellants could have obtained it by virtue of the deed of gift. We think, therefore, that so far as this *khata* is also concerned, the decree of the Civil Judge must be upheld.

The result is that we maintain the decree of the lower Appellate Court and dismiss the appeal and the cross-objections with costs.

S. *Appeal dismissed.*

SIND CHIEF COURT

Criminal Appeal No. 34 of 1940

August 30, 1940

DAVIS, C. J.

SANOO MANAJI—APPELLANT

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), ss. 297, 441—S. 297, whether to be interpreted by reference to s. 441—Meaning and scope of "trespass" in s. 297—S. 297, if limited to religious feelings—Feelings contemplated by it are limited by reference to place of worship on sepulture—Whether refers to intention only—Accused held committed trespass—Criminal trial—Evidence—Statements by persons not called as witnesses—Court, if bound to accept their statement because case is criminal.

Section 297, I. P. C., fully deals with offences to which it refers and is self-contained and requires interpretation by no reference to s. 441, I. P. C. The word "trespass" in s. 297, I. P. C., means any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Section 297, I. P. C., does not refer to "religious feelings," though the kind of feelings, which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. That s. 297, is not limited to feelings of a religious nature is clear by the fact that in s. 298, which follows it, "religious feelings" are expressly referred to, Section 297, does not refer only to "intention". It refers also to trespass which is likely to wound the feelings. [p. 617, cols. 1 & 2.]

The complainant erected stones in memory over his dead daughter and two children, over their ashes in the cremation ground. The complainant's son-in-law, eleven years after the death of his wife as a result of a dispute about money matters with the complainant went to the cremation ground and deleted the name of the complainant from all the stones on the ground that they were erected out of money provided by him:

Held, that on the evidence and circumstances of the case the accused's (son-in-law's) trespass was committed with something more than knowledge; it was committed with intent to wound the feelings of the complainant. It was done in a spirit of spite and vindictiveness, and it was by injuring the complainant's feelings that the accused's feelings of spite and vindictiveness had to be satisfied. This was not a case where the feelings which were wounded were merely worldly feelings of vanity and pride. The fact that the stones were erected out of the money provided by the accused did not give him the right to enter the cremation ground and delete the name of the complainant therfrom. [p. 619, col 1.]

The Court is not bound to accept statements made by persons who were not called as witnesses merely because the case is a criminal one. [p. 618, col. 2.]

Cr. A. against conviction and sentence passed by the Additional City Magistrate, Karachi, dated March 5, 1940.

Messrs. *Gopaldas* and *N. Lalla*, for the Appellant.

Mr. *Partabrai D. Punwani*, Advocate-General, for the Crown.

Judgment.—This is an appeal against a judgment of the Additional City Magistrate, Karachi, who convicted the appellant Sanoo, a Police constable, of an offence under s. 297, I. P. C., but instead of sentending him to imprisonment directed him to be released on his entering into a bond of Rs. 300 with one surety for twelve months to keep the peace and be of good behaviour under s. 562, Criminal P. C. I admitted this appeal though no substantive sentence of imprisonment and no fine had been imposed because the section was a section which does not often come before the Courts, and because there was not much authority as to its interpretation. But even now I have been referred to only three cases; the principal case is reported in *Jhulan Sain* v. *Emperor* (1), which is followed by the Rangoon High Court judgment in *Mustan* v. *Emperor* (2), while there is a third judgment of the Allahabad High Court reported in *Queen-Empress* v. *Subban* (3) and which was prior in time to the Calcutta judgment. There is a case of the Bombay High Court, but this is an unreported case, and I see no reason to refer further to it, which differs from the Calcutta case and takes the view that trespass under s. 297, I. P. C., has the same meaning as criminal trespass under s. 441, I. P. C.

But after having heard arguments upon this point, I am quite satisfied that s. 297, I. P. C., is a section which fully deals with offences to which it refers and is self-contained and requires interpretation by no reference to s. 441, I. P. C., and I would say at once that I agree, with all respect, with the view of Richardson, J. in *Jhulan Sain* v. *Emperor* (1), that "trespass" in s. 297, I. P. C., appears to mean any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Further, it is to be noted that s. 297, I. P. C., does not refer to "religious feelings," though the kind of feelings, if I may use the phrase, which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places.

(1) 40 C 548; 18 Ind. Cas. 677; 14 Cr. L J 117; 17 C W N 534.

(2) 1 R 690; 81 Ind. Cas. 41; A I R 1924 Rang. 106; 25 Cr. L J 553.

(3) 18 A 395; A W N 1896, 119.

It does not, as the learned Advocate for the appellant, I think, rightly contends, punish acts which are merely of earthly vanity or pride. But that s. 297, I. P. C., is not limited to feelings of a religious nature is, I think, clear by the fact that in s. 298, I. P. C., which follows it, "religious feelings" are expressly referred to. Further, while the learned Advocate for the appellant has based his case upon the argument that there was no intention on the part of the appellant to wound the feelings of the complainant s. 297, I. P. C., does not refer only to 'intention." It refers also to trespass which is likely to wound the feelings. It will however make the matter clearer if the section is cited, and the section is as follows :

"297.—Whoever with the intention of wounding the feelings at any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished...."

Now, the facts of this case are that the appellant, one Sanoo, was married to one Aushabai, daughter of the complainant. The appellant himself does not in his statement say when he was married to Aushabai. The complainant says that it was about sixteen years before he gave evidence; but the exact date is not of much importance, and there is no reason to doubt the complainant's word when he said that his daughter died about eleven years ago, and thereafter he erected in her memory in the cremation ground a stone over her ashes and stones over the ashes of his two children who had also died, and the appellant admits that he went to the cremation ground, and there is no reason to doubt the accuracy of the date given by the complainant, November 15, 1939, and deleted the name of the complainant from the stone in memory of his wife and two other stones in memory of the complainant's children. The appellant said in his statement he did this because he had given month after month his salary to the complainant, it was his money that was spent on the stones and not the complainant's money : therefore, the complainant had no right to have engraved upon these stones the words "Built by Eknath Sakaram", and therefore his Advocate says that in assertion of his rights the appellant went and deleted

the name of Eknath Sakaram from all three stones. In any case if this act did not fall within s. 207, I. P. C. it would apper to mean a despicable act arising, as it clearly does, from a dispute about money matters between the appellant and the complainant who was his father-in-law. It appears from the evidence of one Babu, the secretary of the Daxni Mahratta Panch, that the complainant on Decembar 11, 1936, sent an application asking the Panchayat to be summoned so that he might obtain money due from the appellant himself. He gave details of his claim which amounted to Rs. 2,056. The appellant in his reply stated that from 1924 to 1931 he had paid the complainant month by month Rs. 30 and paid him also other money. He had in fact paid him Rs. 3,335, of which Rs. 1,985 had been spent and properly spent by the complainant and he, the appellent, should receive the balance of Rs. 1,350. There was also a dispute about ornaments and this dispute the Panchayat could not decide.

The learned Magistrate came to the conclusion that the appellant's contention that he paid Rs. 30 month after month to the complainant and that these stones were built with his money could not be believed. He relied upon the evidence of one Haridas a *pujari*, who lives near Eknath, the complainant, who lives in one of the tenements in the *mandir* belonging to Marhattas and who knows something of the way of life of the complainant and his family, to prove that the appellant and his wife, the complainant's daughter, did not live always with the complainant, but as might be supposed, lived from time to time in the Police quarters. The Magistrate has rejected, as he was entitled to reject, the evidence of Mohandas, whom he describes as a discharged *pujari* and a discontented man of this temple. The learned Advocate for the appellant has drawn my attention to the evidence of La Fransis, a sergeant in the Karachi Police to support the defence contention that he lived with his wife in the house of the complainant and gave him all or nearly all his pay. He also argues that the complainant could not on Rs. 80 a month support without the assistance of the appellant's money two wives, two daughters, a brother's wife and a son and himself. But as he paid only Rs. 11 a month rent, I see no reason why he should not decently support these women and these children out of this money; and even if the appellant did for some time or from time to time with his wife, the daughter of the complainant, live and mess with the complainant and paid him from time to time money, the messing charges, that does not appear to me to give him the right to enter the cremation ground and delete in a vindictive spirit, and because of his quarrel about money, the name of the complainant from the three stones. The Magistrate says that he did not believe the appellant's contention that the stones were erected at his expense. It is said on behalf of the appellant that he could not be expected to prove this, but it would appear to me that if he had some real and just grievance in the matter, he would not have allowed the matter to rest for eleven years since the death of his wife, and that if he did not enter this cremation ground in the vindicative spirit, that it was not his intention to wound the feelings of the complainant, he would long before this have given notice to the complainant that his name should be deleted from the stones of his wife and children which were built and erected with the appellant's money.

It is said that if the appellant desired to wound the feelings of the complainant he would not have gone openly to this cremation ground and in the presence of a keeper deleted these names from the stones. The keeper of the cremation ground was not called as a witness and I do not know whether the appellant did or did not under the keeper's eyes mutilate these stones in this manner. Antarsing is mentioned as a *chowkidar* or watchman of the cremation ground in the evidence of Eknath, and Eknath says that he prohibited the appellant from doing this but the appelalnt insisted that he would do this and enter his name in the book. I can see no reason, merely because this is a criminal case and certain facts were admitted, why I should accept statements made by persons who were not called as witnesses. But I do not think it makes any difference to the case whether the apdellant did do this in spite of Antarsing's prohibition. It cannot be expected that a *chowkidar* would enter into a brawl with this Police constable in this sacred place.

It might be said that if it could be proved that there was not the intention of the appellant to wound the complainant's feelings, but merely to assert his rights, and that merely because as a result of such assertion the feelings of the complainant were wounded, the offence under s. 297, I. P. C. would not have been committted. Section 297, I. P. C. refers to something more than an intention: it refers to trespass committed with the knowledge that feelings

of any person are likely to be wounded. But I am satisfied that the evidence and the circumstances in this case show, that the appellant's trespass was committed with something more than knowledge; it was committed with intent to wound the feelings of the complainant. It was done in a spirit of spite and vindictiveness, and it was by injuring the complainant's feelings that the appellant's feelings of spite and vindictiveness had to be satisfied. This is not a case where the feelings which were wounded are merely worldly feelings of vanity and pride. It appears to me therefore that the conviction was perfectly proper and all the essential conditions for an offence under s. 297, I. P. C. have been proved. The trespass and deletion of the names from the three stones or their disfiguration was never denied. The third condition, that of intention, within the meaning of s. 297, I. P. C. has, in my opinion, been fully proved. The sentence errs, if anything, on the side of leniency. The appellant should, I think, consider himself fortunate that he has been so leniently dealt with. The appeal therefore is dismissed.

D. *Appeal dismissed.*

RANGOON HIGH COURT

Special Second Appeal No. 87 of 1940
June 18, 1940
DUNKLEY, J.

MA KALEMA AND ANOTHER—APPELLANTS
versus
MA KYAING AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Applicability to agreements made during execution proceedings—Minor seeking to avoid compromise voidable at his instance—Compromise must be declared void against all parties to compromise.

Execution proceedings are a continuance of the suit, and O. XXXII, r. 7, Civil P. C., is applicable to an agreement or compromise made in the course of proceedings for the execution of the decree obtained in the suit.

It is clear from the provisions of sub-r. (2) of r. 7, O. XXXII, that when a minor desires to avoid a compromise, which is voidable at his instance, it is voidable against all parties, and therefore must be declared void against all parties and not against some of them only. 34 Ind. Cas. 213 (1) and 186 Ind. Cas. 72 (2), explained.

Sp. S. A. against the decree of the District court, Pyapon, dated December 8, 1939.

Mr. *A. H. Paul*, for the Appellants.

U Tha Kin, for the Respondents.

Judgment.—The suit out of which this second appeal arises was a suit by the plaintiffs-respondents against the defendants-appellants and one U Pan On for a declaration that a compromise effected between person named U On Pe and U Pan On in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon was void. U Pan On is not a party to this present appeal. He has not appealed against the judgment and decree of the District Court of Pyapon on first appeal, which decreed the suit against him and the two appellants. The two appellants and respondents Nos. 2, 3 and 4 are the heirs of one U Tha Maung. Ma Kyaing, respondent: No. 1, is the mother of the other respondents In a suit for the administration of the estate of U Tha Maung, she acted as the next friend of the other three respondents who were all minors at that time. A decree was obtained in connexion with that administration suit against U Pan On for a sum of Rs. 6,750, being the rent of a rice mill. The decree was obtained by the Receiver of the estate, and after it had been obtained it was transferred by him to the appellants and respondents jointly. Ma Kyaing had no personal interest in this decree and she is not really a proper party to the present proceedings. After the decree had been transferred to them, the appellants and Ma Kyaing executed a power-of-attorney in favour of one U On Pe so that he could execute the decree on their behalf. U On Pe obtained a transfer of the decree to the Assistant District Court of Pyapon and applied in that Court for execution thereof. In November 1934, Ma Kyaing cancelled the power-of-attorney which she had given to U On Pe and, therefore, from that stage onwards he had no authority to act as the agent of the next friend of the other three respondents. However, in spite of Ma Kyaing having cancelled his power, U On Pe filed a fresh execution application in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon and in that application, which is signed by U On Pe and the appellant Maung Than only, U On Pe did not give any description of his status or state what was his right to execute the decree on behalf of the other decree-holders. Unfortunately, the learned Assistant District Judge held no enquiry whatever into this important point and did not question the status of U On Pe.

In first appeal the learned District Judge, in the course of a long and discursive judgment, which contains several unfortunate clerical errors, has discussed this question of U On Pe's status in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon at great length, but it is quite unnecessary, for the purpose of the point

for decision in these proceedings, to come to any definite decision regarding the status of U On Pe in those execution proceedings, and it may be accepted that, so far as respondents Nos. 2, 3 and 4 were concerned, he was acting as their next friend. At the same time as the execution application was filed, U On Pe and U Pan On presented to the Court a joint petition for the compromise of the decree, and in this petition U On Pe described himself as the agent of the decree-holders. This compromise was recorded and in furtherance thereof a registered security bond was executed by U Pan On and certain sureties. This is the compromise which is called in question in the present proceedings. The orders of the Assistant District Court in regard to the matter are as follows:

"September 24, 1935. A joint application is filed by the parties praying that a settlement in terms of the said application be recorded in the case. A security bound is executed. Let it be registered. Put up registered bond on September 26, 1935.

September 26, 1935. Bond duly registered. Case closed. Enter non-satisfaction."

Hence the learned Assistant District Judge recorded this compromise without any enquiry as to whether the compromise was for the benefit of the minor decree-holders or not, and in so doing contravened the provisions of O. XXXII, r. 7, Civil P. C. As I have said, the most favourable view of U On Pe's status, as representing the respondents in regard to this compromise, was that he acted as the next friend of the three respondents who were minors at the time; and r. 7 of O. 32 reads as follows:

"(1) No next friend or guardian for the suit shall without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such argument or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

Execution proceedings are a continuance of the suit, and O. XXXII, r. 7, is applicable to an agreement or compromise made in the course of proceedings for the execution of the decree obtained in the suit. The compromise now in question was recorded without the leave of the Court, and no such leave was expressly recorded in the proceedings. Hence there was a contravention of sub-r. (1) of r. 7, and consequently, under sub-r. (2) the compromise is voidable against all parties other than the minors. The learned Advocate for the appellants admits that this compromise must be declared void so far as the respondents are concerned, by reason of sub-r. (2) of r. 7, but he argues that the appellants still support this compromise, and that, therefore it should not be set aside so far as they are concerned. He urges that sub-r. (2) of r. 7 has no application to the adult parties to such a compromise and he refers in support of his argument to the cases of *Jama Bai Saheb Mohitai Avergal* v. *Vasanta Rao Ananda Rao* (1) and *Somorendra Nath* v. *Ashutosh Ray* (2). But the proposition laid down in these cases is not the proposition for which learned Counsel for the appellants contends: in fact, these cases lay down that it is only the minor who has the right to avoid such a compromise, and that the adult parties have no right to avoid it on the ground that the necessary leave of the Court has not been obtained. That proposition is undoubtedly correct, but it is clear from the provisions of sub r. (2) of r. 7 that when a minor desires to avoid a compromise, which is voidable at his instance, it is voidable against all parties, and therefore, the appellants cannot now be permitted to act on the compromise, which must be declared to be void against them. This is the decision at which the learned District Judge on first appeal arrived, though on somewhat different grounds. The result, therefore, is that this appeal fails and is dismissed with costs, Advocate's fee five gold *mohurs*. The decree of the District Court also contains a clerical error, copied from the judgment.

D. *Appeal dismissed.*

(1) 39 M 409; 34 Ind. Cas. 213; A I R 1916 P C 2; 43 I A 99; 14 A L J 534; 18 Bom. L R 432; 31 M L J 18; 3 L W 540; 24 C L J 74; 20 M L T 31; (1916) 1 M W N 452 (P. C).

(2) 45 C W N 962; 186 Ind. Cas. 72; A I R 1939 Cal. 588; 70 C L J 115; 12 R C 437.

BOMBAY HIGH COURT

Criminal Revision Application No. 278 of 1940

September 23, 1940

BROOMFIELD AND WASSOODEW, JJ.

DR. H. L. BATLIWALLA SONS & CO., LTD. AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Companies Act (VII of 1913), s. 73 — Strict construction —Burden to establish infringement of law is on prosecution —"Outside the office" in s. 73 (a), if mean outside premises—S. 73, object.

Section 73 of the Companies Act, being a penal provision has to be construed strictly, and therefore the burden is very strongly on the prosecution, to show that there really has been an infringement of the law and that in circumstances in the case a meaning must be given to the section which is not the literal one.

By s. 73 the Legislature desired to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The requirements of the Act would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building in which it is situated. It cannot be held that when an office is situated within a compound the law requires the name of the company to be painted or affixed outside the compound as well as outside the office. The words "outside the office" in s. 73 (a) do not mean outside the premises.

Cr. R. App. from the conviction and sentence passed by the Presidency Magistrate, Fourth Court, Girgaum, Bombay.

Messrs. *G. O'Gorman* and *J. C. Tarapore*, for the Applicants.

Messrs. *H. Coyajee* and *V.N. Chhatrapati*, for the Complainant.

Mr. *R. A. Jahagirdar*, Govt. Pleader, for the Crown.

Broomfield, J.—This revision application involves a question of the construction of s. 73 (a), Companies Act. The applicants are (1) Dr. H. L. Batliwala Sons & Co., a limited company, which manufactures and sells a patent medicine called Batiwala Ague Mixture, (2) Kaikobad Cawashaw Batiwalla, who is one of the directors of this company. They have been prosecuted for an alleged contravention of s. 73 (a), Companies Act, which requires that every limited company shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters. The complaint was that on the first three days of September 1937, this company had not got its name painted or affixed outside its office or place of business as required by the section, and the learned Presidency Magistrate has found this proved as a fact and has convicted the applicants under s. 74 (1) of the Act which makes the contravention of s. 73 penal, and imposed sentences of fine. The firm in question is a family firm. The complainant in the case is a member of the family. It appears that he has had disputes with the directors of the company for some time, and so far as the facts of the case are concerned, it is a purely private quarrel of no general importance. The point of law involved is, however, of some importance to companies generally.

The office of the company is situated in a bungalow at Worli which is surrounded by a compound. The office is on the first floor. There are two entrance gates to the compound. At one of these gates there is a board bearing the name of the bungalow "Saklat Villa," but no board bearing the name of the company. It was disputed whether there was a board bearing the company's name at the other gate of the compound, which was on the north. The accused alleged that there was such a board and called evidence to prove it. The learned Magistrate, while apparently prepared to accept the view that there normally was a board at that gate, has found that on these particular days in September 1937, there was no board there. On behalf of the complainant, it is now contended that the evidence showed that there was no board anywhere on these three particular days. The learned Magistrate in the course of his judgment says that he visited the premises on December 14, 1939. He was then shown a board on one of the pillars of the north gate of the compound, *i. e.*, the board which, as I say, he has found was not in existence at that place on the relevant dates. He also says that he was taken upstairs to the landing of the upper story of the bungalow where the office room is located and on the wall opposite the landing he found a small board, as he describes it, with the words "Dr. H. L. Batiwalla Sons & Co. Ltd." This board was fixed in such a manner that it would be visible to anyone who goes up the staircase but would not be visible from the road. The board was two feet by one foot and the largest capital letters were two and a half inches, the others about one inch.

A perusal of the very long and careful judgment of the learned Magistrate points to the conclusion that the question between the parties was as to the existence of the board at the northern gate of the compound and as to whether it was necessary that there should be a board at one of the compound gates in order to comply with the terms of s. 73. Elsewhere in the judgment the learned Magistrate says: "I may add that the fact that there has been a board inside on the first floor landing does not help the defence." The reason he gives for this finding is that the whole bungalow and the compound constitute the company's premises, and on the view he took of the construction of s. 73, it was necessary that there should be a board outside the premises and not merely outside the office room situated in a bungalow in the com-

rpound. There is nothing in the whole of the judgment to suggest, as far as we can see, that it was seriously argued before him, or at any rate that he found as a fact, that the board, the nature of which I have described was not in existence on the relevant dates outside the office room. The question for our consideration therefore is whether this board was a sufficient compliance with s. 73 or whether that section requires that the company should have maintained a board with its name outside one or other of the compound gates. In the view we take the requirements of the section are satisfied by the board outside the office room.

The learned Magistrate's view is that "outside the office" in s. 73 (*a*) means outside the premises. But that is not what the section says. According to the literal meaning of the words used there has been no contravention of the section. It is a penal provision and has to be construed strictly, and therefore the burden is very strongly on the prosecution, *i. e.*, the opponents in this application to show that there really has been an infringement of the law and that in circumstances such as those existing in this case a meaning must be given to the section which is not the literal one. The learned Magistrate's reason for holding that the words "outside the office or place where the business is carried on" mean outside the premises or in this particular case outside the compound seems to be that in the absence of a board outside there would be a difficulty or might be a difficulty in finding one's way to the office. That is to say, he takes the object of this provision to be to require that companies should advertise their whereabouts and assist members of the public to find their way to the office of the company. There does not however appear to be anything in the Act to suggest that that is the object, and no authority of any kind has been cited in that connection. On the other hand, in Palmer's Company Law (at p. 261 of the fifteenth edition) the learned commentator in dealing with the corresponding sections of the English Companies Act gives the object of this provision as something quite different. He says:

"Why this solicitude on the part of the Legislature as to the publication of a company's name? The answer is, that the Legislature, whilst allowing limited liability, desired by this means to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited. This policy it has fortified by pecuniary penalties."

According to that view at any rate—and in our opinion, that is at least as likely to be the correct view as that now put forward on behalf of the prosecution—s. 73, has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. It is well known that in most cities there are large buildings which contain a considerable number of offices of companies and it might be extremely inconvenient if the law required that boards bearing the names of these various companies should be affixed or that the names should be painted outside the building. We think that in such a case clearly the requirements of the Act would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. No doubt, in the present case, the company owns the whole of the premises, but we do not consider that that makes any difference in principle, and we are not prepared to hold that when an office is situated within a compound the law requires the name of the company to be painted or affixed outside the compound as well as outside the office.

Our attention was drawn to evidence that was given in the case to show that certain persons who desired to enter the compound were prevented from doing so or obstructed in doing so by a watchman maintained by the company. We do not consider however that this fact has anything to do with the construction of s. 73 (*a*). The learned Magistrate has not found and we do not think that it could have been found that the board outside the office room did not comply with the section in respect of conspicuousness and legibility. It was not a large board nor were the letters on it very large. But the Magistrate said that it would be visible to anyone who gets up to the landing where the office is situated. The letters were obviously large enough to be read with ease and the board seems to have been sufficiently conspicuous. In our opinion, the law does not require anything more than this. This being our view of the construction of s. 73 (*a*), we are of opinion that the conviction under s. 74 cannot be sustained. We therefore make the rule absolute, set aside the convictions and direct that the fines be refunded.

S. *Rule made absolute.*

NAGPUR HIGH COURT

Civil Revision No. 246 of 1939
February 26, 1940
PURANIK, J.

SHEOSHANKER SAHAI AND OTHERS—DEFENDANTS—APPLICANTS
versus
Seth SURAJMAL AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY

Usurious Loans Act (X of 1918), as amended by C. P. Amendment Act (XI of 1934), s 3—Suit instituted after amendment in respect of transactions prior to amendment—Amendment, if applies—Court, if bound to re-open such transactions if interest is excessive.

The provisions of the Usurious Loans Act as amended by the Central Provinces Amendment of 1934 will apply to a suit instituted long after the amendment came into force but in which transactions of dates prior to the amendment are called in question and sought to be re-opened on the only ground that interest is excessive within the meaning of the amendment. Consequently the Court is bound to re-open the transactions if it finds that interest alone is excessive as defined in the amendment. 169 Ind. Cas. 832 (2) and 179 Ind. Cas. 129 (3), distinguished. S. A. No. 479 of 1936 S. A. No. 43 of 1937 and C. R. No. 832 of 1937 relied on. [p. 625, col. 1.]

C. R. App. for revision of the order of the Court of the Small Causes, Bilaspur, dated February 6, 1939.

Mr. *N. T. Mangalmurti*, for the Applicants.

Mr. *G. R. Deo*, for the Opposite Party.

Order.—The defendant borrowed a sum of Rs. 600 from the plaintiffs on October 4, 1930, and executed a bond for the same agreeing to re-pay it with interest at Rs. 1-12-0 per cent. per mensem. He borrowed a sum of Rs. 600 against on November 17, 1930, and executed a fresh bond for the same agreeing to repay it with interest at 2 per cent. per mensem. The defendant's case is that he re-paid Rs. 163 on May 27, 1931, Rs. 400 on May 4, 1932, and Rs. 200 on September 7, 1932, total Rs. 763. An account of what was due on the two bonds was made on March 15, 1933, and it was found that an amount of Rs. 1,014 was still due. The defendant paid Rs. 474 in cash on March 15, 1933, and executed a fresh bond in favour of the plaintiffs for the balance, *viz.* Rs. 540. This amount of Rs. 540 was agreed to be repaid with interest at Rs. 1-12-0 per cent. per mensem on June 27, 1934. Towards this bond also the defendant repaid Rs. 471-15 0 in two instalments of Rs 221-15 0 and Rs. 250 on July 22, 1936, and October 10, 1936, respectively. The plaintiffs, however, instituted the present suit on November 27, 1938, for Rs. 622-8-0 as the balance still due to them after giving credit for repayments.

The defendant claimed a re-opening of the accounts between the parties on the ground that the interest was excessive and stated that by reason of the provisions of the Reduction of Interest Act the plaintiffs were not entitled to interest at more than 10 per cent. per annum from January 1, 1932. He wanted the accounts to be recast and pleaded that the plaintiffs' claim may come to Rs. 110-14-0. The applicability of the Usurious Loans Act as amended in 1934 in C. P. was not expressly pleaded. The plaintiffs did not agree to the re-opening of the accounts pleading that the Reduction of Interest Act did not permit this. They agreed to a reduction of interest at 10 per cent. per annum from the date, of bond, dated March 15, 1933.

The Court below agreeing with the plaintiffs did not re-open the transactions but reduced the interest at 10 per cent. per annum from the date of the bond in suit dated March 15, 1933, and decreed the claim for Rs. 300 and made the same payable by instalments. The defendant feeling himself aggrieved by this decision has filed the present revision application in this Court.

The main contention raised before me is that not only the provisions of the Reduction of Interest Act but the provisions of the Usurious Loans Act as amended by the Central Provinces Amendment Act of 1934, applied to the facts of the case and the Court was bound to re-open the transactions and allow only a reasonable rate of interest upto January 1, 1932, from which date under the provisions of Interest Act, interest at the reduced rate of 10 per cent. per annum will be applicable. It is contended that the Usurious Loans Act as amended in C. P. in 1934 casts a duty on the Court to grant relief to the debtor by re-opening the transactions in suits to which the Act applied if interest is shown to be excessive and interest above the rate of Re. 1-8-0 per cent. per mensem in case of an unsecured loan is deemed to be excessive. Reliance was placed on *Bajirao* v. *Kesar Bai* (1) and *Gulabdas* v. *Bahirmal* (2) and also on observations in *Nilkanthrao* v. *Vishwanath*, Second Appeal No. 479 of 1936, *Asaram* v. *Shrawan* Second Appeal No. 43 of 1937, and *Kesheorao* v. *Damodhar*,

(1) I L R (1937) Nag 119; 168 Ind. Cas. 151; A I R 1936 Nag. 259; 9 R M 238.
(2) I L R (1937) Nag 410; 169 Ind. Cas 832; A I R 1937 Nag 101; 10 R N 23.

Civil Revision No. 832 of 1937. The plaintiffs, however, relied on *Bhagwant Rao* v. *Damodhar* (3), and argued that the Central Provinces Amendment of 1934, will affect transactions entered into after the amendment came into force in 1934 and did not permit the Court to re-open transactions already effected before the Amendment came into force. What their Lordships meant to lay down in *Bhagwant Rao* v. *Damodhar* (3), does not appear to have been properly stated in the head-note of the case as reported. Their Lordships were dealing with a suit instituted and closed by a judgment followed by a preliminary decree before the amendment of 1934 came into force and stated with reference to such a case that amendment could not be held to apply retrospectively. There are no doubt observations in the body of the judgment which has led to a wrong head-note which runs as under:

"Acts which have the effect of impairing contracts and affect vesting rights must be strictly construed and in interpreting such laws the Courts must lean against giving retrospective effect to their provisions.

Unless there is something in the language of an Act showing a contrary intention, the duty and the practice of the Courts of justice is to presume that the Act is prospective and not retrospective.

Kerr v. *Marquis of Ailsa* (4), *Gardner* v. *Lucas* (5), *Colonial Sugar Refining Co. Ltd.* v. *Irving* (6), *Sardar Ali* v. *Doliluddin* (7) and *Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner, Delhi* (8), followed.

Section 2 of the Usurious Act (X of 1918), as amended by the Usurious Loans (Central Provinces Amendment) Act, 1934, is not retrospective in operation so as to enable the Court to exercise the wider power to re-open loan transactions made before June 15, 1934."

It is this head-note which is relied on by the plaintiffs and on the basis of this note it is argued that the Court cannot re-open transactions entered into before the Act of 1934 and as the bond in suit is of the year 1933 and the two previous bonds are of 1930 the transactions cannot be re-opened. The observations of their Lordships in *Bhagwant Rao* v. *Damodhar* (3), were, however, made with reference to a case instituted in 1931 and the preliminary decree wherein was passed on February 19, 1934, *i.e.*, both these events had occurred before the amendment. The Appellate Court was examining this decree after the amendment came into force and it was decided that the mere fact that the decree comes to be examined after the Act was passed would not enable the Court to apply the amendment which came into force on June 15, 1934. See p. 97* of the report. Their Lordships made this clear when they stated their conclusion at p. 100* as under:—

"Applying the principles expressed in the above cases, we are of the opinion that s. 2 (*a*) of the amending Act XI of 1934 is not retrospective in operation so as to enable the Court to exercise the wider power to re-open loan transactions made before June 15, 1934, *at any rate when the amount due under such a loan has become the subject-matter of a litigation instituted before that date.*"

The words underlined (here italicised) have not been reproduced in the head-note of the case with the result that it has been possible to argue that the Act is not retrospective and loan transactions before the amendment came into force cannot be re-opened even in a suit instituted after the amendment came into force. Reading the ruling carefully it is clear to me that it was only with a view to demonstrate properly that the amendment of 1934 which came into force in June 1934, will not affect transactions which had already formed the subject-matter of litigation before the amendment that the Court entered upon an elaborate discussion about the retrospective nature of a legislation and not with a view to say that transaction entered into before the amendment of 1934 will not be liable to be re-opened in suits instituted after the amendment came into force though the Act with the amendment applied to them.

My attention is invited to an unpublished decision of the Divisional Bench *Mst. Begabai* v. *Tarachand*, First Appeal No. 13 of 1936, decided on December 8, 1939, and it was argued that the view taken in *Bhagwant Rao* v. *Damodhar* (3), was adhered to in this case and it was expressly stated that *Gulabdas* v. *Bahirmal* (2), which is a ruling to the contrary was overruled.

Mst. Begabai v. *Tarachand*, First Appeal No. 13 of 1936, decided on December 8, 1939, was again a case in which the suit was instituted in 1932 and it was with reference to such a suit that the observations were made. Ruling to the contrary in *Gulabdas* v. *Bahirmal* (2), which was stated to be overruled laid down that the amend-

(3) I L R (1938) Nag 91; 179 Ind. Cas. 129; 20 N L J 285; A I R 1938 Nag 112; 11 R N 271.
(4) (1854) 1 Macq H L 736.
(5) (1878) 3 A C 582.
(6) (1905) A C 369; 74 L J P C 77; 92 L T 738; 21 T L R 513.
(7) A I R 1928 Cal 640; 113 Ind. Cas. 49; 56 C. 512; 32 C W N 1130; 48 C L J 150.
(8) A I R 1927 P C 242; 106 Ind. Cas. 156; 54 I A 421; 9 L 284; 4 O W N 1053; 8 P L T 791; 25 A L J 964; 53 M L J 819; 47 C L J 1; 30 Bom L R 60; I L T 40 Lah 1; 32 C W N 237; 29 P L R 37; (1928) M W N 95; 27 L W 179 (P C).

*Pages of I. L. R. (1938) Nag.—[*Ed.*]

ment of 1934 was applicable to suits pending on the date of the amendment. This view taken in *Gulabdas* v. *Bahirmal* (2), was declared as overruled. Pollock, J. in *Gulabdas* v. *Bahirmal* (2) and in *Vishwanath* v. *Janardhan* (9), had taken the view that from the date on which the amendment came into force Courts were bound to take note of it and apply it even to pending litigation if the facts of the case warranted the application with a view to afford relief to the debtor. All that has been done by *Bhagwant Rao* v. *Damodhar* (3), is to overrule this view and substitute in its place the rule that the amendment will not affect suits instituted before the amendment came into force and in such suits transactions will not be re-opened unless the conditions laid down in the Usurious Loans Act as it originally stood in 1918 are complied with.

The point that I have to decide is whether the provisions of the Usurious Loans Act as amended by the Central Provinces Amendment of 1934 will apply to a suit instituted long after the amendment came into force but in which transactions of dates prior to the amendment are called in question and sought to be re-opened on the only ground that interest is excessive within the meaning of the amendment.

The ruling in *Bhagwant Rao* v. *Damodhar* (3), does not apply to the facts of the present case nor does the case fall within the category of the cases referred in *Gulabdas* v. *Bahirmal* (2). It may be that the view taken in *Bhagwant Rao* v. *Damodhar* (3), is open to doubt as was argued before me but as I am not dealing with a suit instituted the amendment of 1934 nor with a case pending on the date on which the amendment came into force but with a suit instituted long after the amendment came into force, I do not think it necessary to pursue this subject further.

It is, however, argued before me that transactions entered into between the parties when the Usurious Loans Act of 1918 without the amendment was in force will be governed by the provisions of the said Act and in cases of such transactions the debtor will have to show that not only the interest was excessive but that the transaction was substantially unfair and even in such a case the Court is not bound to re-open the transaction but may do so if the circumstances so require. It is further argued that the amendment of 1934 must be given effect to only from the date on which it came into force and will affect only transactions entered into after that date. In this view of the case it is contended that the fact that the suit was instituted after the amendment came into force is not of any significance. It is in support of this proposition that observations in *Bhagwant Rao* v. *Damodhar* (3), are again relied on.

I have already stated that the entire discussion in *Bhagwant Rao* v. *Damodhar* (3), regarding the retrospective and pr spective nature of legislation was intended to state forcibly the view that the amendment will not affect suits already instituted or decided before the amendment came into force. Every legislation is ordinarily prospective and unless there is something in the legislation itself to indicate that it was intended to affect past transactions, it will not so affect. The law governing the case is the Usurious Loans Act of 1918 and under s. 2 (3) thereof suit to which the Act applies means any suit for the recovery of a loan made after the commencement of this Act (of 1918), or for the enforcement of any security taken or any agreement, whether by way of settlement of account or otherwise, made after the commencement of this Act, in respect of any loan made either before or after the commcement of this Act, or for the redemption of any security given after the commcement of this Act. This definition of suit has not been amended by the Central Provinces Amendment Act. The Central Provinces Amendment Act (XI of 1934) only amended s. 3 and the effect of the amendment is that in Central Provinces on and after June 15, 1934, in respect of suits to which the Usurious Loans Act of 1918 applied a debtor is entitled to ask for a relief on the simple ground that the interest is excessive and that it is not necessary to prove in addition to the excessive nature of the interest that the transaction was substantially unfair as he was required to prove under the Act as it stood before the amendment. The amendment went further and laid down that interest in excess of Rs. 1-8 0 per cent. per mensem on unsecured debts and 1 per cent. per mensem on secured debts will be deemed to be excessive. One more change brought about by the amendment is that a duty is enjoined on the Court to exercise all or any of the powers mentioned in s. 3 in any suit to which the Act applies whether heard *ex*

(9) (1937) N L J 63.

parte or otherwise. The word 'may' was substituted by the word 'shall.'

Even under the original Act of 1918 if the conditions in s. 3 were complied with, the Courts were empowered to exercise all or any of the powers mentioned in s. 3 and the only restrictions imposed on them were:—

that the Courts shall not—

(*i*) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction;

(*ii*) do anything which affects any decree of a Court. Subject to these two restrictions very wide powers of re-opening past transactions were conferred on the Courts.

The Central Provinces amendment, as shown already, went further and it not only enabled but required the Court to exercise the powers conferred by s. 3 only on the ground that interest was excessive as explained in the amendment. I am clearly of opinion that inasmuch as the original Act itself contained provisions which indicated that transactions entered into within 12 years of the transaction in dispute in a suit to which the Act applied were to be affected by it and inasmuch as the Central Provinces Amendment of 1934 did not in any way curtail that power, transaction before the year 1934 could be re-opened if the Act read with the amendment applied to the transaction.

The present suit is certainly one for recovery of a loan made after the commencement of the Usurious Loans Act of 1918, as the loans were advanced in 1930 and renewed in 1933. The suit for recovery of this loan was instituted long after the Central Provinces Amendment of 1934 had come into force. The Act as amended does apply to the facts of the case. The Court is, therefore, bound to re-open the transactions if it finds that interest alone is excessive as defined in the amendment. The ruling in *Bhagwant Rao* v. *Damodhar* (3), does not apply as it related to a suit instituted before the amendment came into force. This ruling nowhere lays down that in a suit instituted after the amendment came into force transactions before the date of amendment will not be questioned and tested with reference to the amendment. It only says that suits pending on the date of the amendment will be governed by the Usurious Loans Act as it originally stood.

I am fortified in my view by the observations of Niyogi, J. in *Nilkanthrao* v. *Vishwanath*, Second Appeal No. 479 of 1936 decided on November 2, 1938, *Asaram* v. *Shrawan*, Second Appeal No. 43 of 1937, decided on December 21, 1938, and of Gruer, J. in *Kesheorao* v. *Damodar*, Civil Revision No. 832 of 1937, dated August 24, 1938. All these were suits instituted after the amendment came into force, in which transactions before the amendment were re-opened simply on the ground that interest was excessive within the meaning of the terms as defined in the amendment. I hold that inasmuch as interest at a rate exceeding Re. 1-8 0 per cent. per mensem is mentioned in the bonds of 1930 and as the bond of 1933 is in suit, and inasmuch as the suit was one instituted in 1938, the transactions in suit are such to which the Usurious Loans Act, 1918 as amended by Central Provinces Act XI of 1934 applies and the Court shall exercise all or any of the powers mentioned in s. 3 of the Usurious Loans Act. As the lower Court has not done this, the case has to be remanded.

The Court was also wrong in not charging interest at 10 per cent. per mensem from January 1, 1932 as required by the Reduction of Interest Act which was then in force. The Court in its judgment stated that it could not find out the principal due on January 1, 1932, and the Reduction of Interest Act did not say that a transaction closed after January 1, 1932, should be re-opened. This is a wrong reasoning. The Reduction of Interest Act s. 3 clearly lays down that notwithstanding any contract to the contrary interest shall not be recoverable from any debtor on a debt incurred by him whether before or after the passing of this Act in respect of any period between January 1, 1932, and such other date as the Provincial Govt. by notification appoint, save at the rate shown in the schedule. Though a fresh bond was executed by the defendant in 1933, it was with respect to debt already incurred in 1930 and the Court could have ascertained the principal due on January 1, 1932, and granted the debtor a relief. I set aside the decree of the Court below and remand the case for a fresh trial and decision with advertence to my observations in this decision. Costs will be costs in the case. The trial Court in deciding the case will take into consideration the fact that the defendant had admitted plaintiff's claim to the extent of Rs. 110-14-0.

Before closing I must state that at one time during the hearing I thought that I ought to refer the matter and request the Hon'ble the Chief Justice to have the points raised in this case decided by a Full Bench but on reconsideration I thought that as the ruling in *Bhagwant Rao* v. *Damodhar* (3), did not stand in the way of granting the relief to the defendant and that as the ruling did not go further than laying down that pending suits were not to be affected by the amendment and as the head-note of the case was somewhat misleading, the purpose will be served by making the position clear in this judgment. Under the circumstances I declined to make a reference. It may be made in another suitable case.

D. *Case remanded.*

OUDH CHIEF COURT

Criminal Revision No. 157 of 1940
January 23, 1941
BENNETT, J.
PADAM SINGH—APPLICANT
versus
KING-EMPEROR—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 514, 537—Forfeiture of security bond — Failure to record grounds of proof—No prejudice to surety nor failure of justice—Defect is curable—Security bond for keeping peace—Person under recognizance convicted—Forfeiture proceedings, whether must be started by same Court and at time of conviction—Forfeiture proceedings, if must be started before expiry of period of bond.

Where in proceedings for the forfeiture of the security bonds the Magistrate holds for good and justifiable reasons that the bonds had been forfeited but fails to record the grounds of proof as required by s. 514, Criminal P. C, such an omission is merely an irregularity curable under s. 537 when the surety is not prejudiced thereby and no failure of justice has occasioned. 184 Ind Cas 742 (3), relied on. 67 Ind. Cas. 830 (1) and 122 Ind. Cas. 532 (2), dissented from.

It is not necessary that proceedings for the forfeiture of the security bond for keeping peace should be taken only by the Court which convicts the person under recognizance and at the time of the conviction. 18 Ind. Cas. 403 (4), not followed. *Emperor* v. *Raja Ram* (5) and 92 Ind. Cas. 742 (6), relied on.

The proceedings for the forfeiture of a bond for keeping the peace need not be commenced before the expiry of the period for which the bond was given. [p. 629, col. 2.]

Cr. R. of the order of the Sessions Judge of Unao, dated October 21, 1940.

Mr. *Akhlaque Husain*, for the Applicant.

The Govt. Advocate, for the Crown.

Judgment.—This is an application in revision against the order of the learned Sessions Judge of Unao summarily dismissing an application in revision against an order passed by the District Magistrate of Unao modifying an order forfeiting certain security bonds passed by the Sub-Divisional Magistrate of Unao.

The order of the Sub-Divisional Magistrate, dated April 12, 1940, shows that three persons, namely Bachani, Ganga Bishun and Suraj Bakhsh Singh, were required to furnish security under s. 117 (3) of the Criminal P. C., on November 20, 1937, pending the completion of an enquiry under sub-s. (1) of that section. Each of them executed a bond for Rs. 1,000, and the present applicant Padam Singh stood surety for each of them in this amount.

It is stated that during the proceedings against these three persons under s. 107 a man named Sundar Lal was murdered by them and that they were all convicted under s. 302 of the I. P. C. Bachani is said to have been hanged, and the other two to have been either transported or sentenced to imprisonment. Learned Counsel for the applicant states that the conviction of the other two was not under s. 302, but it is so stated in the Magistrate's order. It is not disputed that they were all found guilty of an offence involving a breach of the peace. No action was taken at the time for the forfeiture of the bonds. The Magistrate before whom the proceedings under s. 107 were pending considered after Sunder Lal's murder that no purpose would be served by continuing the proceedings and he accordingly passed an order quashing them, meaning by this, I understand, that he was not going on with them further. The case against the three men for the murder of Sunder Lal pending at the date of this final order on March 21, 1938, in the s 107 case. Bachani, Ganga Bishun and Suraj Bakhsh Singh are said to have been convicted on November 19, 1938.

Proceedings for the forfeiture of the bonds were taken on an application by the brother of the murdered man made on August 31, 1939. The question of taking action for the forfeiture of these bonds had apparently not been considered previously. The application was ordered to be put up with the connected file, that is the file under s. 107 and notice was issued to Padam Singh on February 24, 1940. This notice contained full details

of the bonds and the reasons why Padam Singh was being called upon to show cause why they should not be forfeited.

Padam Singh put forward three grounds against the forfeiture of the bonds, none of which has been pressed in this application in revision. The first was that he was not liable because he had filed an application under the Encumbered Estates Act. The Magistrate was clearly justified in holding that this did not protect him. Secondly it was contended that the bonds had not been stamped at the time of execution. The Magistrate observed that the court-fee stamps had been supplied after execution of the bonds and that this could not make the bonds invalid. Thirdly Padam Singh said that he did not understand the meaning of the bonds. The Magistrate disbelieved this, and there has been no contention to the contrary in this Court.

A number of legal points have, however, been put forward on behalf of the applicant. It is sought to show that there were legal defects in the procedure which invalidated the order. Before considering these objections it should be mentioned that there was an appeal to the District Magistrate against the order requiring Padam Singh to pay Rs. 3,000, that is, Rs. 1,000 in respect of each of the bonds forfeited, and that the District Magistrate reduced the amount from Rs. 3,000 to Rs. 2,000, taking into consideration his financial position.

The first contention advanced on behalf of the applicant is that no action could be taken under s. 117 (3) because the previous proceedings in the case under s. 107 had been quashed by the final order in those proceedings passed on March 21, 1938. I do not think that there is any force in this contention. The Magistrate did not by his order cancel those proceedings altogether. He merely terminated them. He did not and he could not pass an order setting them aside as if they had never been taken

Secondly it has been contended that the forfeiture of the bonds is invalid because there was no preliminary enquiry or order under s. 514 of the Criminal P. C This section provides that when it is proved to the satisfaction of the Court by which a bond under the Code has been taken that such bond has been forfeited, the Court shall record the grounds of such proof and may call upon any person bound by such bond to pay penalty thereof, or to show cause why it should not be paid. In the present case the Magistrate did not record the grounds of proof that the bonds had been forfeited. He sent for the record of the case under s. 107 and satisfied himself from it that proceedings in that case had been dropped because Bachani, Ganga Bishun and Suraj Bakhsh Singh were being prosecuted for the murder of Sunder Lal, committed while those proceedings were pending. Probably, though the record does not show this, he had also before him some evidence to show that they had all been convicted in this case. There is no reason for holding in these circumstances that the Magistrate was not justified in thinking that the bonds had been forfeited, and the only question for consideration is whether the subsequent proceedings were vitiated by his omission to record the grounds for coming to this conclusion. On this point I have been referred to two rulings of the Patna High Court. In the first, *Thakur Kishan Narain Singh* v. *King-Emperor* (A. I. R 1922 Patna, 242) (1), it was held that where there has been a failure to carry out the express provisions of s. 514, the Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause and the proceedings should be set aside on this ground. The judgment in the case mentions that the petitioners had been in no way prejudiced by the procedure adopted, and the learned Judge only allowed the application because there had been a failure to carry out the express provisions of the law with the result that in his opinion the Magistrate acted without jurisdiction.

In the second case, *Zulmi Kahar* v. *Emperor* (A. I. R. 1929 Patna, 643) (2), it was held that the proper course for a Magistrate proceeding to pass an order under s. 514 is to come to a finding based on some evidence that the bail bond executed by the surety has been duly forfeited, and then only to issue a notice to show cause why the penalty should not be realised from him.

It cannot be said in the present case that the Magistrate had no evidence before him that the surety bonds had been forfeited. He had at least before him the record of the proceedings under s. 107

(1) A I R 1922 Pat. 242; 67 Ind. Cas. 830; 3 P L T 381; 23 Cr. L J 478.

(2) A I R 1929 Pat. 643; 122 Ind. Cas. 532; Ind. Rul. (1930) Pat. 212; 31 Cr. L J 420; 11 P L T 572.

which showed why those proceedings had been dropped.

With all respect for the authorities relied upon I am unable to agree, that in the present case the proceeding was vitiated by the failure of the Magistrate to record his reasons for coming to a *prima facie* conclusion that the bonds had been forfeited. He had clearly good reasons to think that they had been forfeited; this is not disputed. When Padam Singh appeared before him he did not dispute the facts stated in the notice which was issued to him, that is that he had stood surety for these persons and that these persons had been found guilty of an offence involving a breach of the peace during the pendency of the proceedings against them under s. 107. The objections which are now being raised were not raised by Padam Singh when notice was issued to him. He did not object to the procedure nor did he dispute the facts. The applicant not being prejudiced and the omission to record the grounds of proof not occasioning a failure of justice, the defect in the procedure was merely an irregularity of the kind referred to in s. 537 of the Criminal P. C. In support of this view I would refer to a ruling of a Bench of this Court in *Emperor* v. *Abdul* (1939 O. W. N. 960) (3), where a similar contention that a conviction under the Motor Vehicles Act was invalidated by a defect in the summons was rejected.

I do not consider that the Magistrate acted without jurisdiction merely because he failed to record the reasons for holding that notice should be issued to the applicant.

Thirdly, it is contended that proceedings for the forfeiture of a bond can be taken only by the Court which convicts the person who was furnished the bond at the time of his conviction. In support of this contention reference was made to the case of *Emperor* v. *Mawaz* (18 Ind. Cas. 403) (4). This was a Full Bench case of the Punjab Chief Court.

The headnote reads:

"If, in convicting a person of a offence involving the forfeiture of a bond for keeping the peace, a Magistrate, who has knowledge of the fact that the person before him has, by his conduct, forfeited his bond, does not make any order for forfeiture he must be taken to have decided not to take action on the bond in respect of that particular breach of the peace, and he cannot thereafter reconsider and add to his order by directing forfeiture of the recognizance".

To the contrary effect is a ruling of the Allahabad High Court, in *Emperor* v. *Raja Ram* (1. L. R. 26 Allahabad 202 (5), where it was held that the mere fact that no immediate action under s. 514 of the Criminal P. C., is taken against a person under recognizances to keep the peace, or against his surety, on the conviction of the former of an offence involving a breach of the peace is no bar to the taking of such proceedings at a subsequent time.

Similarly in a case of the Judicial Commissioner's Court of Sind, *Jeomal* v. *Emperor* (A. I. R. 1926 Sind, 180) (6) it was held that there is no objection to a Magistrate proceeding to take steps to forfeit the recognizance, although he had omitted to do so at the time of the conviction of the person concerned.

It has also been argued that the proceedings should have been started while the *interim* order was in force. No direct authority has been referred to in support of the argument, and I am clearly of opinion that there is no force in it. In an other Allahabad case *Emperor* v. *Uma Dait Misir* (I. L. R. 44 All. 657) (7), it was held that where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given, the fact that such period has expired is no bar to their continuance. It was sought from this ruling to argue that proceedings should have been started before the expiry of the period, but I do not consider that this conclusion is warranted.

It has further been argued that action should not have been taken in the present case against Padam Singh at the instance of a private person who was merely interested in gratifying his spite against him. But action was not taken by the Magistrate with this object. The brother of the murdered man brought to his notice the fact that no action had been taken to forfeit the bonds and the Magistrate presumably considered that it was in the public interest that such action should be

(3) 1939 O W N 960; 184 Ind. Cas 742; 1939 O L R 647; 12 R O 138; 41 Cr. L J 92 (2); A I R 1940 Oudh 77.

(4) 18 Ind. Cas 403; 7 P W R 1913 Cr; 14 Cr. L J 67; 39 P L R 1913; 13 P R 1913 Cr. (F B).

(5) 26 A 202.

(6) A I R 1926 Sind 180; 92 Ind. Cas. 742; 27 Cr. L J 326

(7) 44 A 657; 68 Ind. Cas. 847; 20 A L J 693; 23 Cr. L J 623; A I R 1922 All. 503.

taken, the matter previously having overlooked.

Lastly, it has been argued that the amount which Padam Singh has been required to pay is very large and that it will bear hardly on him as he is already financially embarrassed. The District Magistrate took his financial position into consideration in reducing the amount from Rs. 3,000 to Rs. 2,000 and I see no reason to reduce it further.

I can find no good ground therefore for interfering with the order passed and I dismiss this application.

s. *Application dismissed.*

MADRAS HIGH COURT

Second Appeal No. 518 of 1937
May 3, 1940
KING, J.
PATTU ACHI—APPELLANT
versus
V. RAJAGOPALA PILLAI AND OTHERS—RESPONDENTS

Hindu Law — Adoption — Adoption by widow on death of her adopted son—Estate vested in her as heir of deceased adopted son, if divested.

Where on the death of an *aurasa* or adopted son the estate which has descended to him from his father vests in his mother as heir, and she makes an adoption to her deceased husband, the estate so vested in her will be divested. *Rai Jatindranath* v. *Amritlal* (2) and 18 Ind. Cas. 479 (3), relied on.

[Case-law discussed and distinguished.]

S. A. against the decree of the Sub-Judge, Mayavaram, in A. S. No. 42 of 1936.

Messrs. *V. V. Srinivasa Iyengar* and *K. Venkataraman*, for the Appellant.

Messrs. *T. M. Krishnaswami Iyer* and *C. A. Seshagiri Sastri*, for the Respondents.

Judgment.—The subject-matter of this appeal is part of the property admittedly left by one Venkatachala Pillai who died in May 1890. At that time Venkatachala Pillai was a young man, married to defendant No. 1 who was shortly expecting a child. She was delivered of a still born female child in July. It is not now seriously disputed that shortly before he died Venkatachala Pillai orally authorized his wife to make an adoption in case the child she was expecting should prove to be a girl. On February 9, 1891 defendant No. 1 adopted one Pichai Pillai who lived to become a major, but shortly afterwards (in February 1907) was murdered while still unmarried. In 1922 defendant No. 1 executed Ex. W, by which the estate which had originally belonged to Venkatachala Pillai and was then in her hands, was divided into two portions, the larger half being retained by defendant No. 1 and the smaller conveyed to Muthukumara Pillai, the nearest reversioner. In May 1926 defendant No. 1 made a second adoption to her deceased husband, the person chosen as adopted son being the plaintiff who happens to be the natural son of the man who was convicted and hanged for the murder of Pichai Pillai. In 1934 plaintiff filed the present suit for recovery of the property conveyed to Muthukumara Pillai and his principal opponent is defendant No. 2, Muthukumara Pillai's widow. The suit has been decreed by both Courts below and defendant No. 2 has filed this second appeal. The first point taken in the appeal is to contend that the adoption of plaintiff is invalid. It is so contended on two grounds: (*i*) that defendant No. 1's motive in making the adoption was a corrupt one. It is asserted that she adopted plaintiff only because she had been living in criminal intimacy with his father; and (*ii*) that the authority to adopt given by Venkatachala Pillai was confined to the adoption of Pichai Pillai. I have had to disallow any argument on the first ground. The intimacy was found against as a fact by the first Court, and the Subordinate Judge's judgment shows that no attempt whatever was made before him to challenge that finding.

The second ground also seems to me to be equally barred by the provisions of s. 100. No doubt there is no precise finding of the exact words used by Venkatachala Pillai in conferring the authority upon his wife, and two views are certainly possible on an examination of some of the exhibits filed in the case which refer to the authority (*see* Ex. B, Ex. G and Ex. J); but the learned Subordinate Judge has definitely found that Venkatachala Pillai's intention was to confer a general power of adoption on his wife and that he 'simply indicated preference' for Pichai Pillai. This finding, it seems to me, is unquestionably a finding of fact with which I cannot interfere in second appeal. The second point taken in the appeal, however, is equally undoubtedly one of law. It relates to the effect of plaintiff's adoption upon the title to the subject-matter of this suit. The argument is put in this way: When Pichai Pillai died defendant No. 1 succeeded to his

estate in her capacity as his adoptive mother. Plaintiff's relationship to Pichai Pillai is that of brother. Of the two relations, defendant No. 1 and plaintiff, defendant No. 1 is the preferential heir. Her estate cannot therefore be divested by the adoption, and must continue till she dies. So long as she is alive defendant No. 2, whose title is good for her lifetime, cannot be dispossessed.

Now, if one considers this matter solely from the point of view of the devolution of property this argument would appear to be unanswerable; but unfortunately for the appellant, the authorities in this matter are almost uniformly against her. The only direct authority in her favour is found in *Gobindo Nath Roy* v. *Ram Kandy Chowdhry* (1), a judgment delivered so long ago as 1875. Against her is a direct authority in *Rai Jatindranath* v. *Amritlal* (2), followed in *Hamed Gazi* v. *Sadat Ali* (3), and also the opinion of Mayne in para. 197 of Edn. X, of his Hindu Law, where it is stated that

"Where on the death of an *aurasa* or adopted son the estate which has descended to him from his father vests in his mother as heir, and she makes an adoption to her deceased husband, it is well-settled that the estate so vested in her will be divested."

The principle of this, according to Mayne, is either that the mother elects to hold the property as her husband's property when she exercises her power of adoption or that the title of the adopted son relating back to his father's death is the necessary legal result of the power to substitute another son for the deceased. I need now refer only briefly to other cases which have been cited before me by the appellant's learned Advocate. They are *Subramania Chettiar* v. *Somasundaram Chettiar* (4), *Amarendra Man Singh* v. *Sanatan Singh* (5), and *Radha Bai* v. *Rajaram* (6). The first of these is a case in which it was found that though a custom amongst Natukottai Chetties permitted the adoption of a second son even when the first adopted son had died leaving a widow that adoption did not affect the rights of that widow to the estate. The facts there are thus different and there is no direct pronouncement by the learned Judges which could be applied to the present facts. *Amarendra Man Singh* v. *Sanatan Singh* (5), is a judgment of the Privy Council in which the question at issue was the right to succeed to an impartible estate. The rival claimants were an adopted son, who was adopted after the death of a natural son who had survived his father, and a reversioner who claimed to be next in succession to the natural son. The reversioner's suit was dismissed by the Privy Council. This case affords no support to the view that the devolution of this property was unaffected by the adoption—and is of little assistance either way as no woman could ever be entitled to the property. *Radha Bai* v. *Rajaram* (6), again deals with quite different facts. The widow who made the adoption in that case, was the widow of a man who never himself had any exclusive title to the property in dispute. Her adoption therefore could obviously never affect the devolution of her property which descended to her only through her husband's brother. In the result I see no reason at all to interfere with the decree of the lower Appellate Court and dismiss this appeal with costs. Leave granted.

N.-S. *Appeal dismissed.*

(1) 24 W R 183.
(2) 5 C W N 20.
(3) 44 C W N 443; 188 Ind. Cas. 479; A I R 1940 Cal. 241; 71 C L J 243; 13 R C 6.
(4) 44 L W 185; 164 Ind. Cas. 977; A I R 1936 Mad. 642; 59 M 1064; (1937) 1 M L J 60; (1936) M W N 774; 9 R M 189.
(5) 38 L W 1; 143 Ind. Cas. 441; A I R 1933 P C 155; 60 I A 242; 12 Pat. 642 Ind. Rul. (1933) P C 168; 37 C W N 938; (1933) M W N 769; 65 M L J 203; 14 P L T 399; (1933) A L J 710; 57 C L J 593; 35 Bom. L R 959 (P C).
(6) A I R 1938 Bom. 383; 177 Ind. Cas. 165; I L R (1938) Bom. 679; 40 Bom. L R 559; 11 R B 68.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 118/46 of 1939
November 15, 1940

ALMOND, J. C. AND MIR AHMAD, J.

Mst. JASODAN DEVI w/o BHAI JWALA SINGH—PLAINTIFF—APPELLANT

versus

JAI GOPAL AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Maintenance—Widow—Estoppel—mortgage by son, of house left by deceased father—Widow signing deed after hearing contents—Whether estopped from claiming right of residence and maintenance as against mortgagee.

A Hindu son mortgaged a house left by his father and after having read the contents of the deed, his widowed mother signed the deed. As a token of her consent the widow had acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance:

Held, that the widow was estopped from claiming those rights against the mortgagee. 65 Ind. Cas. 954 (1), explained, 150 Ind. Cas. 765 (3), applid.

C. A from an order and decree of the District Judge, Peshawar, dated April 3, 1939.

L. *Wazir Chand*, for the Appellant.
Dewan *Charanjit Lal*, for Respondent No. 1 (Jai Gopal).

Mir Ahmad, J—Jwala Singh died leaving a widow *Mst.* Jasodan Devi, and a son Mela Ram. Mela Ram was married to *Mst.* Manoran Devi also known as *Mst.* Rameshro Devi. Jwala Singh left a house. On January 8, 1932, Mela Ram mortgaged this house to *Mst* Ram Ditti for Rs. 1,000. He then mortgaged the house to one Hari Chand on January 5, 1933, for Rs. 3,000. Mela Ram paid off Rs. 1 000 due to *Mst.* Ram Ditti out of this amount. Mela Ram died and so did Hari Chand. Jai Gopal, the grandson of Hari Chand, obtained a decree for sale of the property under O. XXXIV, Civil P. C. *Musammat* Jasodan Devi brought this suit for a declaration that she had a right of residence and of maintenance in the house. The Counsel for *Mst.* Jasodan Devi has admitted before us that what he meant in the plaint was that this house should be sold subject to his client's rights of residence and maintenance. The defence taken was that the debt was incurred for legal necessity and that the rights of residence and maintenance could not therefore be claimed in the encumbered property, It was also pleaded that *Mst.* Jasodan Devi was estopped by her conduct from claiming the rights of residence and maintenance because she had witnessed the mortgage deed. The following issues were framed by the trial Judge:

"1. Is the plaintiff not entitled to right of residence and maintenance in the house in question? On defendants.
2. Is the plaintiff estopped from bringing this suit by her own conduct? On defendants.
3. Can the suit not lie in its present form, and is not properly stamped? On defendants.
4. To what relief is the plaintiff entitled? On defendants."

Hari Chand, the scribe of the mortgage deed, definitely stated that the two ladies signed the mortgage deed in his presence. They were identified by Mela Ram to be his mother, *Mst.* Jasodan Devi, and his wife *Mst.* Manoran Devi. The witness read out the contents of the documents to them. Amir Chand, a marginal witness, deposed that he was the broker who arranged the transaction, that Hari Chand, mortgagee, told Mela Ram to get his mother and wife to sign the mortgage deed and that they did so in his presence. Pandit Rup Chand averred that the mother of Mela Ram did not observe *pardah* from him and the witness was certain that the two ladies who signed the mortgage deed were *Mst.* Jasodan Devi and the wife of Mela Ram. *Musammat* Jasodan Devi appeared in Court and the last sentence she uttered was that she had not signed the document. Counsel for Jai Gopal presented a petition to the trial Judge, after the statement of *Mst.* Jasodan Devi had been recorded, that the thumb impression of *Mst.* Jasodan Devi on the mortgage deed should be sent to Phillaur for comparison with her admitted thumb mark. This application was rejected. The trial Judge found that the woman had a right of residence; that the debt was not contracted for legal necessity and that her thumb impression on the mortgage deed did not estop her, because the Privy Council had laid down in the ruling reported in *Pandurang Krishnaji* v. *M. Tukaram* (1) that mere attestation of a document did not amount to estoppel as to the contents of the document. The trial Judge also held that the suit had been properly framed and stamped. The Judge granted a declaratory decree to the plaintiff. The decree was worded as follows:

"It is ordered that a decree for declaration to the effect that the plaintiff has the right of residence in the house in suit and therefore it is not liable to attachment and sale in execution of the decree of defendant No. 1 against defendants Nos 2 and 3 so far as her rights are concerned, be and the same is hereby passed in plaintiff's favour."

An appeal was preferred by Jai Gopal to the District Court. The District Judge remanded the case to the trial Judge for recording his findings as to the right of maintenance. The trial Judge found that the plaintiff was entitled to the right of maintenance also. At the final hearing the District Judge came to the conclusion that *Mst.* Jasodan Devi could not have her right of maintenance enforced against the property because she had not managed to make it a charge on the house either by decree or by a private agreement. He held that *Mst.* Jasodan Devi had surrendered her rights in the house at the time when the mortgage was being effected because she had signed the deed. The Appellate Judge therefore accepted the appeal and dismissed the plaintiff's suit with costs throughout. *Musammat* Jasodan Devi has come up on further appeal to this Court. In our opinion the judgment of the lower

(1) A I R 1922 P C 20; 65 Ind. Cas. 954; 49 I A 16; 49 C 334; 18 N L R 1; 26 C W N 201; 3 U P L R (P C) 85; 20 A L J 305; 42 M L J 436; 15 L W 486; 30 M L T 249; 35 C L J 409; 24 Bom. L R 557 (P C.)

Court should be maintained on the point of estoppel only. Their Lordships of the Privy Council have, in the ruling reported in *Pandurang Krishnaji* v. *M. Tukaram* (1), laid down the following proposition.

"Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects It is, of coures, possible, as was pointed out by their Lordships in the case in *Banga Chandra Dhur* v. *Jagat Kishore Acharjya* (2) that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document but no such knowledge ought to be inferred from the mere fact of the attestation."

It is obvious that their Lordships did not mean to extend the dictum laid down by them as regards the effect of attestation to cases where the person signing the document had become cognisant of the text of the document and had signed it in token of consent. This was the interpretation of their Lordships' judgment made by a Single Judge of the Patna High Court, in the ruling reported in *Bhagwat Rai* v. *Gorakh Rai* (3). The Judge said :

"Where an attesting witness is present at the transaction and attests the deed having heard its contents, he is estopped from challenging the right of the transferee."

We have given above the names of the witnesses who appeared and said that *Mst.* Jasodan Devi had signed the document after hearing its contents and that the reason for her signing it was that the mortgagee insisted that she should do so in token of consent. We do not see any reason for disbelieving them. Applying the principle laid down above we think *Mst.* Jasodan Devi had acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance. She is now estopped and cannot claim those rights against the mortgagee. The decree of the lower Appellate Court is consequently maintained. The appeal is dismissed with costs.

D. *Appeal dismissed.*

(2) A I R 1916 P C 110; 36 Ind. Cas 420; 44 C 186; 43 I A 249; 20 M L T 335; 31 M L J 563; (1916) 2 M W N 336; 4 L W 458; 8 Bom. L R 868; 14 A L J 1103; 24 C L J 487; 1 P L W 1; 21 C W N 225; 10 Bur. L T 177 (P C)

(3) A I R 1934 Pat. 93; 150 Ind. Cas. 765; 7 R P 19.

ALLAHABAD HIGH COURT

Civil Revision Application No. 79 of 1940

November 22, 1940

COLLISTER, J.

BANSI LAL AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

CHAIRMAN, TOWN AREA COMMITTEE, SAIDPUR—DEFENDANT—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 102—Suit for refund of amount recovered as tax with prayer for declaration of plaintiff's non-liability—Second appeal does not lie.

A suit for refund of amount recovered as a tax with a prayer for declaration of plaintiff's non-liability to pay the tax, is a suit of Small Cause nature and hence no second appeal lies under s. 102, Civil P. C. 17 Ind. Cas. 704 (1) and 134 Ind. Cas. 251 (2), relied on.

C. R. App. against the order of the Additional Civil Judge, Benares, dated November 30, 1938.

Mr. *B. S. Shastri*, for the Applicants.

Mr. *Ram Nama Prasad*, for the Opposite Party.

Order.—This is a plaintiff's application in revision under s. 115, Civil P. C. The suit out of which the application arises was instituted by the plaintiff for (1) a declaration that he was not carrying on business within the limits of the Town Area Committee of Saidpur in the District of Ghazipur and was therefore not liable to pay tax, (2) for the refund of a sum of Rs. 143-14-0 illegally realised from the plaintiff by the Town Area Committee on account of tax, plus Rs. 35 as interest, and (3) for release of the goods belonging to the plaintiff which had been attached by means of a distress warrant. The suit was dismissed by the trial Court. The plaintiff—the applicant before me—appealed, but on the date of hearing neither he nor his Counsel was present and the Court dismissed the appeal.

The plea taken before me by learned Counsel for the applicant is that the learned Judge of the Appellate Court dismissed the appeal on merits and thereby acted without jurisdiction; he ought to have dismissed the appeal for default under O. XLI, r. 17, Civil P. C. Learned Counsel for the opposite party concedes that the appeal was dismissed on merits and that it ought to have been dismissed for default under O. XLI, r 17, Civil P. C., but he has advanced a preliminary objection to the effect that a second appeal from the decree of the Appellate Court was competent to the High Court and therefore no revision lies. The answer which is given

to this plea by learned Counsel for the applicant is that this was a suit of a small cause Court nature and therefore a second appeal was barred under s. 102, Civil P. C. Learned Counsel for the opposite party meets this contention by pleading that this was not a suit of a Small Cause Court nature at all; it was a suit which is excepted from the jurisdiction of the Small Cause Court under Art. 19, of Sch. II, to the Prov. Small Cause Courts Act, which provides that a suit for a declaratory decree is not triable by a Small Cause Court.

It is perfectly true that the Small Cause Court was not competent to try this suit in view of the fact that there was a prayer for a declaration, and it was no doubt for that reason that the suit was instituted as a regular suit in the Munsif's Court. On the other hand, it seems to me that the applicant's claim was substantially a claim for refund of the tax which, according to him, had been wrongfully realized and for release of the property which had been wrongfully distrained; but it was not possible for him to obtain these reliefs without also adding an incidental prayer for a declaration. In respect to this relief he paid no separate court-fee. In *Veera Raghava Iyengar* v. *Vellai Mooppai* 17 Ind. Cas. 704 (1) a suit was instituted for recovery of rent along with a prayer for a declaration of right and a Bench of the Madras High Court held that this was a suit of a Small Cause Court nature and therefore no second appeal lay. The judgment is very short and may be usefully reproduced. It reads as follows:

"The preliminary objection is taken that no second appeal lies in this case. We are of opinion that this contention should be upheld. The suit was one merely for recovery of rent. It is contended that the first prayer in the plaint is that the plaintiffs right to the *melwaram* of the land should be declared; but this can be treated as only incidental to the prayer for the recovery of rent The cause of action, as stated in para. 10 of the plaint, is merely the non-payment of rent. No separate court-fee was paid for the declaration. There is absolutely nothing anywhere in the plaint to suggest that the prayer for declaration was treated as an independent one. The second appeal is dismissed with costs."

In *Allah Bux* v. *Nurul Hasan* (2) Small Cause Court under s. 23 Small Cause Courts Act, returned a plaint for presentation to the proper Court, the reason being that a question of title appeared to be involved. It was held by a Bench of this Court, Sulaiman, A. C. J. and Bajpai J. that the suit was nevertheless a suit of a Small Cause Court nature and a second appeal was therefore barred under s. 102, Civil P. C. Sulaiman, A. C. J., who delivered the judgment, said:

"The transfer of a Small Cause Court suit under s. 23 makes it a regular suit and a first appeal no doubt lies. But the nature of the suit continues to be a Small Cause Court one and a second appeal is barred under s. 102, Civil P. C. The mere fact that a question of title was considered to have been involved in the case or has been incidentally decided would not permit of a second appeal."

In my opinion the suit to which this application relates was a suit of a Small Cause Court nature and therefore no second appeal lay. This application in revision is therefore competent. For the reasons given, I allow this application with costs and set aside the order of the lower Appellate Court. Following the procedure which was adopted by a Bench of this Court in *Nasir Khan* v. *Itwari* (3). I hereby pass the order which the Appellate Court ought to have passed; that is to say, I dismiss the appeal to that Court for default. If the appellant desires to have his appeal restored, he must apply to the Court below under O. XLI, r. 19, Civil P. C.

S. *Application allowed.*

(1) 17 Ind, Cas. 704; 23 M L J 517.

(2) (1931) A L J 967; 134 Ind. Cas. 251; Ind. Rul. (1931) All. 827.

(3) 45 A 669; 74 Ind. Cas 905; A I R 1924 All. 144 21 A L J 667; 9 O & A L R 645.

MADRAS HIGH COURT

Appeal Against Appellate Order No. 108 of 1936

July 31, 1939

WADSWORTH, J.

K. MUNUSAMI CHETTI (DIED) AND OTHERS —APPELLANTS

versus

CHENCHU NAIDU AND ANOTHER— RESPONDENTS

Madras Co-operative Societies Act (VI of 1932), s 51, rules under, r. 15—Award made under, filed in Civil Court under r. 15 (7) (c)—If can be execut d by assignee of person in whose favour it was made

An award under r. 15 of the rules under s. 51 of the Co-operative Societies Act made, after it has been filed in Civil Court for enforcement under r. 15 (7, (c) can be executed on the application of an assignee from the person in whose favour the award was made.

A. against the order of the District Court of Chingleput, dated March 31, 1936, and made in A. S. No. 205 of 1935 preferred against the order of the Court, of the District Munsif of Tiruvallur, dated August 6, 1935, and made in E. A. No 269 of 1935 in E. P. No. 371 of 1935 in Pondavakkam Co-operative Society Claim No. 2748 of 1930-31.

Mr. *K. Rajah Ayyar*, for the Appellants.

Messrs. *T. M. Krishnaswamy Iyer* and *M. Natesam* for the Respondents.

Judgment.—The only question in this appeal is whether an award under r. 15 of the Rules under s. 51 of the Co-operative Societies Act made, after it has been filed in Civil Court for enforcement under r. 15 (7), (c) be executed on the application of an assignee from the person in whose favour the award was made. No authorities have been cited. The rule itself says that the "Court shall enforce the award as if it was a decree of the Court." If it were a decree, the assignee could under O. XXI, r. 16 of the Civil P. C. apply for execution. I see no reason why this provision should not apply to a co-operative award which is enforceable as if it were a decree. The appeal is dismissed with costs.

N.-S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 1953 of 1938

August 12, 1940

SEN, J.

ATUL KRISHNA BOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ZAHED MONDAL AND OTHERS—DEFENDANTS RESPONDENTS

Registration Act (XVI of 1908), ss 17 (1) (d), 17 (2) (vi), 49 — Exemption under s. 17 (2) (vi) does not extend to decrees embodying lease —Compromise decree embodying fresh lease—Decree must be registered and if unregistered it cannot be relied upon to prove rent of tenancy—Evidence Act (I of 1872), s. 91—Rent suit based on unregistered lease — Rate of rent cannot be proved aliunde—Bengal Tenancy Act (VIII of 1885), s. 51—Scope—Written lease—Presumption of terms, if can be drawn under s. 51.

It is true that s. 17 (2) (*vi*), Regis. Act exempts a decree or order of Court from registration but the exemption does not extend to decrees embodying leases. This is perfectly clear from the wording of sub-s. (2) of s. 17 which expressly limits the operation of the exemption therein contained to documents dealt with in cls. (*b*) and (*c*) of sub-s. (1). Sub-clause (*d*) of sub-s. (1) which deals with leases is excluded from the operation of sub-s. (2).

Where after annulling the tenancy by notice under s. 167, Ben. Ten. Act, the plaintiff sues the tenant as trespasser for rent arrears but the suit is compromised by the defendant taking a fresh lease, the compromise decree is not the recognition of an old lease but a new lease and hence is compulsorily registrable under s. 17 (1) (*d*). Where the compromise decree is not registered, it cannot be relied upon by the tenant for proving the rent of the tenancy. 118 Ind. Cas. 895 (1), referred to.

The terms of s. 91, Evi. Act, are quite explicit in their prohibition of the proof of the terms of the lease *aliunde*, and no other evidence can be given to prove the rate of rent in a suit which is based on an unregistered lease except the lease itself which is inadmissible in evidence under s. 49, Regis. Act. 71 Ind. Cas. 650 (2), relied on.

There cannot be scope for any presumption under s. 51, Ben. Ten. Act, of the terms of a lease in a case where there is a written lease setting forth the terms. In such a case therefore the tenant proving the rent paid in the previous years is not entitled to the presumption that it is the rent payable.

A. from the appellate decree of the District Judge, Khulna, dated April 29, 1938.

Messrs. *Krishna Kamal Moitra*, *Hiralal Chakraborty* and *Rabindra Nath Bhattacharjee*, for the Appellants.

Messrs. *Kshitindra Nath Bose* and *Upendra K. Roy*, (for Deputy Registrar), for the Respondents.

Judgment—This appeal arises out of a suit for rent, the plaintiffs being the appellants. Their case is that they purchased the superior interest at a rent sale and annulled all incumbrances by a notice under s. 167, Ben. Ten. Act. They then brought a suit being Title Suit No. 136 of 1923 for *khas* possession against the defendants. The suit was decreed on compromise. By the terms of the compromise, a lease was granted to the defendants at a rental of Rs. 16 per annum. The defendants have fallen into arrear and the plaintiffs accordingly sue for recovery of rent. The defence taken is that the original rent of the tenancy was Rs. 6-6-0 that the compromise decree was obtained by fraud and that the enhancement of rent from Rs. 6-6-0 to Rs. 16 was illegal by reason of the terms of s. 29, Ben. Ten. Act. The Munsif negatived this defence and gave the plaintiffs a decree. The defendants appealed. The learned District Judge has found that no fraud was practised but he held that the lease was inadmissible in evidence as it was not registered and that therefore the plaintiffs could not claim rent on the basis of the lease. He held also that if the present lease be treated as the continuation of the old one then the enhancement of the rent from Rs. 6-6-0 to Rs. 16 was illegal. He allowed the plaintiffs rent at the admitted rate of Rs. 6-6-0 per annum. The plaintiffs now appeal. It is accepted that the compromise decree was not obtained by fraud and that the rent originally paid by the defendants was Rs. 6-6-0. The decree is not registered. The first question for determination is whether it is a document which must be registered.

The contention of the appellant is that decree does not create a lease but that it is a document which merely recognises or

declares the existence of the old tenancy and is therefore not compulsorily registrable under s. 19, Regis. Act. I have carefully considered the document and have no hesitation in holding that by the compromise decree a new lease is created. The old tenancy was extinguished by the notice under s. 17, Ben. Ten. Act, annulling encumbrance. The plaintiffs sued the defendant after annulling his tenancy on the footing that he was a trespasser. The suit was compromised by the defendant's taking a fresh lease. The words used are "*jama bandobasta Korealoyeelam*" (I hereby take a lease). The compromise decree is not the recognition of an old lease but it is a new lease. Now, s. 17 (1) (*d*), Regis. Act, says that a lease from year to year or for any time exceeding one year or reserving a yearly rental must be registered. The compromise decree is a document of this description and it is compulsorily registrable. It is true that s. 17 (2) (*vi*) exempts a decree or order of Court from registration but the exemption does not extend to decrees embodying leases. This is perfectly clear from the wording of sub-s. (2) which expressly limits the operation of the exemption therein contained to documents dealt with in cls. (*b*) and (*c*) of sub-s. (1). Sub-cl. (*d*) of sub-s. (1) which deals with leases is excluded from the operation of sub-s. (2). In this connection I would refer to the case in *Nazar Ali* v. *Indra Kumar Sutar* (1). Now this decree being compulsorily registrable under s. 17, Regis. Act, and not having been registered, it cannot affect the immovable property comprised therein or be received as evidence of any transaction affecting such property. This is the effect of s. 49, Regis. Act. The plaintiffs cannot therefore rely upon this compromise decree for proving the rent of the tenancy.

The next question for decision is whether the rate of rent can be proved *aliunde*. It was argued by learned Advocate for the appellant that rent at the rate claimed has been paid and that there are counterfoil receipts to prove this. He wished to prove the rate of rent by these receipts. In my opinion, s. 91, Evi. Act, stands in the way of any other evidence being given of the rate of rent. The rate of rent is one of the terms of the lease. Section 91 says that when the terms of a contract or any grant or other disposition of property are reduced to the form of a document no evidence shall be given of the proof of such terms grant or other disposition except the document itself. The terms of s. 91 are quite explicit in their prohibition of the proof of the terms of the lease *aliunde*, and I hold that no other evidence could have been given to prove the rate of rent in this suit which is based on an unregistered lease except the lease itself and that s. 49, Regis Act, prevents the document being put in evidence. The result is that the plaintiffs cannot prove the rate of rent. To hold otherwise would be to render nugatory the provisions of the Regis. Act and of s. 91, Evi. Act. A similar question arose and was considered by the Judicial Committee of the Privy Council in *Subramanian* v. *Lutchman* (2).

The case related to a mortgage by deposit of title deeds. There was a writing accompanying the deposit. Their Lordships held that the writing should have been registered as it constituted the bargain between the parties and was not merely a memorandum of a contract already completed. The writing was not registered and was held to be inadmissible in evidence. It was contended that oral evidence my be given of the terms of the mortgage. The contention was repelled by their Lordships who laid down that as the writing could not be proved on oral evidence of the terms of the contract could be given. In doing so they quoted the words of Couch, C. J. in *Kedarnath Dutt* v. *Sham Lal Khettry* (3) which were as follows;

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement."

They also referred with approval to the words of Lord Cairns in *Shaw* v. *Foster* (4) and said:

"In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (4) although it is a well established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that, that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of written document, and any implication that might be raised, supposing there was no document, is put out of the

(1) 56 C 427; 118 Ind. Cas. 895; A I R 1929 Cal. 462; Ind. Rul. (1929) Cal. 703.

(2) 50 I A 77; 71 Ind. Cas. 650; A I R 1923 P C 50; 44 M L J 602; 32 M L T 184; 25 Bom L R 582; I R 66; 2 Bur. L J 25; 38 C L J 41; 18 L W 446; (1923) M W N 762; 28 C W N 1; 50 C 338 (P C).

(3) 11 Beng. L R 405: 20 W R 150.

(4) (1872) 5 H L C 321; 42 L J Ch. 49; 27 L T 281; 20 W R 907.

case and reduced to silence by the documents by which alone you must be governed."

I must hold therefore that the plaintiffs cannot give oral testimony of the rate of rent fixed by the unregistered lease. Learned Advocate for the appellants next relied upon the terms of s. 51, Ben. Ten. Act, which are as follows :

"If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year."

He argued that he was able to prove the rent paid in the previous years and that he was therefore entitled to the presumption that this was the rent payable All I need say about this argument is that there cannot be scope for any presumption of the terms of a lease in a case where there is a written lease setting forth the terms. The decree of the lower Appellate Court giving the plaintiffs rent at the rate admitted by the defendants must therefore be upheld. It was contended by the respondents that even if the lease could be given in evidence it would be inoperative so far as the increase of the rent is concerned inasmuch as it offends against the provisions of s. 29, Ben. Ten. Act. In view of my decision that the lease cannot be proved and that no oral or other evidence can be given of the rate of rent, it is unnecessary to decide this question. The appeal is dismissed with costs. Leave to appeal under s. 15 of the Letters Patent is refused.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Second Appeal No. 508 and Appeal No. 252 of 1936

August 22, 1939

PATANJALI SASTRI, J.

S. RATNASABAPATHI PILLAI—APPELLANT

versus

GOPALA IYER AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 146, 151, O. XXII, r 10—A's suit for recovery of property decreed against B—During pendency of suit A's son S acquiring suit property by final partition decree—Appeal by B—S applying to be impleaded as respondent—Neither s. 146 nor O. XXII, r. 10 held applied—Remedy provided by code not availed of by party—Inherent powers cannot be invoked.

A obtained a decree against *B* in a suit for the recovery of property. During the pendency of the suit *A's* son *S* acquired *A's* interest in suit property by a final partition decree. On an appeal by *B* against decree passed against him, *S* applied under O. XXII, r. 10 to be impleaded as supplemental respondent to the appeal:

Held, that s. 146, Civil P. C., did not apply as *S* could not be regarded as claiming under *A* as he got the suit property by virtue of the partition decree and not by reason of any assignment or devolution from his father;

Held, further that O. XXII, r. 10, also did not apply as *S* acquired the property before the appeal and not during its pendency. *S* was therefore not entitled to be impleaded as respondent. 149 Ind. Cas. 970 (1), and *Kantichander v. Pirbhu Dayal* (2), relied on.

A party who had an appropriate remedy under a specific provision of the Code but of which, however, he failed to avail himself, cannot be allowed to invoke the inherent powers of the Court 78 Ind. Cas. 416 (3) 41 Ind. Cas. 598 (4) and 200 Ind. Cas. 154 (5), relied on.

S. A. against the decree of the Sub-Judge Mayavaram, in A. S. No. 7 of 1935.

Mr. *K. S. Sankara Iyer*, for the Appellant.

Mr. *C. A. Seshagiri Sastri*, for the Respondents.

Judgment.—The facts giving rise to this civil miscellaneous appeal and the connected second appeal No. 508 of 1936 are briefly these : One Sambasivan Pillai, respondent No. 3 herein, brought the suit O. S. No. 265 of 1932 for recovery of the plaint-mentioned property from respondent No. 1 herein on the ground that it had been leased by him to one Vyasachariar who let respondent No. 1 into possession as a sub-tenant and that the latter was bound to surrender possession as the lease to Vyasachariar has been terminated.

The trial Court decreed the suit on September 26, 1933 and respondent No. 1 preferred an appeal A. S. No. 7 of 1935, on the file of the Subordinate Judge's Court of Mayavaram. By this time, respondent No. 1 had discovered that there had been a partition suit between respondent No. 3 and his two sons and that a final decree had been passed therein on August 25, 1927 under which the suit property had been allotted to the sons of respondent No. 3. That partition suit culminated in a second appeal (S. A. No. 630 of 1933) to this Court which was dismissed on September 15, 1933. On these facts respondent No. 1 contended in his appeal to the Subordinate Judge of Mayavaram that respondent No. 3 had no right to sue for recovery of the property as he had lost the right to such property by reason of the final decree passed in August 1927 under which the suit property as already stated had been allotted to respondent No. 3's sons. In view of this contention the appellant herein who

is one of the sons of respondent No. 3 who got the property under the partition decree filed I. A. No. 13 of 1935 in A S. No. 7 of 1935 in the lower Appellate Court under O. XXII, r. 10, Civil P. C., to implead himself as a supplemental respondent in the appeal so as to enable him to resist respondent No. 1's appeal as the rightful owner of the property and thus safeguard his interests therein. The Court below dismissed this application and allowed the appeal and this civil miscellaneous appeal and the connected second appeal have been preferred against the said order and decree respectively.

The learned Counsel for the appellant has urged three contentions before me in the civil miscellaneous appeal. First he argued that the appellant was entitled to come on record under s. 146, Civil P. C., and that the lower Court was wrong in dismissing the petition without considering the applicability of that section. I do not however see how that provision is applicable to the appellant in the circumstances of the case. That section would apply only if the appellant could be properly regarded as claiming under respondent No. 3 who originally brought the action and was the sole respondent in the appeal in the Court, below. But it is clear that the appellant cannot be so regarded as he got the suit property by virtue of the partition decree referred to already and not by reason of any assignment or devolution from his father, respondent No. 3. I must therefore reject this contention.

The appellant's Counsel next urged that O. XXII, r. 10 applied to the case and the appellant is entitled to be impleaded in the appeal under that provision. But, as pointed out by the Court below, reading that provision in the light of r. 11 of the same Order, it is clear that unless the assignment creation or devolution referred to in the provision occurred during the pendency of the appeal, that provision would not entitle the appellant to be impleaded in the appeal, and from the material dates already given, it will be seen that the appellant acquired the suit property as his separate and absolute property by virtue of the partition decree passed during the pendency of the suit and before the appeal was filed even taking the date of the dismissal of the second appeal as the date when the partition became final between the parties. It cannot therefore be said that the appellant acquired any title during the pendency of the appeal as contemplated in O. XXII, r. 10, read with r. 11 *see Phul Chand* v. *Tahir Hussain* (1) and *Kantichander* v. *Pirbhu Dayal* (2).

Lastly, it is urged that if neither s. 146 nor O. XXII, r. 10 was applicable to the facts of this case, the Court had inherent powers under s. 151, Civil P. C. to implead the respondent, as otherwise the appellant would be deprived of all opportunity of resisting the appeal and might run the risk of even losing the property to which respondent No. 1 was found to have no manner of right or title. I should be disposed to consider this argument with more favour if I could see may way to hold that the appellant's case was altogether outside the purview of O. XXII, r. 10. But I am of opinion that the accrual of exclusive title to the appellant in meaning of respect of the suit property under the partition decree could properly be regarded as the 'creation' of an interest within the meaning of O. XXII r. 10, so that if the appellant had only applied under that provision to be impleaded during the pendency of the suit, his application would have been in order and the present difficulty would have been avoided. He, however, failed to do so and made this application only during the pendency of the appeal when it was no longer maintainable under that provision for the reasons already indicated. The appellant had thus an appropriate remedy under a specific provision of the Code of which, however, he failed to avail himself and he cannot therefore be allowed to invoke the inherent powers of the Court. It has often been held that there is no room for the exercise of such powers in a case comming within any specific provision of the Code; *see Shib Prakash* v. *Jinguria* (3) *Ghuznavi* v. *Allahabad Bank Ltd.* (4) and *Vallabhai Naranji* v. *Chotalal Purshothamdas & Co.* (5). This contention also must therefore be rejected. In the result the appeal fails and is dismissed wih costs. It is conceded that if the civil miscellaneous appeal is dismissed, the second appeal cannot be sustained. It is accordingly dismissed but I make no order as to costs therein.

N. S. *Appeals dismissed.*

(1) A I R 1934 All 442; 149 Ind. Cas. 970; (1934) A L J 832; 6 R A 1004.
(2) A I R 1935 Lah 119.
(3) 46 A 144; 78 Ind. Cas. 416; A I R 1924 All 446.
(4) 44 C 929; 41 Ind. Cas. 598; A I R 1917 Cal 44; 21 C W N 877; 26 C L J 49 (F B).
(5) 51 B 26; 100 Ind. Cas. 154; A I R 1927 Bom 79; 28 Bom L R 1442.

OUDH CHIEF COURT

Privy Council Appeal No. 16 of 1939

March 3, 1941

BENNETT. AND GHULAM HASAN, JJ.

Lala SUDAMAN PRASAD—APPLICANT

versus

MOHAMED ABDUL ALIM—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s 110, Para. 2 —Test laid down by, for granting leave — Decretal amount with interest amounting to less than Rs. 10,000 —Property attached in execution value at Rs. 15,000 held to be waqf property not liable to attachment and sale— Leave to appeal, held could not be granted.

Paragraph 2 of s. 110, Civil P. C., is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and uparwds, not that the rights affect properties whose value is Rs 10,000 and upwards.

Where therefore in execution of his decree a decree-holder attached certain property of the judgment-debtor valued at Rs. 15,000, for recovery of the decretal amount with interest amounting to Rs 9,957-5-3, and an objection under s. 47, Civil P. C., that the property being *waqf* property was not liable to attachment and sale being successful applied for leave to appeal to the Privy Council :

Held, that leave could not be granted as the test laid down by para. 2 of s. 110, Civil P. C., had not been satisfied. 167 Ind. Cas. 670 (7), dissented from.

[Case law relied on.]

Messrs. *L. S. Misra* and *S. N. Srivastava*, for the Applicant.

Mr. *Mohammad Ayub*, for the Opposite Party.

Judgment.—This is a petition for leave to appeal to His Majesty in Council against the decree dated September 1, 1939, passed by a Bench of this Court in an execution of decree appeal.

On April 3, 1933, the petitioner obtained a simple money decree against one Merajuddin for a sum of Rs. 9 250. On May 23, 1935, Merajuddin died leaving a widow, *Mst.* Matin-un-nissa. In execution of the decree the petitioner attached *mahal* Amat-uz Zahra in village Bhanpur on October 21, 1935 for recovery of the decretal amount with interest, namely Rs. 9,957-5-3. The *mahal* in question is stated by Counsel for the petitioner to have been valued at Rs. 15,000. On February 5, 1936, *Mst.* Matin-un-nissa filed objections under s. 47 of the Civil P. C. objecting that the property being *waqf* was not liable to attachment and sale. The Civil Judges rejected the objections, holding that the property was not *waqf*. This decision was reversed on appeal by a Bench of this Court and it was held that the property, which was the subject-matter of attachment, was *waqf* property.

By the present petition the petitioner decree-holder desires permission to appeal to His Majesty in Council. Paragraphs 6 and 7 of the petition show that the petitioner prays for leave under one or other of the grounds stated in s. 110 of the Civil P. C.

Learned Counsel on behalf of the petitioner, however, has confined his case only to the second paragraph of s. 110 of the Civil P. C. It is argued that the second paragraph of s. 110 applied to the case, namely, that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of like amount or value. The contention urged on behalf of the petitioner is that although the value of the subject-matter in appeal to the Chief Court was stated as less than Rs. 10,000 the decree passed by this Court involves, directly or indirectly, the question that the petitioner is entitled to sell the attached property of the value of more than Rs. 10,000 for the satisfaction of the decretal amount. We are unable to accede to this argument.

It was held by Sir Lawrence Jenkins, C. J. in *John Joseph De Silva* v. *John Joseph De Silva* (VI Bombay Law Reporter, 403) (1) that to determine the value prescribed by s. 596, now corresponding to s. 110, of the Civil P. C, the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value; and the case does not fulfil the requirements of s. 596 of the Code. That was a suit for a declaration and partition in which it was held that the property belonged to the estate of the deceased and the plaintiff's interest therein was a one-third. At p. 406* it was observed :—

"The argument has been that inasmuch as the whole property is valued at Rs. 12,000 there is a compliance with the terms of s. 596, though the loss to the defendant by reason of the decree is limited to 1/3 of that property and profits. If we were to give effect to the contentions urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property

(1) 6 Bom. L R 403.

*Page of 6 Bom. L. R.—[*Ed.*]

worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil P. C. would exist."

This decision was followad in a Bench decision of the Madras High Court in *Appala Raja* v. *Rangappa Naicker* 40 I. C. 680-A. I. R. 1918 Madras, 632) (2) where it was held that para. 2 of s. 110, Civil P. C. is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs 10,000 and upwards.

This view was further confirmed in *Sukkira Goundan* v. *Palani Goundan* (A. I. R. 1938 Mad. 666) (3).

To the same effect is the decision of a Bench of the Lahore High Court in *Dhanna Mal* v *Rai Sahib Lala Moti Sagar* (A. I. R. 1923 Lah. 286 (2) 4). The matter was discussed at some lenght in *N. C. Gatliara* v. *A. M. M. Murungappa* (A. I. R. 1934 Rang. 292) (5), where it was held that under s. 110 it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal no appeal lies under s. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards.

Reliance has been placed on behalf of the petitioner on *A. V. Subramania Ayyar* v. *Sellamal* (I. L. R 39 Mad. 843) (6). We are quite unable to see how this decision supports the contention of the petitioner. Sir John Wallis, C. J. observed :

"The words "involve directly", contained in the second paragraph of s. 110 of the Code, cannot be read as including cases which involve nothing but the actual subject-matter in dispute in the appeal".

(2) 40 Ind. Cas. 680; A I R 1918 Mad. 632; (1917) M W N 414; 6 L W 12; 33 M L J 481.

(3) A I R 1938 Mad. 666; 182 Ind. Cas. 913; 47 L W 591; (1938) M W N 433; (1938) 1 M L J 728; I L R (1938) Mad. 923; 12 R M 166.

(4) A I R 1923 Lah. 286 (2); 75 Ind. Cas. 654; 6 Lah. L J 78.

(5) A I R 1934 Rang. 292; 156 Ind. Cas. 345; 12 R 355; 7 R Rang. 402.

(6) 39 M 843; 31 Ind. Cas. 296; 2 L W 1057; 18 M L T 450; (1915) M W N 941; 30 M L J 517.

while Srinivasa Ayyangar, J. observed :

"If the operation of the decision is confined only to the particular object matter, cl. (2) of s. 110 does not apply, and unless the case satisfies the conditions in cl. (1), there is no right of appeal.

If the decision, beyond awarding relief in respect of the particular object matter of the suit, affects rights in other properties, cl. (2) would apply : also if the matter in dispute is one which is incapable of valuation as in the case of easements cl. (2) may apply."

Reference has also been made to a decision of the Allahabad High Court in *Nadir Hussain* v. *Municipal Board, Agra* (I. L R. 1937 Allahabad 405) (7). There it was held that the condition laid down in the second paragraph of s. 110 of the Civil P. C. is independent and self-sufficient, and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph. Even if none of the conditions mentioned in the first paragraph is fulfilled, but the sole condition mentioned in the second paragraph is fulfilled, namely, that the decree sought to be appealed against to the Privy Council involves directly or indirectly some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards, the requirements of s. 110 regarding valuation are complied with. In that case the plaintiff sued to enforce a charge and obtain a decree for sale, with option to sell any part or the whole of the mortgaged property the amount claimed by the plaintiff which was decreed to him was less than Rs. 10,000. The total value of the mortgaged property which he was entitled to sell being over Rs. 10,000, it was held that the decree involved, directly or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 or upwards, and the valuation test laid down by s. 110 was satisfied. The plaintiff had prayed in the plaint for a decree for sale of the entire mortgaged property on the ground that the sum due to him was a charge on the same and that he was entitled to put up the whole property for sale. The learned Judges held :

"We find it very difficult to hold that the High Court's decree does not directly or indirectly involve some claim or question to or respecting property of the value of Rs. 10,000."

No reference was made to the decision of Sir Lawrence Jenkins, C. J., or to any of the Madras decisions. We regret we are unable to follow the view taken by the Allahabad High Court and hold in the circumstances of the present case that the

(7) I L R (1937) All. 405; 167 Ind. Cas. 670; A I R 1937 All. 169; (1937) A L J 38; 9 R A 558; 1934 A L R 214.

test laid down by para. 2 of s. 110 of the Civil P. C. has not been satisfied.

The result, therefore, is that this application is dismissed with costs.

S. *Application dismissed.*

LAHORE HIGH COURT
Full Bench
First Appeal No. 459 of 1938
November 4, 1940
MONROE, BHIDE AND RAM LALL, JJ.
Mst. ZEB-UL-NISA AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
Chaudhri DIN MOHAMMAD AND OTHERS—
[DEFENDANTS AND ANOTHER—PLAINTIFF—
RESPONDENTS

Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi), (iii), Sch. I, Art. 1, s. 7 (iv) (c)—Suit under s. 92, Civil Procedure Code (Act V of 1908) falls under Art. 17 (vi), Sch. II—Declaratory suit in Court Fees Act, whether covered by s. 42, Specific Relief Act (I of 1877)—Criterion for determination of question of court-fees in declaratory suits—Deed or decree sought to be declared void — Considerations — Consequential relief in s. 7 (vi) (c)—Suit for declaration that property is waqf and alienations thereof are ineffectual against waqf property—Nature of—Relief—Court-fee payable—Declaration held could not be granted as suit did not fall under s. 42, Specific Relief Act—Result is dismissal of suit and not assessment of higher court-fee—Declaratory relief found to involve consequential relief within meaning of s. 7 (iv) (c)—Plaintiff can state his valuation of relief—Ss. 8 and 9, Suits Valuation Act (VII of 1887), interpretation of — No consequential relief open or asked for — Declaration asked for is only under s. 42, Specific Relief Act, 1877.

Suits under s. 92, Civil P. C., fall under cl. (*vi*) of Art. 17, Sch. II, Court Fees Act, which prescribes a court-fee of Rs. 10. [p. 645, col. 1.]

The Court Fees Act was passed in 1870, while the Specific Relief Act, was passed in 1877. Section 42, Specific Relief Act, was therefore, not in force when the Court Fees Act, was enacted. The declaratory suits referred to in the Court Fees Act cannot therefore be taken to be necessarily those covered by s. 42 only. [p. 647, col. 1.]

In a suit for a declaration that a deed or a decree is null and void, neither the answer to the question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of s. 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the court-fee payable. The true criterion for determining the question of court-fee in cases of this description is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple, and involves no other relief, the suit would fall under cl. (*iii*) of Art. 17 of Sch. II, Court Fees Act, and the court-fee payable would be Rs. 10 only. At the initial stage of determining the court-fee on a plaint, the question whether the declaratory suit is liable to be dismissed, either because it does not fall within the purview of s. 42, Specific Relief Act, or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise. That question will arise only after the necessary court-fee on the true relief as disclosed by the plaint is paid and the plaint is properly before the Court. [p. 649, cols 1 & 2.]

The expression 'consequential relief' in Art 7 (*iv*) (c), Court Fees Act, means some relief, which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a 'substantial relief'. It follows therefore that if the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere 'consequential relief' in the above sense, the plaintiff must pay court-fee on the substantial relief. [p. 650, col. 1.]

Where the plaintiff sued for a twofold declaration that the property described in the plaint was *waqf* and that certain alienations thereof by the *mutwalli* and his brother were null and void and were ineffectual against the *waqf* property:

Held, that the first part of the relief *viz.*, that it be declared that the property in dispute was *waqf* was purely declaratory and it involved no consequential relief. Had it stood by itself a court-fee of Rs. 10 would undoubtedly have been sufficient. The second part of the declaration however stood on a different footing. The plaintiff wished to have the alienations of the *waqf* property to be declared null and void and ineffectual as against the *waqf* property. In substance, the second part of the relief as claimed was tantamount to the setting aside or cancellation of the alienations referred to in the plaint. In the circumstances the relief claimed by the plaintiffs could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief. The relief claimed in this case could not be treated as a declaration with a 'consequential relief' falling within s. 7 (*iv*) (c), Court Fees Act. The relief claimed fell neither under s. 7 (*iv*) (c) nor under Sch. II, Art. 17 (*iii*) but under the residuary article, Sch. I, Art. 17 and a court-fee of Rs. 10 was sufficient for the first relief as to declaration that the property was *waqf*, but the second relief which was a substantive one in the shape of setting aside of alienations required *ad valorem* court-fee on the value of the subject-matter of the sales. 155 Ind Cas. 13 (11), 19 Ind. Cas. 219 (2) (13, 73 Ind. Cas. 767 (14) and 129 Ind. Cas. 753 (15), **Overruled.** [p. 650, col. 2]

[Case-law discussed.]

Held, also that even if the suit were held to fall under s. 7 (*iv*) (c), it was doubtful whether that would help the plaintiffs in this case. The plaintiffs had themselves valued the relief in the plaint at rupees ten lacs They did so, for purposes of jurisdiction but they were bound to fix the same for the purposes of court-fee in view of ss, 8 and 9, Suits Valuation Act. 135 Ind. Cas. 499 (10) and 165 Ind. Cas. 670 (20), approved. [p. 653, col. 1.]

Held, further that the suit did not fall within the purview of s 42, Specific Relief Act.

If it is held that the declaration asked for cannot be granted because it does not fall under s. 42, Specific Relief Act, the result, should be dismissal of the suit on that ground, and not assessment of a higher court-fee. If, on the other hand, it is found that the declaratory relief claimed involves a consequential relief within the meaning of s. 7 (*iv*) (c), Court Fees Act, it will be for the plaintiff to state

the amount at which he values the relief as provided in that section. [p. 649, col. 2.]

All that s. 7 (*iv*) (c), Court Fees Act, requires is that the plaintiff should state the value of the relief in the plaint. It could scarcely have been intended that the plaintiff should value the relief at one figure for jurisdiction and at another for court-fee. Sections 8 and 9, Suits Valuation Act, show that except when specific rules to the contrary have been framed under s. 9, the value for purposes of court-fee and jurisdiction must be the same. [p. 653, col. 1.]

Section 15, Civil P C, 1859, was repealed by the Specific Relief Act in 1877 and s. 42 of that Act has widened the scope of the declaratory relief. Under s. 42 a person may sue for a declaration as to his legal character or his right to any property even when no further specific relief is open to him; while before the enactment of that section it was not the practice to grant declaratory decrees unless such further relief was open to the plaintiff This provision in s. 42 is introduced to enable a person to remove a cloud on his status or title in certain circumstances even when no further relief is open to him at the time. Thus, it is only under s. 42, Specific Relief Act, that Courts in India can grant declaratory relief even when no other specific relief can be claimed by the plaintiff. It is not open to a plaintiff to ask for a purely declaratory decree apart from the provisions of s. 42, when no consequential relief is open to the plaintiff and none is prayed for. In deciding whether a suit is purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered. [p. 651, col. 2; p. 652, col. 1]

[Case-law referred to.]

F. A. referred to the Full Bench by Tek Chand and Abdul Rashid, JJ., dated March 27, 1940.

Messrs. *Barkat Ali* and *Kh. Ghulam Mohy-ud-Din*, for the Appellants.

M. C. Mahajan, *Amar Nath Monga* and *Jaindra Lal*, for Respondents Nos. 5 to 7.

Bhide, J.—The material facts of the case which have given rise to this reference may be shortly stated as follows: On October 31, 1917, one Ghulam Rasul executed a trust, in the nature of what is known as *waqf-al-aulad* under Muhammadan Law in respect of his property for the benefit of himself and his descendants and also for certain charitable objects. According to this deed he was to be the first *mutwalli* and on his death his eldest son, Din Mohammad was to succeed him. After the death of Ghulam Rasul, however, Din Mohammad repudiated the trust and he and his brother (defendants Nos. 1 and 2) effected several alienations of the dedicated property. Thereupon the present plaintiffs who are some of his descendants and relations and as such interested in the proper administration of the *waqf* instituted the present suit praying for the following relief, *viz.* that a declaration to the effect that the property in dispute mentioned in para. 1 of the petition of plaint is *waqf* and the alienations thereof mentioned in para. 4 of the petition of plaint which defendants Nos. 1 and 2 have effected in favour of defendants Nos. 3 to 10 are null and void and ineffectual as against the *waqf* property may be passed with costs in their plaintiffs' favour against the defendants or any other relief deemed equitable may be granted.

The relief was valued by the plaintiffs at rupees ten lacs for the purposes of jurisdiction, but a court-fee of Rs. 10 only was paid treating the suit as one for a declaration without any consequential relief falling under cl. (*iii*), Art 17, Sch. II, Court Fees Act. A preliminary objection was raised on behalf of the defendants that the suit was not properly valued for the purpose of court-fee It was contended that the suit was not really for a mere declaration, but involved also a consequential relief in the shape of cancellation of certain alienations and therefore, court-fee should have been paid *ad valorem* on the value of the properties involved, *i. e.*, on rupees ten lacs as stated by the plaintiffs themselves for the purpose of jurisdiction. The learned Judge of the trial Court upheld this contention and the plaintiffs having failed to pay the necessary court-fees within the time fixed by him, rejected the plaint under O. VII, r. 11, Civil P. C. From this decision an appeal was preferred to this Court which came up for hearing before a Division Bench. The learned Judges who constituted the Bench were of opinion that there was a considerable conflict of authorities on the questions of law which arose in connection with the valuation of the suit for purpose of court-fee and hence referred the case for decision to a Full Bench.

Two main points arise for decision in this appeal, *viz.*: (1) What is the nature of the relief claimed in the present suit and under what category of suits does it fall for the purposes of the Court Fees Act? (2) How is that value to be computed? As regards the first point it was conceded by the learned Counsel for the appellants that in order to determine the real nature of the relief claimed the plaint must be considered as a whole and not merely the form in which the relief claimed is expressed. The contention of the learned Counsel for the plaintiffs-appellants, however, was that according to the proper construction of the plaint, the relief claimed was in the nature of the declaration pure and simple and therefore a court fee of Rs. 10 was sufficient. As regards the question whether the plaintiffs were entitled to sue for a mere

declaration without praying for consequential relief the learned Counsel urged, that no consequential relief was open to the plaintiffs and that, in any case, that question was immaterial for the purpose of determining the nature of the relief claimed. For, if it be found that the plaintiffs have failed to sue for a consequential relief which was open to them (*e. g.*, injunction restraining the *mutwallis* from treating the property as their own and requiring them to administer the trust: see *F. A. Shihan* v. *Abdul Alim Abed* (1), at p. 795) the suit might be liable to be dismissed on that ground; but that would not affect the question of court-fee. He however maintained that no further relief was open to the plaintiffs and the suit for declaration was therefore competent.

The learned Counsel for the defendant-respondents on the other hand contended that the plaintiffs are in effect suing for cancellation of the various alienations effected by Din Mohammad and the mere fact that the plaintiffs have chosen to disguise the relief in a declaratory form cannot alter its real nature. It was also urged that a further relief in the shape of restitution of possession to the *mutwalli* was open to the plaintiffs and hence a suit for a mere declaration was incompetent. In my opinion the first contention of the learned Counsel for the respondents should prevail. As stated above, it was not disputed before us that in order to ascertain the real nature of the relief claimed by the plaintiffs, the substance of the plaint must be considered and the mere fact that the relief as stated in the prayer clause is expressed in a declaratory form would not necessarily show that the suit is for a mere declaration and no more. This proposition is well-established and is supported by ample authority: *see Shankaran Nair* v. *Gopala Menon* (2), *Arunachalam Chetty* v. *Rangasamy Pillai* (3), *Kamla Prasad* v. *Jagarnath Prasad* (4), *Parvatibai* v. *Vishvanath Ganesh* (5), *Maung Shein* v. *Ma Lon Ton* (6), *Kalu Ram* v. *Babu Lal* (7) at p. 822 *Roop Rani* v. *Bithal Das* (8) *Hakim Rai* v. *Ishar Das Gorakh Rai* (9) and *Sri Kishan Das* v. *Sat Narain* (10). The question whether the relief claimed in the present case is purely a declaratory one or involves or is tantamount to other substantial relief has therefore to be decided in the light of this proposition.

The reliefs claimed in the present case are: (*i*) a declaration to the effect that the property mentioned in para. 1 of the plaint is *waqf*; (*ii*) secondly, that the alienations of the property mentioned in para. 4 of the plaint, are null and void and ineffectual as against the *waqf* property. As regards the first part of the declaration, *viz.*, that the property mentioned in para. 1 of the plaint is *waqf*, it is not disputed that the relief claimed is purely a declaratory one. Defendants were denying that the property was *waqf* and hence this declaration was properly asked for. As to the second part of the relief claimed, however, it is contended on behalf of the defendants that this relief, though expressed as a declaration, amounts to a prayer for cancellation of the alienations and therefore the relief is in reality a substantive relief. In *Sultan Khan* v. *Zia-uddin* (11), which was a case of a similar type a contrary view appears to have been taken but it is contended that that ruling does not lay down the law correctly. The plaintiffs in that case, in addition to a declaration that the suit property was *waqf* wanted it to be declared that the sale of a portion of the said property by defendants Nos. 4 to 7 in favour of defendants Nos. 1 to 3 was invalid. It was held that this prayer could not be looked upon as one for a 'consequential relief.' The only reason given in support of this view was that the plaintiffs were not parties to the sale transactions which were impugned. This view was stated to be based upon a series of decisions of the Punjab Chief Court and this Court and the following authorities were referred to: *Ganeshi Lal Beni Prashad* (12), *Amin Chand* v. *Sant Murli*

(1) A I R 1930 Cal. 787 (795); 130 Ind. Cas. 369; 34 C W N 1129; 53 C L J 91; 58 C 474.
(2) 30 M 18; 1 M L T 412.
(3) A I R 1915 Mad. 948; 28 Ind. Cas 79; 38 M 972; 28 M L J 118; (1915) M W N 118; 17 M L T 154 (F B).
(4) 10 Pat. 432; 130 Ind. Cas. 46; A I R 1931 Pat. 78; 13 P L T 155; Ind Rul. (1931) Pat 142.
(5) 29 B 207; 6 Bom. L R 1125.
(6) 9 R 401; 134 Ind. Cas. 1263; A I R 1931 Rang. 319; Ind. Rul. (1932) Nag. 15.
(7) 54 A 812 (822); 139 Ind. Cas. 32; A I R 1932 All. 485; (1932) A L J 684; Ind. Rul. (1932) All. 518 (F B).
(8) 13 Luck 628; 172 Ind. Cas. 81; A I R 1938 Oudh 1; 1937 O W N 1186; 10 R O 158; 1937 O L R 587 (F B).
(9) 8 L 531; 102 Ind. Cas. 46; A I R 1927 Lah. 499; 29 P L R 602; 9 Lah. L J 400.
(10) 13 L 391; 135 Ind. Cas 499; A I R 1932 Lah. 132; 32 P L R 729; Ind. Rul. (1932) Lah. 99.
(11) A I R 1935 Lah. 611; 156 Ind. Cas. 13; 7 R L 873.
(12) 1 P R 1911; 9 Ind. Cas. 673; 47 P L R 1911.

Dhar (13) *Nihal Debi* v. *Rai Chuni Lal*, 73 Ind. Cas. 753 (14), *Karam Chand* v. *Uma Datt Hans Raj*, 129 Ind. Cas. 753 (15) and *Beli Ram* v. *Isher Dass* (16). In support of his contention that the law was not correctly laid down in *Sultan Khan* v. *Zia-ud-din* (11) or the rulings which it purported to follow, the learned Counsel for the defendants relied chiefly on a Full Bench ruling of the Chief Court of Lucknow, reported in *Bepin Singh* v. *Bhagwan Singh* (17).

Before proceeding further, it is necessary to examine the cases relied on in *Sultan Khan* v. *Zia ud-din* (11) because that ruling does not discuss the law on the point, but merely takes it, as well-settled, that when a person who is not a party to a decree or a deed sues to have it declared void, Art. 17, Court Fees Act, applies, and the court-fee payable is Rs. 10. The first case relied on in *Sultan Khan* v. *Zia-ud-din* (11), *viz.*, *Ganeshi Lal* v. *Beni Prasad* (12) does not appear to be of much assistance. There was no question of setting aside any deed or decree in that case. The plaintiff sued for a declaration that he was the real holder of a certain decree which had been obtained by defendants against a third party and also prayed that the decree be transferred to him. The learned Judge treated the latter prayer to be redundant and held the suit to be merely declaratory and as such properly stamped with a ten rupee stamp. The question whether any other further relief was open to the plaintiff's and the plaintiffs should have asked for it was however left open.

The next ruling relied on was *Amin Chand* v. *Sant Murli Dhar* (13). In that case the plaintiffs claimed to be in possession of a certain *dharamsala*, alleged to be *waqf* property, and sued for a declaration that the sale of it made by a former manager to defendants Nos. 2 and 3 was illegal and the decree for possession passed in favour of the latter on the basis of the sale deed was null and void and should have no effect on the property. The trial Court had dismissed the suit, holding that the plaintiffs had failed to sue for a further relief which was open to them, *viz.*, cancellation of the sale deed. On appeal, the Chief Court held that the plaintiffs were not bound to sue for cancellation of the sale deed which was merely an 'auxiliary equitable' relief and not such 'further relief' as is contemplated by s. 42, Specific Relief Act. It was therefore held that the plaintiffs were competent to maintain a suit for a mere declaration. It may be observed that as the plaintiffs were in possession of the suit property, there was no question of their suing for possession in that case.

The decision in *Amin Chand* v. *Sant Murli Dhar* (13) seems to be based chiefly on the analogy between the position of a *mahant* and that of a widow under Hindu Law. It was pointed out in the judgment that a reversioner of a Hindu widow is competent to obtain a declaratory decree with respect to a sale made by the widow without suing for concellation of the sale and the same principle was held to be applicable to the case of the sale of the *waqf* property which was before the learned Judges. With due respect, it must be said that the two cases differ in one material respect. In the case of a Hindu reversioner, no question of cancellation of the sale deed arises, as the sale deed remains operative during the lifetime of the widow who makes an alienation. The case is different where the property is *waqf* and consequently inalienable except for the purposes of the *waqf*. If not so made, the sale is null and void. This aspect of the question does not appear to have been considered at all in *Amin Chand* v. *Sant Murli Dhar* (13). The next case relied on in *Sultan Khan* v. *Zia ud-din* (11) was *Nihal Devi* v. *Rai Chuni Lal* (14). This case was apparently similar to *Amin Chand* v. *Sant Murli Dhar* (13). It was held that where a person who is not a party to a decree sues to have it declared void he need not sue for any consequential relief and the court-fee payable is that for a declaratory suit. In this ruling also, the distinction referred to above between a suit where a reversioner seeks a declaration with respect to an alienation made by a widow and that in which an alienation of *waqf* property is challenged was not noticed. The ruling purports to follow *Bua Ditta* v. *Laaha Mal*, 54 Ind. Cas. 833 (18) in which the principles laid down in *Arunachalam*

(13) 18 P R 1913; 19 Ind. Cas. 219 (2); 211 P L R 1913.

(14) A I R 1923 Lah. 373; 73 Ind. Cas. 767; 5 Lah. L J 357.

(15) 129 Ind. Cas. 753; A I R 1930 Lah. 755; 31 P L R 383; Ind. Rul. (1931) Lah. 225.

(16) A I R 1928 Lah. 113; 110 Ind. Cas. 262; 8 L 730; 29 P L R 97.

(17) 14 Luck 176; 177 Ind. Cas. 550; A I R 1938 Oudh 201; 1938 O W N 889; 11 R O 54; 1938 O L R 425 (F B).

(18) 54 Ind. Cas. 883; A I R 1919 Lah. 63; 2 U P L R (L) 37.

Chetty v. *Rangasamy Pillia* (3) were approved and followed.

The next ruling referred to in *Sultan Khan* v. *Zia-ud-din* (11) was *Karam Chand* v. *Uma Datt Hans Raj*, 129 Ind. Cas. 753 (15). The question of court-fees was not discussed at any length in this ruling. It merely purports to follow *Ganeshi Lal* v. *Beni Prasad* (12) and *Nihal Devi* v. *Rai Chuni Lal* (14) in holding that when a person who is not a party to a decree challenges it, the suit should be treated as one for a declaration only. The last case relied on in *Sultan Khan* v. *Zia-ud-din* (11) was *Beli Ram* v. *Isher Dass* (16). This case seems to be clearly distinguishable as it was one under s. 92, Civil P. C. There is ample authority for the proposition that such suits fall under cl. (*vi*) of Art. 17, Sch. II, Court-Fees Act, which also prescribes a court-fee of Rs. 10. The decision is, therefore, not relevant for the purpose of a suit of the present type. It will thus appear that only two of the rulings relied on in *Sultan Khan* v. *Zia-ud-din* (11) are in point for the purposes of the present reference, *viz.*, *Amin Chand* v. *Sant Murli Dhar* (13) and *Nihal Devi* v. *Rai Chuni Lal* (14). The facts of these two cases were similar to those of the present case. In the former case, the decision was based on the analogy of a suit by a reversioner to challenge an alienation by a Hindu widow but there is a distinction between the two classes of cases as pointed out above. The latter case purports to follow *Bua Ditta* v. *Ladha Mal*, 54 Ind. Cas. 833 (18) in which the principles laid down in *Arunachalam Chetty* v. *Rangasamy Pillai* (3) were approved. This Full Bench ruling has been relied on or referred to in several rulings bearing on the question of court-fees in cases of this type and it will be threfore useful to examine it in some detial at this stage.

In *Arunachalam Chetty* v. *Rangasamy Pillai* (3) a decree had been passed against the father of the plaintiffs on the basis of a hypotheaction bond. The plaintiffs had been made parties to that suit; but they alleged that they were minors at the time and had been wrongly represented as majors. They therefore sued for a declaration that the debt for which the decree had been obtained was not binding on the family and the decree itself was a nullity. They further prayed for an injunction restraining the decree holder from executing the decree. The Courts below had held that *ad volerm* court-fee was payable. On second appeal, it was contended, firstly, that the suit was really a declaratory one and secondly that even if the prayer for injunction was considered to be a consequential relief, the plaintiffs were entitled to value the relief as they liked under s. 7 (*iv*) (*c*), Court Fees Act and therefore *ad valorem* court-fee was in any case not payable on the amount of the decree. The case came before a Division Bench which referred three questions to a Full Bench for opinion The first of these, which is the only one relevant to the point now under discussion, was as follows:

"Whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt, is not binding, is a declaratory suit only."

The Full Bench held that as the plaintiffs had in terms claimed not only a declaration but also an injunction which was a consequential relief, the case clearly fell under s. (*iv*) (*c*). In this aspect, the above question did not really arise. They, however, went on to answer the above question which had been referred to the Full Bench *viz.*, whether (even apart from the injunction) the suit for a declaration that a certain decree or instrument to which the plaintiff was a party was not binding on him could be considered to be a purely declaratory suit. They referred to *Tacoordeen Tewarry* v. *Ali Hossain Khan* (19) a decision of their Lordships of the Privy Council, in which the plaintiffs asked for confirmation of thier possession of certain villages after setting aside a sale as fraudulent. It was held by their Lordships in that case that the prayer for setting aside the sale which was contained in the plaint was itself a substantive relief. Relying on this and certain other authorities, the Full Bench came to the conclusion that a suit of the kind referred to in the question as stated above involved a consequential relief in the shape of the setting aside the decree or the instrument to which the plaintiff was a party and hence it must be looked upon as a declaratory decree with a consequential relief within the meaning of s. 7 (*iv*) (*c*), Court Fees Act. It will appear from the above that the only case which the Full Bench had to consider was that of a plaintiff who sued for a declaration that an instrument of sale or mortgage executed by him or a decree passed against him was not binding on him. The converse case, *viz.*, one in which the plaintiff is not a party to

(19) 21 W R 340; 1 I A 192; 13 Beng. L R 427; 3 Sar 368 (P C).

a mortgage or sale, which he seeks to get rid of, was not before the Full Bench and was not considered by them at all. There are a few remarks about the converse case in the referring order of the Division Bench but even these can hardly be considered to be tantamount to expression of any definite opinion. All that the Division Bench said on the point was as follows :

"Where a party executes a document or a decree is passed against him, *prima facie* such deed or decree is binding on him Until it is set aside it cannot be treated as void. The decree therefore, declaring that the deed or decree is not binding on the plaintiff has the effect of the cancellation of the deed or decree. It does not appear to us to be a mere declaratory decree. The case might be different where a declaration is sought by a person who is not a party to the bond or the decree. In a case like that the suit may properly be regarded as one for declaration but in the other case, it is more properly a suit to get rid of an already existing obligation."

The Full Bench did not refer to the latter class of cases at all and expressed no opinion about them. It will thus appear that in the Full Bench decision there is no warrant for the proposition that where a person who is not a party to a decree or instrument sues to have it declared null and void, the suit must be looked upon as one for a declaration without any consequential relief and as such chargeable with a court-fee of Rs. 10 only. In *Bua Ditta* v. *Ladha Mal* 54 Ind. Cas. 833 (18), *Arunachalam Chetty* v. *Rangasamy Pillai* (3) was apparently considered to be as an authority in support of the proposition that in cases where the plaintiff, who is not a party to a decree or instrument, seeks to set it aside the suit may be regarded as one for a declaration only. But as pointed out above, there is nothing in the report of this case beyond the remarks in the referring order quoted above to support the view. The remarks on this point in *Bua Ditta* v. *Ladha Mal*, 54 Ind. Cas. 833 (18) were moreover really *obiter*, as the plaintiff in that case was a party to the decree sought to be set aside. The decision in *Nihal Devi* v. *Rai Chuni Lal* (14) was apparently based chiefly on *Amin Chand* v. *Sant Murli Dhar* (13) and *Bua Ditta* v. *Ladha Mal*, 54 Ind. Cas. 833 (18) and most of the subsequent rulings of this Court seem to have merely followed that case without further examination of the point.

In three recent rulings, however a different view has been expressed *viz.* in *Mahomed Hayat Khan* v. *Firm Jagpat Rai Babu Ram* (20) *Sohindar Singh* v. *Shanker Das* (21) and *Narain Das* v. *Firm Har Sukh Das Chhog Mal*, 152 Ind. Cas. 847 (1) (22) I shall therefore now proceed to consider these cases. In *Mahomed Hayat Khan* v. *Firm Jagpat Rai Babu Ram* (20) the plaintiff sued for a declaration that he was the owner of a certain house and that the mortgage deed in respect of it executed by the defendants was ineffective against him being null and void. The plaintiff had paid a court-fee of Rs. 10 only treating the suit as a purely declaratory one, but it was held by the Division Bench that the suit fell under s. 7 (*iv*) (*c*), Court Fees Act as in the circumstances it was necessary not only that he should get a declaration that he is the owner, but that he should pray for the cancellation of the mortgage. The facts of this case have not been given fully and the point is not discussed at length. The plaintiff was apparently not a party to the mortgage deed and it is not explained why it was necessary for him to get the mortgage deed cancelled. The case-law on the point has also not been considered. In *Sohindar Singh* v. *Shankar Das* (21) the facts were as follows : The grandfather of the plaintiff Ramdass mortgaged certain property alleged to be ancestral. The mortgagee brought a suit on the mortgage impleading the sons of Ramdass as his legal representatives. The suit was decreed and the property was sold in execution. The plaintiff, who was a minor, sued for a declaration that the decree and the sale were invalid as the original mortgage debt was either fictitious or raised for immoral purposes. He treated the suit as one for a declaration without consequential relief, and paid a court-fee of Rs. 10; but it was held by the Division Bench, that the suit fell under s. 7 (*iv*) (*c*), Court Fees Act. In this case also, the question of court-fees is not discussed at any length. But so far as I can see, the reason why the Division Bench held the case to be not purely declaratory was that the plaintiff was represented by his father in the previous suit by the mortgagee and it was therefore not sufficient for him merely to ask for a declaration that the decree or the sale was not binding on him, but it was necessary also to ask for a consequential relief invalidating the decree and the sale.

(20) A I R 1936 Lah. 703; 165 Ind. Cas. 670; 38 P L R 923; 9 R L 281 (2).
(21) A I R 1936 Lah. 166.
(22) 152 Ind. Cas. 847 (1); 7 R L 334.

The case was thus treated on the same footing as one in which a person who is a party to a decree or a sale seeks to set it aside.

In *Narain Das* v. *Firm Har Sukh Das Chhoq Mal*, 152 Ind. Cas. 847 (1)(22) another Division Bench of this Court held that a plaint in a suit for a declaration that a decree could not be executed against the plaintiffs on the ground that they were not parties to it must pay *ad valorem* court-fee under s. 7 (*iv*) (c), Court Fees Act. The facts of this case are not however very clear. The ruling purports to follow *Bindraban* v. *Punjab National Bank Ltd* (23) but in that case, the plaintiff was seeking to set aside a decree which was passed against him. So far as the other High Courts or Chief Courts in India are concerned, it will be sufficient to refer to two recent Full Bench decisions of the Chief Court of Lucknow in which the case law on the subject has been reviewed, *viz* *Roop Rani* v. *Bithal Das* (8) and *Bepin Singh* v. *Bhagwan Singh* (17). In the former case the questions referred to the Full Bench were:

"1. Whether the question of proper court-fee payable in a suit is to be determined mainly on the language of the relief claimed in the plaint or on the substance of the claim to be gathered from the whole plaint; and 2. Whether a consequential relief should be deemed to be implied in the prayer for declaration claimed in the present suit and the plaint should therefore bear an *ad valorem* court-fee or whether it should be treated merely as a declaratory suit governed by Art. 17 (*iii*) of Sch. II, Court Fees Act"

As regards the first question, the principle that the substance of the plaint taken as a whole must be considered and not merely the language in which the relief asked for is expressed, was affirmed. As to the second question, it may be stated that in the case referred to the Full Bench the plaintiff, who was the minor son of one Mannu Lal, sued for a declaration that a partition decree obtained by his father as his guardian was 'collusive, illegal and void.' The Full Bench held after a review of the case law that although consequential relief was not expressly asked for it was implicit in the declaration asked as the plaintiff was a party to the partition decree which was impugned, and hence the suit should be treated as one for a declaration with consequential relief. It was held that when a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of his objections under it, and hence the relief is not of a purely declaratory character. In *Bepin Singh* v. *Bhagwan Singh* (17) the case referred to the Full Bench was the converse of that dealt with in *Roop Rani* v. *Bithal Das* (8). The question referred to the Full Bench in that case was a follows:

"When a plaintiff not party to a decree seeks a declaration that he is not bound by that decree or that a decree-holder cannot proceed against certain property, is he seeking to obtain a declaratory decree where consequential relief is prayed within the meaning of s. 7 (*iv*) (c), Court Fees Act, and is he therefore bound to pay court-fees accordingly."

It was pointed out that it did not follow logically from the decision in *Roop Rani* v. *Bithal Das* (8) that when a person who is not a party to a decree sues for a declaration that it is null and void, the suit must be treated as a purely declaratory one without any consequential relief. It was further pointed out that the Full Bench decision of the Madras High Court in *Arunachalam Chetty* v. *Rangasamy Pillai* (3), also did not support any such proposition. The Bench eventually held that the true criterion for deciding whether a suit was a purely declaratory one or not was not whether the plaintiff was or was not a party to the decree which is impugned but whether the suit is or is not a declaratory one of the type as covered by s. 42, Specific Relief Act. Reliance was placed in support of this conclusion chiefly on the remarks of Sir Lawrence Jenkins, Chief Justice of the Calcutta High Court, in *Deokali Koer* v. *Kedar Nath* (24). The main relief asked for in *Deokli Koer* v. *Kedar Nath* (24) was as follows:

"That it may be declared that the registered deed, dated June 1, 1896, for Rs. 14,000, executed by defendant No. 9 in favour of the father and ancestors of defendants Nos. 1 to 8, is collusive, nominal, invalid, fraudulent and without consideration; that the decree passed on the basis thereof which is pending execution in No. 83 of 1909 in the first Court of Subordinate Judge at Arrah has been collusively and fraudulently obtained and it is ineffectual inoperative and invalid; and that for the satisfaction of the said decree, the mortgaged property in question mentioned in said decree cannot be sold."

With reference to this relief, the learned Chief Justice remarked as follows:

"It is in this section (s. 42, Specific Relief Act that the law as to merely declaratory decrees applicable in the circumstances of this case is now to be found ..... We have to be guided by it provisions as they are expressed. The sectio

(23) A I R 1929 Lah, 463; 116 Ind. Cas. 895; 30 P L R 176.

(24) 39 C 704; 15 Ind. Cas. 427; 16 C W N 838.

does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property; it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints... Now what are the declarations that are sought in this case. None relate to the plaintiff's legal character; so only those are permissible which relate to 'any right as to any property.' Of the declaration in the first prayer of the plaint none as expressed, is a declaration of this character it may be that the proposition at which the plaintiff aims is in some measure involved in those declarations but that is not what is sanctioned by s. 42."

Applying this test, the learned Judges of the Lucknow Chief Court held that the suit before them did not fall under s. 42, Specific Relief Act, and therefore was not a suit for merely a declaratory relief. The Full Bench accordingly answered the question referred to them as follows :

"The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (*iii*) of Sch. II, Court Fees Act, or whether it is a decree with consequential relief governed by s. 7 (*iv*) (c), Court Fees Act, depends not gon whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under s. 42, Specific Relief Act."

With the greatest respect, I must say that I find it difficult to understand the above conclusion. There seems to be divergence of judicial opinion on the question whether a declaratory suit is maintainable in India apart from the provisions of s. 42, Specific Relief Act, but assuming for the sake of argument that the section is exhaustive of the cases in which a declaratory decree may be asked for, it is difficult to see, how it follows that when a plaintiff prays for a declaration, which does not fall under s. 42, Specific Relief Act, the suit ceases to be a declaratory one. If a plaintiff asks for a declaration that does not fall under s. 42, the result may be that his suit may be liable to be dismissed if according to law he is not entitled to ask for such a declaration. But I do not see how that can affect the question of court-fees. The question of court-fees has to be decided on the suit as framed. If the plaintiff is asking for a mere declaration without any consequential relief, *prima facie*, he is entitled to sue on a court-fee of Rs. 10 only. The case may be different if it is found that although the plaintiff has asked for what is, in form, a declaratory relief that relief includes in reality some other relief of a consequential character. In such a case, the suit may rightly be held to be in substance a suit for a declaration with consequential relief as held by the Full Bench of the Lucknow Chief Court in *Roop Rani* v. *Bithal Das* (8). But if no such consequential relief is necessarily included in the declaration asked for, I do not see why the suit should not be treated as purely declaratory. In *Deokali Koer* v. *Kedar Nath* (24), on which reliance was placed by the Full Bench in *Bepin Singh* v. *Bhagwan Singh* (17), it was no doubt held that the declaratory reliefs claimed did not fall under s. 42; but the declarations asked for in that case included substantive reliefs. The plaintiff was suing for a declaration (*i*) that a certain sale was collusive, nominal and invalid, (*ii*) that decree passed on the basis thereof had been fraudulently and collusively obtained and was ineffectual, inoperative and invalid and (*iii*) that for the satisfaction of the said decree, the mortgaged property was not liable to be sold.

As pointed out already, it was held by their Lordships of the Privy Council in *Tacoordeen Tewarry* v. *Ali Hossain Khan* (19), that a prayer for the setting aside of a sale is in itself a 'substantive relief.' It is therefore clear that in *Deokali Koer* v. *Kedar Nath* (24), the plaintiff was really asking not merely for a declaration but also for substantive reliefs. The learned Chief Justice further drew attention to the fact that the plaintiffs had obtained an *interim* injunction in the course of the suit restraining the defendants from enforcing their rights under the decree. This also indicated that the plaintiffs' real object was to get rid of the effect of the sale and the decree. According to the test laid down by the Full Bench in *Roop Rani* v. *Bithal Das* (8), the substance of the plaint and not merely, the language of the relief claimed is to be considered in determining the question of court-fee and according to this test, the declarations claimed in *Deokali Koer* v. *Kedar Nath* (24) were rightly held to involve substantive reliefs. It seems to me, that in drawing attention to the fact that a plaintiff is not ordinarily entitled to sue for a declaration unless the case falls within the purview of s. 42, Specific Relief Act, Sir Lawrance Jenkins, the learned Chief Justice who delivered the judgment in *Deokali Koer* v. *Kedar Nath* (24), was probably merely pointing out that the section may be used as one of the tests for deciding whether the plaintiff is suing for a mere declaration or something more. If it is found that the plaintiff is suing for a declaration which does not fall under s. 42 it will probably be disclosed in most cases on examination of the substance

of the relief claimed that he is really suing for some other relief and has merely expressed it in the form of a declaration to evade payment of higher court-fees. But it may also happen that the plaintiff being ill-advised sues for a declaration which does not fall under s. 42, Specific Relief Act, but which at the same time does not, in fact, involve any other relief excepting a declaration. In such a case, I see no reason why he should pay a court-fee of more than Rs. 10. If it is held that the declaration asked for cannot be granted because it does not fall under s. 42, the result, I think, should be dismissal of the suit on that ground, and not assessment of a higher court-fee. It may be observed here that the Court Fees Act was passed in 1870, while the Specific Relief Act, was passed in 1887. Section 42, Specific Relief Act, was therefore not in force when the Court Fees Act was enacted. The declaratory suits referred to in the Court Fees Act cannot therefore be taken to be necessarily those covered by s. 42 only.

It seems to me that neither the answer to the question whether ths plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of s. 42, Specific Relief Act furnishes a satisfactory or conclusive test for determining the court-fee payable in suit of this description. When the plaintiff is a party to the decree or deed, the declaratory relief, if granted, necessarily relieves the plaintiff of his obligations under the decree or the deed and, hence it seems to have been held in such cases, that the declaration involves a consequential relief. In cases, where the plaintiff is not a party to the decree or the deed, the declaratory relief does not ordinarily include any such consequential relief. But there are exceptional cases in which the plaintiff though not a party to the deed or the decree is nevertheless bound thereby. For instance, when a sale or mortgage of joint family property is effected by a manager of joint Hindu family, the alienation is binding on the other members of the family (even if they are not parties to it) until and unless it is set aside. Similarly a, decree passed against the manager will be binding on the other members of the family. If therefore a co-parcener sues for a declaration that such an alienation or decree is null and void the declaration must I think, be held to include consequential relief in the same way as in those cases in which the plaintiff is himself a party to the alienation or the decree, which is sought to be declared null and void. The case dealt with in *Sohindar Singh* v. *Shankar Das* (21) seems to have been of this decription. The case of an alienation by a *mutwalli* of *waqf* property would also appear to stand on a similar footing. In the case of *waqf* property, it is only the trustee or the *mutwalli* who can alienate the property. If he makes an alienation it is binding on all concerned, until and unless it is set aside. If therefore a person sues to get such an alienation declared null and void, he can only do so by getting the deed invalidated. The relief claimed in such cases also may therefore be found to include a consequential relief.

After carefully considering the matter, it seems to me that the true criterion for determining the question of court-fee in cases of this description is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple and involves no other relief the suit would fall under cl. *(iii)* of Art. 17 of Sch. II, Court Fees Act and the court-fee payable would be Rs. 10 only. At the initial stage of determining the court-fee on a plaint, the question whether the declaratory suit is liable to be dismissed either because it does not fall within the purview of s. 42, Specific Relief Act, or, because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not seem to me to arise. That question will arise only after the necessary court fee on the true relief as disclosed by the plaint is paid and the plaint is properly before the Court. In such a case therefore if after the payment of the court-fee, it is found that the declaration prayed for cannot be granted according to law for any such reasons as are mentioned above, the suit may be liable to be dismissed on that ground. If on the other hand, it is found that the declaratory relief claimed involves a consequential relief within the meaning of s. *(iv)* (c), Court Fees Act, it will be for the plaintiff to state the amount at which he values the relief as provided in that section. For instance, if a plaintiff sues for a declaration that a certain decree passed against him is null and void and is incapable of being executed against him, the latter part of the declaration may be looked upon as a consequential relief resulting from the former.

Lastly, there may be cases, where the declaration asked for is merely a surplusage and the so-called consequential relief is in

reality an independent substantial relief. For instance, if a person sues for a declaration that the defendant is liable to pay him money due on a certain bond and also asks for recovery of the amount, or asks for a declaration that he is the owner of certain property and entitled to its possession and asks for recovery of the property, the reliefs for the recovery of the amount or for possession cannot properly be treated as consequential reliefs which can be valued arbitrarily by the plaintiff under s. 7 (*iv*) (*c*).

It seems obvious that the consequential relief referred to in s. 7 (*iv*) (*c*) could not mean a substantive relief the valuation of which is separately provided for in the Court Fees Act. If it were so held, plaintiff could easily evade payment of the necessary court-fee on the substantive relief by prefacing it with a declaration as to his rights. Every suit involves the establishment of certain rights of the plaintiff as a necessary preliminary to the grant of the relief claimed by him. But the addition of a prayer for a declaration as to such rights cannot convert a suit for a substantive relief into one for a 'declaratory decree where consequential relief is prayed for' within the meaning of s. 7 (*iv*) (*c*), Court Fees Act. It is significant that the valuation of the relief in cases falling within the scope of s. 7 (*iv* (*c*) is left to the plaintiff. This is presumably because the 'consequential relief' contemplated by the section is some ancillary relief to which the plaintiff becomes entitled as a necessary result of the declaration, but for which no separate provision is made in the Act. The essence of the relief in such cases lies in the declaratory part and the consequential relief being merely an auxiliary equitable relief, its valuation seems to have been left to the plaintiff.

The meaning of the expression consequential relief as used in s. 7 (iv) (c), Court Fees Act, was recently considered by a Full Bench of the Allahabad High Court (consisting of five Judges) in *Kalu Ram* v. *Babu Lal* (7), and it was held that the expression 'consequential relief' means some relief, which would follow directly from the declaration given the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a 'substantial relief.' It follows therefore that if the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere 'consequential relief' in the above sense the plaintiff must pay court fee on the substantial relief. The above appears to me the appropriate answer to the main question of law which requires decision in this case. Applying the above test, we have now to see what would be the proper court-fee payable in the present case. As stated above, the plaintiff sued in this case for a twofold declaration *viz.* (*i*) that the property described in the plaint is *waqf* and (*ii*) that the alienations which defendants Nos. 1 and 2 have effected in favour of defendants Nos. 3 to 10 are null and void and are ineffectual against the *waqf* property.

The first part of the relief *viz.*, that it be declared that the property in dispute is *waqf* is purely declaratory and there is no suggestion that it involves any consequential relief. Had it stood by itself a court-fee of Rs. 10 would undoubtedly have been sufficient. The second part of the declaration however stands on a different footing. The plaintiffs wish to have the alienations of the *waqf* property to be declared null and void and ineffectual as against the *waqf* property. In other words they want to relieve the property entirely from the effects of the sales. The alienors as well as alienees are parties to this suit and if the declaration prayed for is granted, it will be binding on them. After the declaration, neither of the parties to the alienations will be able to treat the alienations as subsisting and valid. The effect of the declaration in the circumstances will therefore be nothing short of cancellation or the setting aside of the alienations. The averments in the plaint also show that this is the real object of the suit. The position is different when the plaintiffs merely sue for a declaration that a certain alienation has no effect on their rights. I am of opinion that in substance, the second part of the relief as claimed in this case is tantamount to the setting aside or cancellation of the alienations referred to in the plaint. In the circumstances the relief claimed by the plaintiffs cannot be treated as a purely declaratory one.

The learned Counsel for the appellants conceded in the course of his arguments that the present suit did not fall within the purview of s. 42, Specific Relief Act. But he contended that even apart from that section declaratory suits are maintainable in this country and the present suit is of

that category. In support of this contention, he relied chiefly on two rulings of their Lordships of the Privy Council reported in *Robert Fischer* v. *Secretary of State* (25), and *Pratap Singh* v. *Bhabuti Singh* (26). Neither of these rulings, however, appears to me to bear out the contention of the learned Counsel. It may be pointed out at the outset, that neither of these two cases deals with the questions of court fees and they are therefore, strictly speaking, hardly relevant for deciding as to what suits may be considered to be 'declaratory' for the purposes of s. 7 (*iv*) (c) and Sch. II, Art. 17, Court Fees Act. However, even otherwise they do not seem to me to support the position taken up by the learned Counsel. In the Madras case the plaintiff prayed that a certain order passed by the Govt. was '*ultra vires* and illegal and of no binding effect on the plaintiff.' It asked for no further relief. It was therefore contended before their Lordships that the plaint sinned against the Specific Relief Act, which forbids the Court to entertain a suit for a declaratory decree, which may be followed by a consequential relief unless that relief was specifically asked for. With reference to this contention their Lordships observed as follows:

"Now in the first place it is at least open to doubt whether the present suit is within the purview of s. 42, Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of s. 50, Chancery Procedure Act of 1852, 15 & 16 Vict, cap. 86, as interprated by Judicial decision. Before the Act of 1852, it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind"

Their Lordships added that even if the Specific Relief Act applied, the suit would not be open to any objection, as no further relief was open to the plaintiff in the circumstances of the case. It will appear from the above that their Lordships considered that the suit before them was not really a suit for a mere declaration as the suit was in substance to have the true construction of a statute declared and to have an act done in contravention of the statute pronounced void and of no effect. The latter part of the relief cannot be considered to be declaratory, as the plaintiff sought thereby to relieve himself of the effects of the illegal act done by the Govt. It was apparently for this reason that their Lordships considered that this was not the kind of declaratory decrees contempleted by s. 42, Specific Relief Act. The position as regards declaratory decrees in India before the enactment of s. 42, Specific Relief, Act, was considered at length by their Lordships of tha Privy Council in *Strimathoo Moothoo Vijia Rangoonadah Ranee* v. *Dorasinga Tever* (27). At that time s. 15, Civil P. C. of 1859, which was then in force provided that

"no suit shall be open to objection on the ground that a mere declaratory decree or order is sough thereby and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

Their Lordships had to consider whether this section implied that Courts in India had unrestricted power to grant declaratory decrees when no consequential relief was claimed. The conclusion arrived at by their Lordships seems to be that the position in India was the same as that in England under s. 50, Chancery Procedure Act of 1852 (15 and 16 Vict., cap. 86) and that a declaratory decree ought not to be made unless there is a right to some consequential relief, which, if asked for, might have been given by the Court or where, in certain circumstances a declaration of right was required as a step to relief in some other Court: *see Strimathoo Moothoo Vijia Ragoonadah Ranee* v. *Dorasihga Tever* (27) at p. 187*; also *Sheo Singh Rai* v. *Dakho* (28), at p. 111; *Sadut Ali Khan* v. *Khaje Abdool Gunnee* (29) Section 15, Civil P. C., 1859, was repealed by the Specific Relief Act in 1877 and s. 42 of that Act seems to have widened the scope of the declaratory relief. Under s. 42 a person may sue for a declaration as to his legal character or his right to any property even when no further specific relief is open to him; while before the enactment of that section it was not the practice to grant delaratory decrees unless such further relief was open to the plaintiff. This provision in s. 42 seems to have been intro-

(25) 22 M 270; 26 I A 16; 7 Sar. 459; 3 C W N 161 (P C).

(26) 35 A 487; 21 Ind. Cas. 288; 40 I A 182; 16 C C 217; 17 C W N 1165; (1913) M W N 785; 14 M L T 299, 25 M L J 492; 11 A L J 901; 18 C L J 384; 15 Bom. L R 1001 (P C).

(27) 2 I A 169; 23 W R 314; 15 Beng. L R 83; 3 Sar. 456; 3 Suther 106; 6 M H C R 310 (P C).

(28) 5 I A 87 (111); 1 A 688; 2 C L R 193; 3 Sar. 807; 3 Suther 529; 2 Ind. Jur. 396 (P C).

(29) I A Sup. Vol. 165; 3 Sar. 229; 11 Beng. L R 203; 19 W R 171 (P C)

*Page of 2 I. A.—[*Ed.*]

duced to enable a person to remove a cloud on his status or title in certain circumstances even when no further relief is open to him at the time. It will thus appear that it is only under s. 42, Specific Relief Act, that Courts in India can grant declaratory relief even when no other specific relief can be claimed by the plaintiff. This seems to be the view accepted by their Lordships of the Privy Council also in *Sheoperson Singh* v. *Ramnandan Prasad Singh* (30) at p. 704. The judgment of their Lordships was delivered by Sir Lawrence Jenkins and he had elaborated the same view previously as Chief Justice of the Calcutta High Court in *Deokali Koer* v. *Kedar Nath* (24).

The second ruling of their Lordships of the Privy Council, which was relied on by the learned Counsel for the appellants, *viz.*, *Pratap Singh* v. *Bhabuti Singh* (26), seems to be clearly distinguishable. In that case, the plaintiffs had claimed not only that certain decrees were not binding on them, but that "they might be restored to the position held by them prior to December 15, 1899—the date on which the decrees were passed," *see* p. 488 of the report. Their Lordships held that s. 42, Specific Relief Act, was not applicable and actually passed a decree, setting aside the previous decrees and restoring the plaintiffs to their original position: *see* p. 499 of the report. It will thus appear that their Lordships considered the relief prayed for to be in substance one for setting aside the decrees which had been passed against the plaintiffs and was therefore not purely declaratory. Both the cases relied on by the learned Counsel, *viz.*, *Robert Fischer* v. *Secretary of State* (25) and *Pratap Singh* v. *Bhabuti Singh* (26), were thus in substance suits for a declaration coupled with a consequential relief and they do not support the learned Counsel's contention that it is open to a plaintiff to ask for a purely declaratory decree apart from the provisions of s. 42, when no consequential relief is open to the plaintiff and none is prayed for. On the other hand, they go rather to support the conclusion arrived at above, *viz.*, that in deciding whether a suit is purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered.

The next question for determination is the category under which the present suit falls for the purposes of the Court Fees Act. It has been urged on behalf of the appellants and if it is held that the suit is not purely declaratory, then it must be treated as a declaratory suit with "consequential relief" within the scope of s. 7 (*iv*) (*c*), Court Fees Act, and under that section the plaintiffs would have the option to place any value on the relief they like for the purposes of court fee. I would hold that the relief as to the setting aside of the alienations, cannot be properly treated as a "consequential relief" in the circumstances of this case. The expression "consequential relief" is not defined in the Court Fees Act, but the meaning of this expression has been considered and explained by a Full Bench of the Allahabad High Court (consisting of five Judges) in *Kalu Ram* v. *Babu Lal* (7), as stated above. According to the definition of the expression as given in that ruling, the relief claimed in this case cannot, in this case cannot, in my opinion, be called "consequential relief." In the present case the only part of the relief claimed that can be said to be purely declaratory is that in which the plaintiffs ask for a declaration that the property in dispute is *waqf*. But the other part of the relief—which as shown above amounts to the setting aside or cancellation of the alienations—cannot be said to follow directly from that declaration. For, it is not disputed that the alienors had the power in this case to alienate the property for certain purposes. The declaration that the property is *waqf* would not therefore by itself entitle the plaintiffs to to ask for the cancellation of alienations. Nor can it be said that the relief as to cancellation of alienations cannot be claimed independently as a 'substantive relief' or that it is incapable of valuation. It has been already stated above that it was held by their Lordships of the Privy Council in *Tacoordeen Tewarry* v. *Ali Hossain Khan* (19), that the setting aside of a sale is a 'substantive' relief.

As regards the valuation of the relief as to cancellation of the alienations, it was held by the Full Bench of the Allahabad High Court in the case referred to above, *viz.*, *Kalu Ram* v. *Babu Lal* (7), that such a relief falls neither under s. 7 (*iv*) (*c*) nor under Sch. II, Art. 17 (*iii*), Court Fees Act, but under the residuary article Sch. I, Art. 1 of that Act. I am therefore of opinion that the relief claimed in this case cannot be treated as a declaration with a 'consequential relief', falling within s. 7 (*iv*) (*c*), Court Fees Act. In view of the meaning

(30) 43 C 694 (704); 33 Ind. Cas. 914; A I R 1916 P C 78; 43 I A 91; 14 A L J 466; 20 C W N 738; 18 Bom. L R 397; 23 C L J 621, (1916) 1 M W N 419; 20 M L T 1; 3 L W 544; 31 M L J 77 (P C).

of the expression 'consequential relief' as explained in *Kalu Ram* v. *Babu Lal* (7), the reliefs claimed in the present case appear to me to be (*i*) a declaration that the property is *waqf* and (*ii*) a substantive relief in the shape of the setting aside of certain alienations. The court-fee of Rs. 10 would be sufficient for the former relief, but the latter relief would require *ad valorem* court-fee on the value of the subject-matter of the sales. It was not disputed before that the value of the property sold was about ten lacs and the plaintiffs themselves had valued the relief at this figure in the plaint for the purposes of jurisdiction. The present case is one of a so-called family trust and the object of the plaintiffs as disclosed by the plaint seems to be to get rid of the effect of certain alienations made by their relations (defendants Nos. 1 and 2) and to make the property once more available for the benefit of the family. In the circumstances, the order of the trial Court demanding court-fee on the value of the property seems to be justifiable.

The above conclusion is based on the view that the relief claimed in this case does not fall under s. 7 (*iv*) (*c*), Court Fees Act. I may add, however, that even if the suit were held to fall under s. 7 (*iv*) (*c*), it seems to me doubtful whether that would help the plaintiffs in this case. Section 7 (*iv*) (*c*), no doubt, lays down that the plaintiffs shall state the value of the relief in the plaint in such cases, in the present case however the plaintiffs have themselves valued the relief in the plaint at rupees ten lacs. They did so, no doubt, for purposes of jurisdiction. All that s. 7 (*iv*) (*c*) requires however is that the plaintiff should state the value of the relief in the plaint. It could scarcely have been intended that the plaintiff should value the relief at one figure for jurisdiction and at another for court-fee. Sections 8 and 9, Suits Valuation Act, show that except when specific rules to the contrary have been framed under s. 9, the value for purposes of court-fee and jurisdiction must be the same. The present case, even if it falls under s. 7 (*iv*) (*c*), would not fall under the existing rules under s. 9. In the present case, therefore, the plaintiffs were bound to fix the same value on the relief claimed for purposes of court-fee and jurisdiction. Plaintiffs have already fixed the value of the relief in the plaint for purposes of jurisdiction at ten lacs. They had the advantage of having the suit heard by a Court having jurisdiction to try a suit of that value and also of a direct appeal to this Court. The value of the relief was apparently fixed on the basis of the value of the subject-matter of the alienations in dispute, and no reasonable ground has been suggested for allowing the plaintiffs to amend the plaint and put a different valuation on the relief at this stage. The only object of the proposed amendment obviously is to evade payment of court-fee on the value of the relief as stated in the plaint. In *Muhamed Hayat Khan* v. *Firm Jagpat Rai Babu Ram* (20) it was held in a similar case that the value stated by the plaintiff for the purpose of jurisdiction should also be taken as the value for purpose of court-fee. In *Sri Kishan Das* v. *Sat Narain* (10) a Division Bench of this Court refused to allow the plaintiff to alter the valuation in similar circumstances.

The question whether the plaintiff can put an arbitrary value on the relief claimed in a case falling under s. 7 (*iv*) (*c*), Court Fees Act, is not free from difficulty and there is a conflict of a judicial opinion on it. The Full Bench decision of the Punjab Chief Court in *Barru* v. *Lachman* (31), is in favour of the plaintiffs. But that case is distinguishable in so far that a specific value had been fixed on the relief for the purpose of court-fee in that case. That value was held to be proper and it was also decided that the value for jurisdiction should be deemed to be the same as that fixed for the purpose of court-fee. The question as to what is the proper course to adopt when a plaintiff has fixed a reasonable value on the relief for the purpose of jurisdiction with reference to the value of the subject-matter in dispute, but has omitted to fix any value for the purpose of court-fee, was not before the Bench which decided *Barru* v. *Lachman* (31). This question, was, however, considered in *Muhamed Hayat Khan* v. *Firm Jagpat Rai Babu Ram* (20) and in *Sri Kishan Das* v. *Sat Narain* (10) and the decisions in those cases support the view taken by the trial Judge.

There is no doubt that the construction placed on the language of s. 7 (*iv*) (*c*), Court Fees Act, in *Barru* v. *Lachman* (31), leads to anomalous results. If it is open to plaintiff to place any arbitrary valuation on the relief in a case falling under s. 7 (*iv*) (*c*) and the Court has no power to revise it, it would be apparently open to the plaintiffs to value a suit of the present type

(31) 111 P R 1913; 22 Ind. Cas. 503; 23 P L R 1914; 228 P W R 1913 (F B).

which involves rights to property worth ten lacs at one rupee if they choose to do so. Another anomalous result is that while a plaintiff has to pay a court-fee of Rs. 10 in a purely declaratory suit in which no consequential relief is prayed, he could value a suit which includes a consequential relief so low that he may not have to pay a court-fee of more than a few annas. This could scarcely have been the intention of the Legislature. At the same time there seems to be a considerable body of authority in support of the view taken in *Barru* v. *Lachman* (31) : *see Jhanda Singh* v. *Gulab Mal Bhagwan Das* (32). Probably the remedy lies in an amendment of the language of s. 7 (*iv*) (c) or in framing suitable rules under s. 9, Suits Valuation Act, for certain classes of cases : *cf. Pannalal* v. *Abdul Gani* (33). Be that as it may, it seems to me that the present case can be distinguished from *Barru* v. *Lachman* (31) in view of its special features discussed above. I would dismiss the appeal, but in view of all the circumstances leave the parties to bear their costs.

Monroe, J.—I agree.

Ram Lall, J.—I also agree.

D. *Appeal dismissed.*

(32) 13 L 788; 137 Ind Cas. 240; A I R 1933 Lah. 246; 33 P L R 488; Ind. Rul. (1933) Lah. 320.

(33) 34 C W N 321; 127 Ind. Cas. 665; A I R 1930 Cal. 473; Ind. Rul. (1930) Cal. 873.

OUDH CHIEF COURT

Second Civil Appeal No 19 of 1938
March 3, 1941
AGARWAL, J.

Rai Sahib Babu PRITHI NATH—DEFENDANT—APPELLANT

versus

Seth M. H. NOWROJI, PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Provincial Small Cause Courts Act (IX of 1887), *Art.* 35 (j)—*Suit for compensation for illegal attachment — Jurisdiction of Small Cause Court to try— Suit held exempted from jurisdiction of Small Cause Court —Property wrongfully attached, damaged while in custody of* supurdar—*Decree-holder held liable for compensation.*

A decree-holder in execution of his decree attached a machine belonging not to the judgment-debtor but to the plaintiff. The plaintiff's objection under O. XXI, r. 58, Civil P. C, was allowed and the machine was ordered to be released and the *supurdar* in whose possession it was, was ordered to hand it over to the plaintiff. When the plaintiff went to see the machine he learnt that many parts were missing, and some were broken, and the machine had become quite useless. The plaintiff brought a suit against the decree-holder stating in the plaint that he suffered a great loss owing to the improper acts of the decree-holder and the *supurdar*, that the machine had become useless, and so he was entitled to recover its price; the plaint further stated that the cause of action arose on the day when his machine was attached, on the day it was ordered to be released and on the day he learnt of the damage caused to it :

Held, that the wrongful act of the decree-holder alleged by the plaintiff could be no other but that he caused his machine to be attached in execution of his decree, and although the plaintiff claimed the price of the machine, yet he had assessed the damages on that amount. The suit was therefore for compensation for illegal attachment and exempted from the jurisdiction of the Small Cause Court.

[Case-law reviewed and relied on.]

Held, further that the decree-holder was liable for compensation. His liability arose because he got the plaintiff's property attached, and he was bound to restore it in the condition it was at the time of the attachment. 137 Ind. Cas. 900 (7), distinguished

S. C. A. against the decree of the Civil Judge, Mohanlalganj, Lucknow, dated September 27, 1937.

Mr. *Sri Ram*, for the Appellant.

Mr. *Ramapat Ram*, for Respondent No. 1.

Judgment.—This is a second appeal from the judgment and decree of the Civil Judge, Mohanlalganj, Lucknow.

The appellant *Rai Bahadur Babu* Pirthi Nath obtained a simple money decree against the respondents Hashim Brothers. He got a lathe attached in execution of his decree. The plaintiff-respondent *Seth* M. H. Nowrojee preferred an objection under O. XXI, r. 58, Civil P. C. and claimed the lathe to be his. That objection was allowed and within a year of that order, *Seth* Nowrojee brought a suit which has given rise to this second appeal.

He stated that his machine was complete and in working condition when it was attached. That after it was ordered to be released in his favour on May 8, 1935 he learnt that some of the parts had broken, and so he applied on May 27, 1935 that the respondent Hardeo Bakhsh Singh who had been appointed *supurdar* be ordered to hand over the machine to him. That he was ordered by the Court to see the machine in the Golaganj orphanage where the *supurdar* had taken it, and then he learnt that many parts were missing, and some were broken, and the machine had become quite useless. He stated that he suffered a great loss owing to the improper acts of the decree-holder and the *supurdar*, that the machine had become useless, and so he was entitled to

recover its price Rs. 450. The learned Munsif held that the parts missing were worth Rs. 105-12-0, and that the repairs of the parts broken would cost Rs. 2-8-0. He decreed the suit for Rs 108-8-0. His decree was confirmed in appeal by the Civil Judge.

Three points have been urged before me by the learned Counsel for the appellant. (1) That the suit ought to have been instituted in the Small Cause Court, (2) that the plaintiff's title to the lathe in question was not proved and (3) that he was not liable for the amount claimed.

I take the point of jurisdiction first. Under Art. 35, cl. (*j*) of the Prov. Small Cause Courts Act a suit for compensation for illegal improper or excessive distress, attachment or search or trespass committed in, or damage caused by, the illegal or improper execution of any distress, search or legal process is exempted from the cognisance of the Small Cause Courts Act. It is argued on behalf of the appellant that the suit was not for compensation for illegal improper excessive distress or attachment but was for the recovery of the price of the machine. It is said that the allegations in the plaint disclose a cause of action against the *supurdar* only, and so it cannot be called a suit for compensation for illegal attachment. It was stated in para. 7 of the plaint that the plaintiff suffered a great loss owing to the improper acts of the decree-holder and the *supurdar*. It is, therefore, clear that the suit was also for compensation for illegal attachment. The wrongful act of the decree-holder alleged by the plaintiff could be no other but that he caused his machine to be attached in execution of his decree. He stated in para. 9 of the plaint that his cause of action arose on the day when his machine was attached, on the day it was ordered to be released and on the day he learnt of the damage caused to it. The plaintiff, no doubt, claimed the price of the machine, but he had assessed the damages on that amount. I think the suit was for compensation for illegal attachment and therefore exempted from the jurisdiction of the Small Cause Court. The learned Counsel for the appellant has relied on *Chakrapharudu* v. *Venkataramayya*, (I. L. R. 22 Mad. p. 457), (1), The facts of that case were that certain movable property was distrained under s. 15 of Act VIII of 1865 (Madras). The owners thereof sued to set aside the distriant, and obtained orders directing the property to be restored, but those orders were not carried out. The owners sued for the value of the property. It was held that the suit was to recover the value of the property illegaly retained. It was on the particular frame of the suit in that case that it was held not to be recognisable by the Small Cause Court. It was held in *Bodh Raj* v. *Secretary of State*. (A. I. R. 1926 Lah., p. 150) (2), that

"a suit to recover the price of goods wrongfully attached and sold in execution of a decree falls within the purview of Art. 35 (*j*) and is excluded from the cognizance of Small Cause Court:"

The Madras case was referred to and was distingished. The present case is similar to that reported at p. 306 of I. L. R. 33 All. (*Bishambhar Nath* v. *Gaddar*) (3). In that case certain crop was attached and was stolen by the Shahna. It was held that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognisable by a Court of Small Causes. There is another case of the Allahabad High Court, *Rup Kishan* v. *Sobhi* (8 A. L. J., p. 187) (4). In that case the crop attached was sold, and the owner brought a suit for the recovery of its price. It was held that the suit could not be entertained by a Court of Small Causes inasmuch as the Court could not give a decree without deciding whether the attachment was legal or not. The Allahabad case of *Bishambhar Nath* v. *Gaddar* (3) has been followed in this Court in *Ramphal* v. *Mathura* (19 Oudh Cases, p. 236) (5). In that case the Shahna refused to give the crop attached, and it was held that a suit brought by the owner of the crop against the decree-holder and the Shahna for the price of the crop was not cognisable by the Court of Small Causes. It is argued that it was stated in that case that the decree-holder and the Shahna had colluded, but that would not make any difference in my opinion so far as the point of jurisdiction is concerned. The learned Counsel for the appellant has also relied on *Jodha Bijal* v. *Maganlal Chhaganlal Desai* (A. I. R. 1930 Bom. p. 80) (6). That was a case in which the plaintiff had sued to recover the excess amount of rent recovered from him by his landlord together with certain sums for penalty and damages by way of interest.

(1) I L R 22 Mad. 457.

(2) A I R 1926 Lah. 150; 89 Ind. Cas. 962; 1 L 262.

(3) 33 A 306; 9 Ind. Cas. 317; 8 A L J 92.

(4) 8 A L J 187; 9 Ind. Cas 537.

(5) 19 O C 236; 37 Ind. Cas. 169; 3 O L J. 578.

(6) A I R 1930 Bom. 80; 124 Ind. Cas. 112; 31 Bom L R 1307; Ind. Rul. (1930) Bom. 240.

It was held that the interest was claimed by way of damages for detention of money and not as compensation under cl. (*j*) of Art. 35 of Prov. Small Cause Courts Act. After considering these authorities I am of opinion that the suit was excluded from the cognisance of Small Cause Court.

The second point argued is that the plaintiff failed to prove his title to the machine in question. Both the Courts have, on a consideration of the oral and documentary evidence on the record, come to the conclusion that the plaintiff's title is proved. This finding of fact is binding on me. It is argued that the sale deed in favour of the plaintiff does not mention the machine in question. This argument is based on the fact that the list of attached property shows that the machine attached was 6 ft. long but lathes of only 6 inches were sold under the sale deed. The learned Civil Judge has explained the discrepancy. He thinks that a lathe 6 ft. long can be one technically called 6 inches. There was further evidence besides the sale deed to prove the plaintiff's title. There was a letter to show that the judgment-debtor, from whose possession it was attached, had taken it on hire from the plaintiff. I see no reason to disturb the finding of the two Courts.

The third point is about the liability of the defendant. The case of *Bishambhar Nath* v. *Gaddar* (3) above referred to is an authority against the plaintiff. In that case the Shahna had stolen the property attached but the decree-holder was held liable. In this case the parts of the machine were also removed and broken, while the machine was in the custody of the *supurdar*, I find no distinguishing features between the two cases, and think that the decree-holder has been rightly held liable. It has been argued that the *supurdar* was an officer of the Court, and the judgment-debtor ought to have been liable for his actions and not the decree-holder. Reliance is placed for this proposition on 9 O. W. N., p. 571 (*Brij Indar Kuar Mst.* v. *Jai Indar Bahadur Singh Thakur* (7). In that case a Receiver was appointed by the Court and certain payments were made by the judgment-debtor to him. The Receiver embezzled the money and disappeared. A question arose whether the judgment-debtor was absolved of his liability by reason of the payment. Their Lordships of the Privy Council held that it was not shown to them that the judgment debtor was authorised by any order of the Court to pay the money to the Receiver and the Receiver was not an agent of the judgment-creditor. That case is quite distinguishable. Here there is no question of any payment being made to the *supurdar*. The decree-holder's liability arises because he got the plaintiff's property attached, and he was bound to restore it in the condition it was at the time of the attachment. I hold that the decree-holder has been rightly held liable. All the points are decided against the appellant.

The appeal is dismissed with costs.

E. *Appeal dismissed.*

(7) 9 O W N 571; 137 Ind. Cas. 900; Ind. Rul. (1932) P C 225; A I R 1932 P C 191; 36 C W N 882; 56 C L J 48; 34 Bom. L R 1188; (1932) A L J 747; (1932) M W N 830; 59 I A 311; 63 M L J 658; 7 Luck 382 (P C).

LAHORE HIGH COURT

Second Appeal No. 1929 of 1939
November 4, 1940
DIN MOHAMMAD, J.
UDHO DASS—PLAINTIFF—APPELLANT
versus
GIRDHARI LAL AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Puisne mortgagee not impleaded in previous suit by prior mortgage, if can disregard decree made in previous suit.

A puisne mortgagee, who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only. 126 Ind. Cas. 824 (1), 145 Ind. Cas. 304 (2), 164 Ind. Cas. 1098 (3) and 141 Ind. Cas. 252 (4), relied on.

S. A. from the decree of the District Judge, Dera Ghazi Khan, dated August 38, 1939.

Mr. *Qabul Chand Mital*, for the Appellant.

Mr. *J. L. Kapur* and *S. L. Puri*, for the Respondents.

Judgment—The only question that falls to be judged in this case is whether a puisne mortgagee, who is not impleaded in a previous suit by the prior mortgagee is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only. Both the trial Judge and the District Judge on appeal have dealt with the matter at length and answered this question in the affirmative and I entirely agree with them. The principle enunciated above is supported by a Division Bench judgment of the

Allahabad High Court reported in *Nannu Mal* v. *Ram Charan Lal* (1). Mulla in his commentary on the Civil Procedure Code at p. 983 also holds the same view, and so does Chitaley in Vol. III at p. 2/18 (third edition). In fact, these commentators have drawn upon the various authorities of their Lordships of the Privy Council and the other High Courts in India. Even otherwise, I consider that that is the only possible way of dealing with the matter. A person who is not a party to a previous suit cannot be bound by the decree obtained by the plaintiff in that case and when the plaintiff in the original suit is impleaded as a defendant in a subsequent suit, he cannot be allowed to insist upon his previous decree. *Sarda Prasad* v. *Kanhai Lal* (2), *Balwant Maroti Shingore M. G Gopal Balkrishna* v. *Kesheorao* (3), and *Mathra Das* v. *Amin Chand* (4), also lend support to this contention. I, accordingly dismiss this appeal with costs. The cross objections, too, are devoid of force and are hereby dismissed.

D. *Appeal dismissed.*

(1) 52 A 331; 126 Ind. Cas. 824; A I R 1930 All. 485; (1930) A L J 573; Ind. Rul. (1930) All. 872.
(2) A I R 1933 All 412; 145 Ind. Cas 304; (1933) A L J 934; 6 R A 53.
(3) A I R 1936 Nag. 128; 164 Ind. Cas. 1098; I L R (1936) Nag. 9; 9 R N 53.
(4) A I R 1933 Lah. 75; 141 Ind. Cas. 252; 33 P L R 1033, Ind. Rul. (1933) Lah. 97.

PRIVY COUNCIL

Appeal from the Madras High Court

December 2, 1940

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

RAMANATHAN CHETTIAR—APPELLANT

versus

M. AR. RM. VISWANATHAN CHETTIAR—RESPONDENT

Mortgage—Hindu Law—Joint family—Manager—Mortgage by, on behalf of himself and as karta and guardian of his younger undivided brother—What mortgagee must show in order to bind minor's interest in mortgaged property—Mortgage by karta held was not binding on minor's interest in property mortgaged.

Where mortgage of property of Hindu joint family consisting of two brothers one of whom is minor is executed by the elder brother who is *karta* for himself and as manager and guardian of his undivided younger brother, stating as consideration the payment of debts of joint family business, the mortgagee, in order to bind the minor's share in the mortgaged property has to show in his suit that there was necessity for the loan, or that he made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan.

The mortgage in suit was executed in 1916, in favour of *B* by *A* "for himself and as family manager and guardian of his undivided younger brother *R*", on the security of certain properties belonging to the joint undivided family. The consideration was stated to have been received "by your obtaining the same and paying the same towards the debts due by our common firm at Colombo." The mortgagee sued *A* and *R* on the mortgage. *R* denied both the continuance of the Colombo business and of the existence of debts of such business in 1916. There was no evidence sufficient to establish—even *prima facie*—the continued existence of the family business in Colombo in 1916, and the indebtedness of such business and no evidence of any enquiry made by the mortgagee, as to the truth of the representations made to him by *A*. In answer to the order for discovery, *R* filed an affidavit to the effect that the account-books called for were not, and never had been, in his possession, or under his control. The mortgagee took no further steps in the matter:

Held, that the mortgage was not binding on the interest of *R* in the property mortgaged in the absence of evidence as to the position in 1916. The statements of *A* in his written statement, which were not supported in evidence were of no value against *R*.

Held, further that the evidence, acquiesced in by the mortgagee negatived any deliberate withholding of account-books and no adverse inference could be drawn.

Messrs. *J. P. Eddy*, *K. C.* and *J. M. Parikh*, for the Appellant.

Mr. *P. V. Subba Row*, for the Respondent.

Lord Thankerton.—The appellant, who is defendant No 2 in a suit brought by the respondent to enforce a mortgage, appeals from a decree of the High Court of Judicature at Madras dated April 20, 1937, which modified a decree of the Subordinate Judge of Devakottai, dated July 31, 1930.

The mortgage in suit was executed on December 22, 1916, in favour of Ekappa Chettiar by Annamalai Chettiar, who is defendant No. 1 in the present suit, "for himself and as family manager and guardian of his undivided younger brother Ramanathan," the present appellant, for the sum of Rs. 5,000, on the security of certain properties belonging to the joint undivided family. The consideration was stated to have been received "by your obtaining the same and paying the same towards the debts due by our common firm at Colombo."

Chokalingham Chettiar, who had three daughters by his first wife, but no son, adopted defendant No. 1 as his son. After the death of his first wife, he married a second wife, by whom he had a son, the appellant. Chokalingham, who died in the early part of 1910 or sooner, carried on a business in Colombo. The appellant and defendant No. 1 are members of an undivided Hindu family, governed by the Mitakshara Law. In 1916

defendant No. 1 was *karta* of the family, the appellant being then a minor.

On January 3, 1924, the respondent acquired for Rs. 5,000 the interest of Ekappa Chettiar in the mortgage, and he brought the present suit to enforce the mortgage on March 14, 1927.

The only question in the appeal is whether the mortgage of 1916 is binding on the interest of the appellant in the property mortgaged. There can be no doubt that, in accordance with the principles established by this Board, the respondent, as plaintiff in the suit, is required either to show that there was necessity for the loan, or that the mortgagee made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan. The reason for the loan, as alleged in the mortgage in suit, was the discharge *pro tanto* of debts due by the family business in Colombo. This involves two questions of fact, namely, the continued existence of the family business in Colombo in 1916, and the indebtedness of such business.

In the opinion of their Lordships there is no evidence sufficient to establish—even *prima facie*—these facts, and there is no evidence of any enquiry made by the mortgagee, Ekappa Chettiar, as to the truth of the representations made to him by the mortgagor, defendant No. 1. The statements of the latter in his written statement, which were not supported in evidence, are of no value as against the appellant. The respondent relied on three documents, Exs. G. H and J, all dated July 30, 1910, but these are of little or no relevance; they are, if anything, more suggestive of the Colombo business having been wound up in 1910, than of its continuation as a going business after Chokalingham's death. There is literally no evidence as to the position in 1916, and their Lordships find themselves unable to agree with the construction that the High Court have placed on the written statement of the appellant. Their Lordships are unable to read the appellant's pleading as otherwise than a complete, denial of both the continuance of the Colombo business and of the existence of debts of such business in 1916. Nor are their Lordships able to agree with the criticism of the learned Judges as to the non-production of the business books. In answer to the order for discovery, the appellant filed an affidavit on November 16, 1927, to the effect that these documents were not, and never had been, in his possession, or under his control. On November 23, 1927, defendant No. 1 filed an affidavit to the effect that the accounts had been given to the two *panchayatdars*, both of whom were dead, and that he did not know in whose possession the documents were. On December 5, 1927, the following entry appears on the order sheet,

"petition by plaintiff to direct defendants Nos. 1 and 2 to discover on oath. Statements filed may be taken to be sufficient. Petition closed."

The respondent appears to have taken no further steps in the matter. The learned Judges of the High Court held that the defendants had deliberately withheld this evidence from the Court which was peculiarly within their knowledge, and that the inference was irresistible that had it been produced, it would have been fatal to their case. Their Lordships agree with the view of the Subordinate Judge. The evidence, acquiesced in by the respondent, negatives any deliberate withholding on the part of either defendant; there is no reason why the appellant should have ever had the documents, or have known what they contained, and there is no ground for any adverse inference. There seems little doubt that, if they had not been affected by this point and the construction that they placed upon the written statement of the appellant, the learned Judges would have agreed, as their Lordships do, with the Subordinate Judge's dismissal of the suit as against the appellant.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court so far as it relates to the appellant, should be set aside, and that the respondent should pay the appellant's costs of this appeal and in the High Court.

S. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Lambert* and *White.*

Solicitor for the Respondent:—Mr. *Harold Shephard.*

NAGPUR HIGH COURT

Civil Revision Application No. 525 of 1939

September 24, 1940

BOSE, J.

DISTRICT COUNCIL, AMRAOTI—DEFENDANT—APPLICANT

versus

VITHAL VINAYAK BAPAT—PLAINTIFF—OPPOSITE PARTY

Master and servant—Refusal to pay wages during period of suspension of servant when justified—

Misconduct on part of servant justifying his dismissal condoned by master—Master cannot subsequently claim right to dismiss him or impose any other punishment in respect of that misconduct.

A local body has no more authority and power over its servants and employees than any other person or body unless such powers are expressly conferred by statute. The matter, therefore, must be governed along the ordinary lines of master and servant. An ordinary master not given special powers by statute or by some rule or law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. The master can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that instead of exercising the right he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forego his salary during a certain period and agreed to continue to serve on fresh terms under a fresh contract. But it would be necessary for the master to prove in such a case first, that there is this fresh agreement, and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement. [p. 660, col. 2.]

[Case-law referred to]

Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. 86 Ind. Cas. 310 (7), relied on. [p. 661, col 2.]

C. R. App. for revision of the decree of the Court of the Second Subordinate Judge, 1st Class, Amraoti, dated June 22, 1939.

Mr. *N. B. Chandurkar*, for the Applicant.

Mr. *J. R. Mudholkar*, for the Opposite Party.

Order. — The defendant is a District Council. The plaintiff is one of its teachers on a salary of Rs. 44 a month. On April 28, 1937, the plaintiff was suspended and was subsequently reinstated on June 12, 1937. The claim is in respect of the plaintiff's salary during the period of suspension which salary the defendant refuses to pay.

The facts are as follows. A report was made against the plaintiff by a member of the District Council. It is not clear when the report was made nor is it clear when the offence to which that report relates was committed. All that we can gather is that the report and the offence were made and occurred sometime before April 24, 1937. The offence complained of in that report was that the plaintiff had abused the office bearers of the Local Board and the District Council. The nature of the abuse was not set forth. The Vice Chairman of District Council acting on this report passed orders suspending the plaintiff on April 28, 1937. The plaintiff was thereupon asked to submit an explanation. He did so and an enquiry appears to have been made because the next thing that we know is that on June 10, 1937, the School Board of the District Council confirmed the action of the Vice-Chairman suspending the plaintiff and at the same time ordered the plaintiff to rejoin his duty on June 12, 1937.

The plaintiff rejoined. He had originally been attached to the Takarkhed School but on reappointment he was posted to Khartalegaon. While there another complaint was made against him in respect of another matter and the District Council thereupon passed a resolution on August 5, 1938, to the effect that the plaintiff should be degraded down to a salary of Rs. 15 a month and that if he did not accept the same his services should be dispensed with. On August 16, 1938, the School Board of the District Council passed a resolution which sets out the resolution of the District Council itself and resolved that the plaintiff be degraded in accordance with the resolution of the District Council and also added that "the period of suspension be treated as a suspension period without allowance."

It is not clear what period this refers to but it appears to have been assumed throughout that the period referred to is the period of suspension which I have mentioned above.

This matter then went to the Deputy Commissioner and he passed an order on April 3, 1939, setting aside the orders of the District Council.

It is contended on behalf of the District Council that it does not know anything about this order of the Deputy Commissioner as it was not referred to in the lower Court. I find however that it is a portion of Ex. D-1 which has been placed on record wholesale. No trouble has been taken to separate out any portion of this voluminous document and it is clear that the whole of it has been tendered in evidence. In any case reference has been made indiscriminately to portions of this document. In the circumstances seeing that it is the defendant's own evidence and seeing that it is a copy of an official document sent by the Deputy Commissioner himself to the Chairman of the District Council, I see no reason why I should not take judicial notice of it.

It is agreed by both sides that there is no written agreement of service in this case. The learned Counsel for the applicant has not been able to refer me to any laws or rules relating to the engagement of teachers and the conditions of their service by the District Council. He asks for an adjournment but in my opinion the case has no merits and I see no reason why the matter should be kept pending any longer.

It is argued in the first place on behalf of the District Council that the Civil Court has no jurisdiction because a servant of the District Council is on the same footing as a servant of His Majesty and holds office at pleasure, consequently the District Council being on a par with His Majesty in this respect the jurisdiction of the Civil Court is barred. For these wide and sweeping claims reliance is placed on *Malik Narain Das* v. *District Board, Jhang* (1). *Prabhulal Upadhya* v. *District Board, Agra* (2) and *R Venkatrao* v. *Secretary of State for India* (3).

It is not necessary for me to decide in this case whether the wide and sweeping propositions which are contained in the argument addressed apply in all cases where there are rules or regulations framed by Govt. That was the position in the Allahabad case, and so far as the Privy Council case is concerned, it is a case in which a servant of the Crown was concerned. It may be that if there is a special statute, or if rules are framed under an Act by Govt. which set out that a servant of a local body shall hold office at pleasure, then the rule enunciated by their Lordships of the Privy Council in the case of servants of the Crown will apply. But in the present case no such rules have been brought to my notice, no such rules were pleaded and no such rules were produced in the lower Court. So far as the Lahore case is concerned, I am not clear whether there are such rules in the Punjab or not If there are, then as I say the matter is distinguishable. If however the learned Judge who decided the Lahore case quoted above meant to state that every employee of a local body was on the same footing as a servant of His Majesty, I am with respect unable to agree. A local body has no more authority and power over its servants and employees than any other person or body unless such powers are expressly conferred by statute. The matter therefore must be governed along the ordinary lines of master and servant.

It is to my mind clear that an ordinary master not given special powers by statute or by some rule or law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. This rule is enunciated in *Secretary of State* v. *Surendra Nath Goswami* (4) and *Kamini Kumar* v. *Rebati Raman Das* (5) Reliance was also placed on *Tikaram* v. *Gandalal* (6). The Nagpur case is not quite in point, but it is of assistance in this way. It decides that a servant is entitled to be paid his wages up to the date of dismissal even if he has not worked in the interval. A servant who is suspended is clearly not working in the interval If therefore a servant who is dismissed is entitled to be paid his wages up to the date of dismissal, it is clear that a servant who has not been dismissed but continued in service has a right to similar treatment.

In an ordinary case of master and servant a master who dismisses his servant has to justify his action in a Court of law if the servant brings an action for wrongful dismissal. If the servant succeeds in showing that the dismissial was without justification, he is entitled either to his wages or to damages If a master has no power of suspension, then he can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that, inslead of exercising the right he came to a fresh agreement with the servant under which the servant rather than he dismissed agreed to forego his salary during a certain period and agreed to continue to serve on fresh terms under a fresh con-

(1) A I R 1940 Lah. 71; 187 Ind. Cas. 540; 12 R L 460.

(2) I L R (1938) All. 252; 175 Ind Cas. 875; A I R 1938 All. 276; (1938) A L J 351; 1938 A L R 505; 11 R A 3.

(3) I L R (1937) Mad 532; 168 Ind. Cas. 516; A I R 1937 P C 31; 193. O L R 49; 1937 A L R 91; 1937 O W N 116; 9 R P C 118 (3); 3 B R 241; (1937) M W N 103; 18 P L T 132; 45 L W 146; (1937) A L J 213; 41 C W N 554; 64 I A 55; (1937) 1 M L J 529; 39 Bom. L R 689; 65 C L J 231 (P C).

(4) A I R 1938 Cal. 759; 180 Ind. Cas. 918; 42 C W N 1188; 68 C L J 320; 11 R C 758; I L R (1939) 1 Cal 46.

(5) A I R 1921 Cal. 346 (347); 60 Ind. Cas. 756; 33 C L J 336.

(6) 30 N L R 173; 147 Ind. Cas. 571; A I R 1933 Nag. 247; 6 R N 131.

tract. But it would be necessary for the master to prove in such a case first, that there is this fresh agreement, and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement. Not only have these matters not been proved but the order of the Deputy Commissioner shows that there was never at any time any justification for the order of suspension because no proper enquiry was made. That in turn means that there is no proof of any misconduct on the servant's part and as I have said there is no vestige of proof of such misconduct in this case.

Apart from that it is clear from the order of June 10, 1937, that the plaintiff was reinstated in service on June 12, 1937. No conditions were imposed and the plaintiff rejoined service on the strength of that order. There was, therefore, no fresh contract when the plaintiff rejoined. There was no undertaking by him or agreement that he would forego his salary during the period of suspension. There was no agreement that he would continue to serve on a lower salary. The orders in respect of these were not passed till much later, namely on August 5, 1938, but then it was too late, quite apart from the fact that they were passed in respect of another matter. Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. This rule is to be found in *Middleton* v. *Playfair* (7), and in many other cases.

The reason is obvious. A servant even though he misconducts himself has a right to seek other employment, and it is proper and just that he should be given the earliest opportunity of seeking such fresh employment. As time goes by and he grows older, his chances of obtaining employment grow less and less. Therefore, the rule is that a servant must be dismissed at once or given the chance of serving upon a fresh contract. If no such terms are imposed, then clearly new terms cannot be imposed at some later date after the election to condone has been made, for the simple reason that had these conditions been put forward at the time, the servant might have preferred dismissal and the opportunity of obtaining other service. That is the reason underlying the rule which, in my opinion, is a fair, just and proper one.

For all these reasons it is clear that the order of the lower Court is right. The application is, therefore, dismissed with costs. Counsel's fee Rs. 15.

D. *Application dismissed.*

(7) A I R 1925 Cal. 87; 86 Ind. Cas. 310.

PATNA HIGH COURT

Appeal from Original Decree No. 48 of 1939

January 28, 1941

CHATTERJI AND MEREDITH, JJ.

MADHO PRASAD SINGH—DEFENDANT—APPELLANT

versus

MUKUTDHARI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Bihar Money-lenders Act (VII of 1939), ss. 7, 6, 8—S 7, concluding portion, construction of — Words "the loan", meaning of — Bond executed for past liability—Amount for which bond is executed, whether "the amount of loan"—Compound interest—Loan advanced before commencement of Act — Discretion of Court under s. 8 in respect of such interest—Discretion how to be exercised—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 11, 2, 4—Mortgage suit—Interest up to date of preliminary decree—Interest for period subsequent to such date—Option given to Court

The concluding portion of s. 7, Bihar Money-lenders Act, 1939, makes it quite clear that two classes of cases are contemplated, (1) loan advanced and (2) loan based on a document. If the section was meant to limit the amount of interest in all cases to "the amount of loan advanced", the subsequent words "or, if the loan is based on a document the amount of loan mentioned in, or evidenced by such document" would be superfluous. The words "the loan" in the passage "if the loan is based on a document" mean with reference to the previous context, the loan in respect of which the suit is brought; and the word "loan" here must be understood as defined in s. 2, cl. (*f*). Clearly, therefore, a bond executed for past liability constitutes a loan within the meaning of the Act. In the case of such a bond the amount for which it is executed is "the amount of loan" within the meaning of s. 7 of the Act No doubt the expression "the amount of loan mentioned in, or evidenced by such document" may suggest that to determine the amount of loan one must not go behind the document. But it could never have been the intention of the Legislature, while enacting s. 7, to override the provisions of the Contract Act or the Evi. Act. 187 Ind. Cas. 339 (1), relied on. 187 Ind Cas. 612 (2), explained. [p. 664, col. 1.]

The Bihar Money-lender's Act which was intended to afford relief to the debtors prohibits compound interest only on loan advanced after the commencement of the Act (s. 6). There is no such prohibition with regard to loans advanced before the commencement of the Act. Section 8 of the Act, however, gives a discretion to the Court, in case of loan advanced before the commencement of the Act Section 8 does not lay down any conditions under which the Court may exercise its powers but gives a wide discretion. This discretion, however, cannot be exercised arbitrarily. [p. 664, col. 2.]

Rule 11 of O. XXXIV, Civil P. C., must be read with rr. 2 and 4. O. XXXIV, r. 11 gives a discretion to the Court to allow interest up to the date fixed for redemption under the preliminary decree, and this interest is payable "on the principal amount found or declared due on the mortgage". This latter amount is obviously the amount found or declared due by the preliminary decree. Where the mortgage bond carries compound interest, the preliminary decree, according to the provisions of O. XXXIV, r. 2 and r. 4, shall allow compound interest from the date of the bond up to the date of that decree. The Court has no option to disallow interest at the contract rate up to the date of the preliminary decree, unless, of course, the rate of interest is found penal or excessive. For the period subsequent to the date of the preliminary decree, however, the Court has under O. XXXIV, r. 11, the option either to allow or refuse interest. 99 Ind. Cas. 686 (3), referred to. [p. 665, col. 2; p. 666, col. 1.]

A. from a decision of the Subordinate Judge at Arrah, dated February 10, 1938.

Messrs. *N. Khan, T. Nath* and *Muhammad Hasan Jan*, for the Appellant.

Messrs. *Nirsu Narain Sinha, B. P. Sinha* and *B. Narain*, for the Respondents.

Chatterji, J.—This is an appeal by the defendant No. 1 in a suit which was brought on August 7, 1936, to enforce three simple mortgage bonds dated August 18, 1925, March 10, 1929 and December 14, 1931, which were executed by defendant No. 1 for self and as guardian of his minor son defendant No. 2 for Rs. 8,000, Rs. 5,446 and Rs. 8,351 respectively, carrying compound interest with yearly rests at 11 annas 3 pies per cent. per mensem on the second bond and 11 annas 6 pies per cent. per mensem on the other two bonds. The claim on the first mortgage was Rs. 20,376-6-9, on the second Rs. 10,110-11-9 and on the third Rs. 12,417-3-9. The defendant No. 2 attained majority before the institution of the suit.

The defendant No 3 was impleaded as a subsequent purchaser of a portion of the mortgaged property.

The suit was contested by defendants Nos. 1 and 2 who filed separate written statements. The defence so far as it is material to this appeal, was that the entire consideration of the mortgage bonds was not received and that the interest was excessive.

The learned Subordinate Judge decreed the claim on the first mortgage in full, on the second for Rs. 9,941-4-9 and on the third for Rs. 12,224-13-6. He also allowed *pendente lite* interest from the date of the suit till the expiry of the period of grace at the bond rates with yearly rests.

The first point taken on behalf of the appellant is that the entire consideration was not received, and this is confined to the second bond only. The consideration of this bond Ex. 3 (B) is made up as follows :—

	Rs.	A.	P.
(1) Previous dues on a handnote Ex. 4 (A), dated January 5, 1926, for Rs. 1 511-8-0 with interest at 12 per cent. per annum simple ...	2,148	0	0
(2) Previous dues on a handnote Ex. 4 (B) dated May 30, 1927, for Rs 1,500 with interest at 12 per cent. per annum simple ...	1,844	0	0
(3) Previous dues on *bahi khata* with interest at 12 per cent. per annum ...	1,329	0	0
(4) Paid in cash. ...	125	0	0
Total	5,446	0	0

The first handnote Ex. 4 (A) and the second handnote Ex. 4 (B) both carried simple interest at 12 per cent. per annum, but at the time of execution of the mortgage bond Ex. 3 (B) the dues on these two handnotes were set off, calculating compound interest at 12 per cent. with yearly rests. The Subordinate Judge disallowed the compound interest and reduced the amount of the dues on the handnotes accordingly. The handnotes were duly proved and were also supported by corresponding entries in the plaintiff's *bahi khatas*. Out of Rs. 1,329, due on *bahi khatas* Rs. 1,246-2-9 was principal on which simple interest at 12 per cent. amounted to Rs. 82-13-3. The entries Exs. 6 (I) to 6 (Z) 18 on the debit side of the plaintiffs' *bahi khatas* show that the total advances made to defendant No. 1 amounted to Rs. 2,592-2-9. The entries Exs. 7 (C) to 7 (G) on the credit side show that the total payments made by defendant No. 1 amounted to Rs. 1,346. There was thus a balance of Rs. 1246-2-9 due from the defendant No. 1. The defendant relies on the entries Exs. 7 (Z) 1 to 7 (Z) 8 on the credit side of the plaintiffs' *bahi khatas* which show that the defendant No. 1 made payments amounting to Rs. 3,736-8-0 during the period from *Pous* 1, 1333, (December 1925),

to *Pous* 10, 1336, (December 1928). It is contended that the total sum of Rs. 3,736-8-0 covered by these entries should have been taken into account at the time of execution of the mortgage bond Ex. 3 (B) on March 10, 1929. But on the debit side of the plaintiffs' *bahi khatas* there are various other entries Exs. B to B (54) showing advances to defendant No. 1 amounting to more than Rs. 4,000 which were quite separate from those that formed the consideration of the mortgage bond Ex. 3 (B). The plaintiffs' evidence is that the accounts were adjusted before the defendant executed the mortgage bond Ex. 3 (B). The defendant is an educated man of some position. He was a Municipal Commissioner nor three years and a member of the District Board, Arrah, for eight or nine years. He was also the Vice-Chairman of the District Board for six or seven months and an Honorary Magistrate with Second Class powers for three years. It is extremely difficult to believe that a man of his position would blindly execute the mortgage bond Ex. 3 (B) without previous adjustment of accounts. Admittedly he has got his own accounts but he did not produce them on the plea that they could not be found. In his written statement he did not specifically allege how much he actually received out of the consideration. He made the vague allegation with regard to all the bonds.

"They advanced small amounts by instalments and after adding up interest and compound interest thereto and rendering incorrect accounts, got the bonds executed for larger amounts."

In the circumstances I have no hesitation in holding, in concurrence with the learned Subordinate Judge, that the bond Ex. 3 (B) was for consideration.

The next point taken is that in determining the actual amount of consideration of the second and third mortgage bonds no interest should have been allowed on the previous dues on *bahi khatas*. So far as the second mortgage bond Ex. 3 (B) is concerned, I have already shown that the interest charged on the previous dues on *bahi khatas* amounted to Rs. 82-13-3 only. The consideration of the third mortgage bond Ex. 3 (C) partly consisted of previous dues on *bahi khatas* amounting to Rs. 913-4-6 including interest. The learned Subordinate Judge reduced this amount to Rs. 888-9-6, calculating simple interest at 12 per cent. per annum on the actual advances. The defendant admits that he agreed to pay interest on the sums borrowed though he says that the rate of interest was 8 annas per cent. per annum on small sums below Rs. 100 and 4 annas per cent. per mensem on sums above Rs. 100. The learned Subordinate Judge did not accept this evidence and allowed simple interest at 12 per cent. per annum. It is quite reasonable. The defendant had borrowed money from time to time and executed the mortgage bonds after adjustment of accounts and there is no reason why no interest should be charged on the previous dues on *bahi khatas*.

The next contention raised is that under the provisions of s. 7 of the Bihar Moneylenders Act (VII of 1939) the plaintiffs are not entitled to an amount of interest exceeding the principal sum advanced. This objection is confined to the first two bonds only.

Section 7 runs as follows:—

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

It will be noticed that this section is expressly limited to interest payable up to the date of the institution of the suit. Interest payable after that date is left untouched.

The principal sum secured by the first mortgage bond Ex. 3 is Rs. 8,000, but the Court below has passed a decree for Rs. 20,376-6-9, being the principal and interest due up to the date of the institution of the suit. Obviously under s. 7 the plaintiffs cannot get a decree for more than Rs. 16,000 as principal and interest due up to the date of the institution of the suit. The principal sum of Rs. 8,000 includes Rs. 11-7-0 as interest charged on previous dues amounting to Rs. 480-9-0. Leaving aside this insignificant sum of Rs. 11-7-0, the principal sum secured by the first bond represents actual advances.

The second mortgage bond Ex. 3 (B) is for Rs. 5,556-0-0 out of which Rs. 125 was paid in cash and the rest was set off against previous dues, as already stated. Disallowing compound interest for the previous

dues, the Court below reduced the principal sum to Rs. 5,354-13-0 in respect of which it passed a decree for Rs. 9,941-4-9 including interest up to the date of the institution of the suit. This decree, therefore, is within the limit imposed by s. 7 of the Money-lenders Act.

But it is contended on behalf of the appellant that according to s. 7 the amount of interest must be limited to the amount of loan actually advanced and not to the amount for which the mortgage bond was executed. The total amount of actual advances which formed the consideration of the second bond Ext. 3 (B) was Rs. 4,382-10-9, and it is, therefore, argued that the decree for Rs. 9,941-4-9 exceeds the limit prescribed by s. 7. This contention is based upon the expression 'the amount of loan advanced" used in the concluding portion of the section. But this portion of the section makes it quite clear that two classes of cases are contemplated, (1) loan advanced and (2) loan based on a document. If the section was meant to limit the amount of interest in all cases to "the amount of loan advanced", the subsequent words "or, if the loan is based on a document the amount of loan mentioned in, or evidenced by such document" would be superfluous. The words "the loan" in the passage "if the loan is based on a document" mean with reference to the previous context the loan in respect of which the suit is brought and the word "loan" here must be understood as defined in s. 2 cl. (*f*). According to this definition,

"loan means an advance whether of money or in kind on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan".

Clearly, therefore, a bond executed for past liability constitutes a loan within the meaning of the Act. In the case of such a bond the amount for which it is executed is "the amount of loan" within the meaning of s. 7 of the Act. No doubt the expression "the amount of loan mentioned in, or evidenced by such document" may suggest that to determine the amount of loan one must not go behind the document. But it could never have been the intention of the Legislature, while enacting s. 7, to override the provisions of the contract Act or the Evi. Act. Upon a proper construction of s. 7, it seems to me that the amount of loan in the second bond Ex. 3 (B) must be taken to be Rs. 5,354-13-0, as found by the Court below. Accordingly the decree passed by that Court does not offend against the provisions of s. 7.

The view I take is in accord with the decision of this Court in *Singheshwar Singh* v. *Medni Prasad Singh*, 187 Ind. Cas. 339 (1). It is in no way in conflict with the decision of the Federal Court in *Surendra Prasad Narain* v. *Sri Gajadhar Prasad Sahu* 2, in which their Lordships had to deal with transactions on *chithas*. It was contended on behalf of the plaintiff before their Lordships that the amount entered in the last *chitha* should be taken to be the amount of loan within the meaning of s 7 of the Money-lenders Act. But their Lordships held that the *chitha* could not be treated as a bond within the definition of loan in s. 2 cl. (*f*) of the Money lenders Act. Accordingly their Lordships passed a decree only for the total amount of the loan advanced, because the amount repaid by way of interest exceeded the amount of the loan advanced.

The next contention is that compound interest is excessive and should not have been allowed. It may be mentioned that the Bihar Money-lenders Act which was intended to afford relief to the debtors prohibits compound interest only on loans advanced after the commencement of the Act (s. 6). There is no such prohibition with regard to loans advanced before the commencement of the Act. Section 8 of the Act, however, gives a discretion to the Court, in case of loan advanced before the commencement of the Act, to

"re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan".

Section 8 does not lay down any conditions under which the Court may exercise its powers but gives a wide discretion. This discretion, however, cannot be exercised arbitrarily.

As regards the first mortgage bond Ex. 3, the principal sum of Rs. 8,000 represents actual advances except Rs. 11-7-0 only. The rate of interest is 11 annas 6 pies per cent. per mensem compoundable every year. This rate cannot be said to be excessive. There does not seem to be any

(1) 187 Ind. Cas. 339; A I R 1940 Pat 65; 6 B R 453; 12 R P 582.

(2) 21 P L T 753; 187 Ind. Cas. 612; 6 B R 508; A I R 1940 F C 10; 12 R F C 25; (1940) 1 M L J 1 Sup; 1940 O L R 275; (1940) Kar. (F C) 14 Sup; (1940) M W N 686; 71 C L J 557; 44 C W N F C 1.

reason for interfering with this rate under s. 8 of the Money-lenders Act.

With regard to the second mortgage bond Ex. 3 (B), the principal sum as determined by the Court below is Rs. 5,354-13-0 out of which Rs. 4,382-10-9 is the total amount of actual advances, the remaining Rs. 972-2-3 being interest. Thus a little less than one-fifth of the principal amount of the bond represents interest. This interest was calculated at 12 per cent. per annum simple. To allow compound interest on this bond will be rather harsh. It is, therefore, a fit case in which s. 8 of the Money-lenders Act may be applied. I would accordingly allow simple interest at 9 per cent. per annum on the principal sum of Rs. 5,354-13-0 from the date of the bond.

The principal amount of the third bond Ex. 3 (C) is Rs. 8,221-11-0, as found by the Court below. This amount is made up as follows:—

	Rs.	A.	P.
(1) Previous dues on a handnote Ex. 4 (C) 1, dated March 11, 1929, for Rs. 1 300 with interest at 12 per cent. per annum	1,731	2	6
(2) Previous dues on a handnote Ex. 4 (D) 1, dated July 26, 1930, for Rs. 2,545 with interest at 12 per cent. per annum	2,956	7	0
(3) Previous dues on a handnote Ex. 4 (E) 1, dated January 26, 1931, for Rs. 2,000 with interest at 12 per cent. per annum ...	2,219	5	0
(4) Previous dues on *bahi khata*, Rs. 7,83-8-0 with interest at 12 per cent. per annum	888	9	6
(5) Paid in cash Rs. 426-3-0 ...	426	3	0
Total ...	8,221	11	0

The second handnote Ex. 4 (D) 1 referred to in this account was not for cash consideration but was executed for previous dues on *bahi khatas*. The previous advances on *bahi khatas* amounted to Rs. 2,324-5-3 which together with interest Rs. 220-10-9 came up to Rs. 2,545 for which the handnote Ex. 4 (D) 1 was executed. Thus out of the principal sum of Rs. 8,221 11-0 on the third mortgage bond Ex. 3 (C) Rs. 1,387-10-9 represents interest charged at 12 per cent. per annum on the previous advances. The bond carries compound interest at 11 annas 6 pies per cent. per mensem with yearly rests. This is also a fit case in which s. 8 of the Money-lenders Act may be applied. I would accordingly allow simple interest at 9 per cent. per annum on the principal sum of Rs. 8,221-11-0 from the date of the bond.

The last contention on behalf of the appellant relates to interest *pendente lite*. The Court below allowed *pendente lite* interest at the contract rate on the total amount of principal and interest which was found due at the date of the institution of the suit. It is contended that this interest should have been calculated on the principal sums secured by the mortgage bonds and not on the total amount that was found due at the date of the institution of the suit. Reliance is placed on O. XXXIV, r. 11 of the Civil P. C, which provides:—

"In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable the Court may order payment of interest to the mortgagee as follows, namely:—

(*a*) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage (*i*) on the principal amount found or declared due on the mortgage, at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,... ...."

This rule must be read with O. XXXIV, r. 2 and r. 4. Order XXXIV, r. 2 provides—

"(1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—(*a*) Ordering that an account be taken of what was due to the plaintiff at the date of such decree for—(*i*) principal and interest on the mortgage,....."

This provision also applies to a preliminary decree for sale which is dealt with in O. XXXIV, r. 4. It is, therefore, clear that the Court shall pass a preliminary decree for principal and interest due up to the date of that decree. The interest must be calculated at the contract rate unless the Court finds that such rate is penal or excessive This was view taken by their Lordships of the Privy Council in *Jagannath Prasad Singh Choudhary* v. *Suraj Mall Dalal* (3). Their Lordships held that

"On a preliminary decree for foreclosure of sale under O. XXXIV, rr. 2, 4 of the Civil P. C 1908, a mortgagee is entitled to interest at the rate, and with the rests, stipulated in the mortgage down to the date fixed for redemption by the decree."

Order XXXIV, r. 11 gives a discretion to the Court to allow interest up to the date fixed

(3) 54 C 161; 99 Ind. Cas. 686; 4 O W N 46; A I R 1927 P C 1; 31 C W N 390; 52 M L J 373; 38 M L T 73; 54 I A 1; 29 Bom. L R 752; 45 C L J 279; 25 L W 685 25 A L J 23; 8 P L T 173 (P C).

for redemption under the preliminary decree and this interest is payable "on the principal amount found or declared due on the mortgage". This latter amount is obviously the amount found or declared due by the preliminary decree. Where the mortgage bond carries compound interest, the preliminary decree, according to the provisions of O. XXXIV, r. 2 and r. 4, shall allow compound interest from the date of the bond up to the date of that decree. The Court has no option to disallow interest at the contract rate up to the date of the preliminary decree, unless, of course, the rate of interest is found penal or excessive. For the period subsequent to the date of the preliminary decree, however, the Court has, under O. XXXIV, r. 11, the option either to allow or refuse interest.

Now as I am allowing simple interest on the last two bonds, the appellants' objection with regard to *pendente lite* interest will prevail, so far as these two bonds are concerned. Simple interest at 9 per cent. will be calculated from the date of each of these two bonds up to the date of this decree.

The position, however, with regard to the first bond is different. On this bond compound interest is being allowed. According to s. 7 of the Money-lenders Act the total amount due for principal and interest up to the date of institution of the suit will be Rs. 16,000. Interest will be calculated on Rs. 16,000 from the date of the suit up to this date at the contract rate, that is to say, at 11 annas 6 pies per cent. per mensem compoundable at the end of every year. On the authority of the decision of the Federal Court in *Subhanand Chowdhury* v. *Apurba Krishna* (4), already cited, it is contended that *pendente lite* interest should be allowed on the principal sum only. In that case the contract rate was 12 per cent. compound interest with yearly rests. Their Lordships, in the circumstances of the case, applied s. 8 of the Money-lenders Act and allowed simple interest at 12 per cent. per annum on the principal sum. But in this case, as I have already held, there is no reason for applying s. 8, so far as the first mortgage is concerned.

In the circumstances, I would not allow any interest for the period of grace which I fix as three months from this day.

The result is that the appeal succeeds in part. The plaintiffs will get a mortgage decree (1) on the first mortgage bond Ex. 3 for Rs 16,000 including principal and interest up to the date of institution of the suit together with further interest on that sum at 11 annas 6 pies per cent. per mensem compoundable at the end of every year from the date of the suit up to this date; (2) on the second mortgage bond Ex. 3 (*b*) for Rs. 5,354-13-0 principal with simple interest thereon at 9 per cent. per annum from the date of the bond up to this date; and (3) on the third mortgage bond Ex 3 (C) for Rs. 8,221-11-0 principal with simple interest thereon at 9 per cent. per annum from the date of the bond up to this date. The plaintiffs will get proportionate costs in the lower Court on the total amount found due on the three bonds at the date of the institution of the suit. Pleader's fee will be calculated according to the direction given by the Court below. So far as this Court is concerned, parties should bear their own costs. No interest will be payable from this date till the expiry of the period of grace. There after the total amount of the decree including costs will carry future interest at 6 per cent. per annum till the date of realisation. Let a fresh preliminary decree be prepared accordingly.

Meredith, J.—I agree.

S. *Order accordingly.*

(4) 21 P L T 631; 187 Ind. Cas. 436; A I R 1940 F C 7; 1940 O L R 249; (1940) 1 M L J 23 Sup; 6 B R 499; (1940) 3 F L J 58; 52 L W 127; (1940) M W N 682; 44 C W N 18 F C; 72 C L J 174; I L R (1940) Kar. 45.

LAHORE HIGH COURT

Criminal Appeal No. 1124 of 1938
July 12, 1939
YOUNG, C. J. AND SALE, J.
EMPEROR—PROSECUTOR
versus
RAMJI LAL BUDHA AND OTHERS—CONVICTS—RESPONDENTS

Penal Code (Act XLV of 1860), ss 302, 149—Number of persons participating in beating man with intention to kill him—Man dying—Man responsible for fatal blow unknown—All, if guilty of murder—Body of six persons with common object to abduct and murder going to house of deceased and separating into two bodies, one for abducting and another for murdering—Murder committed by latter body—Each body held guilty of murder.

Where persons have been found guilty of deliberate intention to murder, there is no justification for refraining from passing the death sentence on all concerned merely because it cannot be said which of the accused struck the fatal blow. 156 Ind. Cas. 786 (1) and 166 Ind. Cas. 1005 (2), relied on.

A body of six persons went to the house of the deceased with the common object of abducting a woman and murdering the deceased. On their arrival they separated into two bodies, one entrusted to abduct and another to murder. The murder was committed by the latter body :

Held, that each gang was guilty of murder under s. 302, I. P. C, as the murder was committed in pursuance of the common object of the unlawful assembly.

Cr. A. from an order of the Additional Sessions Judge, Hissar at Gurgon, dated August 18, 1938.

Mr. *M. Sleem*, The Advocate-General, for the Crown.

Mr. *Shabir Ahmad*, for the Respondents.

Young, C. J.—Seven persons were placed on trial before the learned Additional Sessions Judge, Hissar, charged under s. 302, I. P. C., read with ss. 149, 366, 365, 147 and 323, I. P. C., with being members of an unlawful assembly on March 6, 1938, at village Kherki-Daula, in the prosecution of the common object of which they murdered Kishen Lal and abducted his wife, *Mst.* Manbhari. These seven persons are Ramji Lal, his two sons Kishori, aged 18 and Tota, aged 16, and his four cousins, (who are brothers *inter se*) Umrao, Amin Chand, Udmi and Ghamandi. The learned Additional Sessions Judge found the case as presented by the prosecution proved, but since it was alleged that only Kishori, Umrao and Amin Chand were directly concerned with the murder of Kishen Lal and since it could not, in the opinion of the learned Additional Sessions Judge, be established which of these three accused dealt the fatal blow he convicted these three accused under s. 326 only and sentenced them to six years' rigorous imprisonment. The other four accused were held to have abducted *Mst.* Manbhari and the learned Additional Sessions Judge considered that it was not established that this abduction was committed in the prosecution of the common object of the unlawful assembly. He therefcre convicted them under ss. 323 and 342, I P. C., and sentenced them to rigorous imprisonment for six months.

From these convictions and sentences all the accused (except Tota) have appealed. On behalf of the Crown the learned Advocate-General has filed a petition against the acquittal of the accused under s 302, I. P. C., urging that all the accused were members of an unlawful assembly and that as the murder was committed in prosecution of the common object of this assembly all should be convicted of murder. The case for the prosecution is that *Mst.* Manbhari, P. W. No. 2, was first married to Mannu, brother of Ramji Lal: this Mannu died some 15 years ago : subsequently *Mst.* Manbhari contracted an intimacy with Kishen Lal deceased and eventually married him by *karewa*. About a month and a half before the murder, Kishan Lal brought *Mst.* Manbhari to the village of Kherki-Daula where the accused lived. It is common ground between Ramji Lal accused and the prosecution that *Mst.* Manbhari was originally married to Ramji Lal's late brother, but Ramji Lal denies that she later contracted *karewa* with Kishen Lal deceased and alleges that in fact she contracted a *karewa* marriage with him (Ramji Lal).

In any case, on March 6, 1938, *Mst.* Manbhari was living with Kishen Lal at Kherki-Daula, where accused also live ; and Ramji Lal appears to have organized this attack on the house of Kishen Lal and Manbhari with the object of abducting *Mst.* Manbhari, an object in which he certainly succeeded since immediately after this crime *Mst.* Manbhari was recovered from Ramji Lal's house by the Police. According to the prosecution witnesses the seven accused came in the early afternoon of March 6, 1938 to the residence of Kishen Lal, which consists of a *chhappar* and a compound. Umrao and Kishori are alleged to have been armed with *pharsas* (which are in fact *chhavis*) while the remaining five were armed with *lathis*. The seven accused divided themselves into two gangs. Three of them, namely Kishori, Umrao and Amin Chand attacked Kishen Lal who was cutting fodder in the *chhappar*; Umrao opened the attack by striking Kishen Lal on the head with his *chhavi*, and when Kishen Lal tried to escape Kishori overtook him and gave him another *chhavi* blow at the back of his neck, while Amin Chand hit him with a *lathi*. In this way Kishen Lal was beaten to death by these three accused. The medical evidence shows that he sustained nó less than twenty injuries, many on the head, some of which were incised and some of which were contused. According to the doctor, the actual cause of death was a contused wound caused by some blunt weapon on the middle line of the head which fractured the skull.

While these three accused were dealing with Kishen Lal, the other four accused, namely Ramji Lal, Udmi, Ghamandi and Tota, forcibly removed *Mst.* Manbhari, who received some injuries in the process. She was taken to Ramji Lal's house from where she was recovered by the Police. The first information report was made to the Police

station on the same day, by the local *safed-posh*, Sulaiman Khan. It is a brief statement to the effect that Kishen Lal had been murdered in his compound, but does not give the names of the accused, nor does it mention the abduction of *Mst.* Manbhari. Since however the first information report was given on hearsay information, the point is of no importance. It is clear from the evidence of Amar Singh, *lambardar*, P. W. No 20, who arrived at the scene of the occurrence almost immediately after the accused had left, that the names of all the seven accused were mentioned to him at the time by those present and also that *Mst.* Manbhari had been abducted. This evidence is relevant as being part of the *res gestæ*. The case for the prosecution depends upon the evidence of four eye witnesses—*Mst.* Manbhari, P. W. No. 2 (wife of Kishen Lal and the woman who was abducted), Dalu, a boy about 14 and a nephew of Kishen Lal who lived in the same house, Nanda, P. W. No. 4, a near neighbour, who was attracted by the noise of the occurrence and Not Ram, P. W. No. 5, who was at his well about 50 yards from Kishen Lal's courtyard and who also was attracted by the noise from Kishen Lal's house. Of these witnesses Nanda P. W. No. 4 (who seems to have arrived after Not Ram) says that he did not see Kishan Lal being murdered; he only saw the woman Mt. Manbhari being abducted by Ramji Mal, Udmi, Ghamandi and Tota. He says that he then went into Kishen Lal's court-yard and saw Kishen Lal lying dead there. The boy Dalu, P. W. No. 3, and Not Ram, P. W. No. 5, gave evidence which agrees in all essential particulars regarding the whole occurrence including the murder of Kishen Lal. Their evidence corroborates the statement of *Mst.* Manbhari, P. W. No. 2.

The record does not disclose, and Counsel for the appellants has not been able to draw our attention, to any reason why these depositions should not be accepted. It is true that Dalu, P. W. No. 3, is a boy of about 14 only; but the learned Additional Sessions Judge recorded a note on the record at the time of his examination, that this witness was an intelligent lad and had given his evidence in a convincing and straightforward way. In his judgment the learned Additional Sessions Judge describes Dalu as the "best prosecution witness." Nor is there any reason to doubt the statement of *Mst.* Manbhari. There can be no doubt that at the time of this occurrence she was living with Kishen Lal as his wife and the fact that she was abducted is proved by her recovery from the house of Ramji Lal by the Police at the beginning of the investigation. The medical evidence shows that she had four contusions and abrasions which support her evidence that she was violently and forcibly removed.

Nanda, P. W. No. 4, appears to be a disinterested witness whose statement there is no reason whatsoever to doubt. As regards Not Ram, P. W. No. 5, he admits that four or five years ago Umrao and Kishori, accused, supported a civil case against his brother. It is suggested that for this reason he might be interested now in taking his revenge on Umrao and Kishori by assisting in their conviction in the present case. From this point of view, it may be that Not Ram's evidence is not disinterested so far as Umrao and Kishori are concerned, but at the same time there appears to be no reason why he should give false evidence against Ramji Lal and his gang as a whole. Even however excluding the evidence of Not Ram there is ample evidence to indicate that the case for the prosecution is proved. In the course of the investigation Kishori accused produced a *pharsa* or *chhavi* which, on examination by the Imperial Serologist, was found to be stained with human blood. Also in the course of the investigation three *lathis* were recovered from various accused, but as they are not proved to be stained with human blood, their recovery is not of any consequence. The only serious point which the Counsel has been able to bring out on behalf of the defence is that Nanda, P. W. No. 4, does not mention, Tota, while *Mst.* Manbhari, though mentioning Tota in her evidence in Court, stated before the Police during the investigation in her statement recorded on the day of the occurrence, that she did not see Tota. Tota is a lad whose age is given on the record as sixteen; and in the circumstances we are inclined to give him the benefit of the doubt as to his participation in this affair. We therefore acquit Tota and dismiss the Crown appeal so far as he is concerned.

As regards the remaining accused we are satisfied that they participated in this occurrence in the manner stated by the prosecution. The defence evidence which they brought is obviously valueless and has not been relied by Counsel in appeal. It was rightly rejected by the learned Addi-

tional Sessions Judge. We are satisfied that, with the exception of Tota, the six accused were members of an unlawful assembly the common object of which was to abduct *Mst.* Manbhari and murder Kishen Lal; and that in prosecution of that object they did in fact murder Kishen Lal and abduct *Mst.* Manbhari. We do not agree with the view of the learned Additional Sessions Judge that merely because the accused on arrival at Kishen Lal's house separated into two gangs, each gang can therefore only be held guilty for the acts committed by it. The fact that the accused went together as a body to Kishen Lal's house, and then separated into two bodies, shows that they were participating in an organized attack in which each member had his particular function to perform. The function of Kishori, Umrao and Amin Chand was to deal with Kishen Lal and they in fact dealt with him inasmuch as they beat him to death. The remainder of the gang concentrated on to abducting *Mst.* Manbhari; but they are nontheless guilty under s. 302 because the murder of Kishen Lal was committed in pursuance of the common object of the unlawful assembly. Nor is the learned Additional Sessions Judge right in applying s. 326, I. P. C, to the participants in the murder of Kishen Lal merely because he thought it was not clear which of the three actual assailants gave him the fatal blow. It is established beyond doubt that Kishori, Umrao and Amin Chand jointly beat Kishen Lal to death. There were no less than twenty injuries on his person, some incised, some contused, indicating that at least two kinds of weapons were used. The doctor says that at least three of the injuries must have been caused by some sharp edged weapon like *pharsa* (*chhavi*), and considers that the fatal injury which resulted in the fracture of the skull was caused by a severe blow with a blunt weapon. If the prosecution evidence is correct this blow was probably given by Amin Chand as he was the only one of the three assailants who was armed with a blunt weapon. The point however is immaterial. In the circumstances all the assailants are equally guilty of murder under s. 302, I. P. C. The learned Additional Sessions Judge purports to follow the principle enunciated in "A I R 24 Lah. 653" [A I R 1924 Lah. 654 ?] in convicting under s. 326, I. P. C. This particular ruling is not traceable and it seems that the learned Additional Sessions Judge has misquoted the reference. We desire however to invite the attention of the learned Additional Sessions Judge to *Mewa* v. *Emperor* (1) and *Chanan* v. *Emperor* (2) in which it was held that where persons have been found guilty of deliberate intention to murder, there is no justification for refraining from passing the death sentence on all concerned merely because it cannot be said which of the accused struck the fatal blow. There are other authorities of this Court which have more than once overruled the view that where a number of accused participate in beating a man to death under circumstances which amount to murder under s. 302 149, I. P. C., the conviction should be under some lesser section than s. 302, I. P. C., merely because it cannot be said which accused is responsible for the fatal blow.

We are satisfied in this case that all the accused except Tota, (to whom we give the benefit of doubt) must be convicted under s. 302, 149, I. P. C. We accept the Crown appeal against the acquittal of all the accused except Tota, and convict them accordingly under s. 302 149, I. P. C. As regards the sentence, we are satisfied that the murder of Kishen Lal was directly committed by Kishori, Umrao and Amin Chand. The murder was deliberate and brutal and we see no extenuating circumstances except for the one fact that Kishori is stated to be a lad of eighteen years of age. For this reason alone we give the lessor sentence of transportation for life to Kishori; but as Umrao and Amin Chand are both grown men we direct that they be hanged by the neck until they are dead. On the ground that Ramji Lal, Udmi and Ghamandi did not directly participate in the murder of Kishen Lal but are constructively guilty, we impose upon them the lesser sentence of transportation for life.

D. *Order accordingly.*

(1) 16 L 1131; 156 Ind. Cas. 786; A I R 1935 Lah. 337, 36 Cr. L J 1001; 38 P L R 109; (1935) Cr. Cas. 571; 8 R L 24.

(2) 17 L 536; 166 Ind. Cas. 1005; 38 Cr. L J 342; 33 P L R 909; 9 R L 459.

PATNA HIGH COURT

Appeal No. 271 of 1939
April 9, 1940
AGARWALA AND ROWLAND, JJ.

DHANUKDHARI SINGH AND OTHERS—APPELLANTS

versus

RAMRATAN SINGH AND OTHERS—RESPONDENTS

Bihar Money-lenders Act (III of 1938), s. 11—Order determining instalments, whether appealable.

A decision under s. 47, Civil P. C., is not a decree within the meaning of s. 2 (2) unless it in some way finally determines the rights of the parties with regard to all or any of the matters in controversy. An order determining instalments under s. 11, Bihar Money-lender's Act is not an order which conclusively determines the rights of the parties and consequently no appeal lies from such an order. 56 Ind. Cas. 452 (4) and 10 Ind Cas. 371 (5), relied on. 193 Ind. Cas. 224 (6), explained. [p. 671, col. 1.]

A. from the original order of the Sub-Judge, Gaya, dated July 19, 1939.

Mr. *G. P. Sahai*, for the Appellants.

Mr. *Harinandan Singh*, for the Respondents.

Agarwala, J.—This is an appeal by the judgment-debtors. The opposite party obtained a decree against the appellants for Rs. 5,470-2-0. On the application of the appellants under s. 11, Bihar Money-lender's Act, the Court fixed instalments for the payment of this decretal debt. The judgment-debtors were to pay Rs. 200 within a week, and Rs. 1,000 on January 1, 1940, and on January 1, of each succeeding year until the debt with interest had been repaid. The judgment-debtors failed to pay the initial sum of Rs. 200 within the week allowed. The Court then extended that time and gave them three weeks within which to make the payment. The payment however was not made within the extended time, although we are told Rs. 150 was deposited later as a part of the initial sum of Rs. 200. No part of the instalment which fell due on January 1, 1940, has been paid. The judgment-debtors attempted to persuade the Court that they were capable of paying only Rs. 300 per annum, and they now appeal against the decision of the Court below on the ground that the instalments fixed are too high.

A preliminary objection has been taken on behalf of the respondents that no appeal lies in this case. The respondents referred us to orders which have been passed in two similar cases. In Civil Revision No. 366 of 1939 decided by Wort, J., on December 9, 1939 it was held that no appeal lay against an order under s. 11, Bihar Money-lenders Act. The learned Judge relied on the fact that whereas an appeal against an order under s. 13 of the Act is expressly provided, there is no such provision with regard to an order under s. 11. The other case mentioned was the miscellaneous appeal of *Sia Ram* v. *Sanjib*, which was disposed of on March 4, 1940, by a Division Bench of this Court. The matter was before that Bench for the purpose of considering an application for extending the time for filing an appeal under s. 5, Lim. Act. The Bench held that, as no appeal lay from an order under s. 11, the question of extending the time did not arise. Wort, J., in the first of these case, pointed out that the right of appeal from a decree is not a constitutional right but is the creature of statute, and as the Money-lenders Act did not confer a right of appeal from an order under s. 11, no right of appeal existed. No reference was made to the provisions of s. 96, Civil P. C., which confers a right of appeal against a decree, and s. 2 (2), Civil P. C., which defines "decree" and includes within the definition an order passed by an executing Court under s. 47.

It has been contended before us on behalf of the appellants that an order under s. 11, Money-lenders Act, is an order within s. 47, Civil P. C., and that it therefore falls within the definition of "decree" and is appealable. During the course of the argument reference has been made to O. XX, r. 11, Civil P. C. Under sub-r. (1) of r. 11 of O. XX, the Court which passes a decree may, at time of passing a decree for money, make an order that payment of the decree shall be postponed, or shall be made by instalments, with or without interest, and sub r. (2) of the same rule provides that, after the passing of a decree for payment of money, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder order that payment of the amount decreed shall be postponed or shall be made by instalments. The order under sub-r. (1) is a part of the decree in the suit, and may be challenged in an appeal from the decree. The order under sub-r. (2) for payment by instalments, can be made only with the consent of the decree-holder. No appeal, therefore, can lie against an order passed with his consent. Nor, on the other hand, can an order refusing instalments under sub-r. (2) be appealed

against, as the right to pay by instalments does not exist unless the decree-holder has consented to it. Three Rangoon cases with regard to sub-r. (2) have been brought to our notice.

It appears from the first of these, *Saya Hattie* v. *Ma Pwa Sa* (1) that in Burma, or at least in that part of Burma from which the appeal arose, the consent of the decree-holder is not necessary for an order under sub-r. (2) of r. 11, Carr, J., sitting singly in that case held that an order under sub-r. (2) is appealable. That decision was followed by Maung Ba, J., sitting singly in *U Tha Me* v. *Paungde Co-operative Town Bank* (2) and by a Division Bench in *Abdul Karim* v. *Maung San Kyaw* (3). In the first of the Rangoon cases, Carr, J., observed that when a question arises whether an order under sub-r. (2) should be passed or not the question appeared to be one clearly between the parties to the suit and one relating to the execution, discharge or satisfaction of the decree, and that consequently it came within s. 47 of the Code and was appealable. The two other Rangoon cases followed the decision of Carr, J., without further investigation into the matter. It has been conceded before us that it is not every order passed between the parties to a suit, in the course of execution proceedings, that falls within the definition of 'decree' so as to be appealable. In *Surendra Nath* v. *Mritunjay Banarji* (4) it was held that a decision under s. 47 is not a decree within the meaning of s. 2 (2) unless it in some way finally determines the rights of the parties with regard to all or any of the matters in controversy.

The same view was taken in *Deokinandan Singh* v. *Bansi Singh* (5) in which it was held that the order, to be appealable as a decree, must conclusively determine the rights of the parties, and that consequently no appeal lay against an order by which the value of the property directed to be sold under a decree has been assessed at a certain figure according to the statement of the decree-holder. The question therefore is whether an order determining instalments under s. 11, Money-lenders Act, is an order which conclusively determines the rights of the parties. The right of the decree-holder to be paid the decretal amount and the liability of the judgment-debtor are determined by the decree in the suit. The power conferred on the executing Court by s. 11, Money lenders Act, is a discretion which the Court may exercise in derogation of the rights of the decree-holder to execute the whole of his decree immediately against the judgment-debtor. In deciding whether it shall or shall not exercise the discretion conferred upon it by this section the Court is not determining any question of the parties' rights, but merely whether an indulgence shall be shown to the judgment-debtor for the purpose of enabling him to meet the just demands of the decree-holder and at the same time avoid the forced sale of his own properties.

In deciding whether the circumstances justify the exercise of the discretion in favour of the judgment-debtor the Court is required by s. 12 to take into consideration the circumstances of the judgment-debtor, the amount of the decree and the capacity of the judgment-debtor to pay the instalments on due dates. From the discussions on this question, which are heard from time to time in this Court, it would appear as if the impression is that the only person whose difficulties are to be considered in the application of s. 11, Money-lenders Act, is the judgment-debtor, and that the difficulties of the judgment creditor are not to be considered at all. It is true that the Court is required to take into consideration the capacity of the judgment-debtor to pay the instalments, but the Court is also required to take into consideration the amount of the decree and the circumstances of the judgment-debtor. To my mind, it appears that what the Legislature had in view that if, taking into consideration the various circumstances mentioned, it appears to the Court that a judgment-debtor will be able to discharge his obligations to his creditor provided he is given a reasonable time, the Court is empowered to give that time by ordering instalments, but the Court is bound to consider whether the resources of the judgment-debtor are such as to justify an expectation that the decree-holder's claim to his dues will not be defeated by allowing instalments. Where it is clear that the resources of the judgment-debtor are so meagre in relation to his liability that he is not likely to be able to discharge

(1) 4 R 247; 97 Ind. Cas. 1037; A I R 1926 Rang. 192.

(2) A I R 1929 Rang. 192; 120 Ind. Cas. 130; Ind. Rul. (1930, Rang. 2.

(3) A I R 1932 Rang. 54; 135 Ind. Cas. 858; Ind. Rul. (1932) Rang. 74.

(4) 5 Pat. L J 270; 56 Ind. Cas. 452; A I R 1920 Pat 249; 1 P L T 645.

(5) 16 C W N 124; 10 Ind. Cas. 371; 14 C L J 35.

the decretal debt within a reasonable time the Court would not be exercising a wise discretion in prolonging the execution proceedings by fixing instalments which would make but little impression on the possibility of the judgment-debtor discharging his indebtedness.

There is one other case of this Court to which reference was made, namely, *Jugeswari Prasad* v. *Kamala Prasad* (6). In this case the Court below had held that it had no power to pass an instalment decree under the Money-lenders Act. The Bench before which the appeal came did not consider the question whether an appeal from an order refusing to fix instalments lay or not, but holding that the Court had jurisdiction to pass an order for instalments, set aside the order of the Court below and directed it to dispose of the matter according to law. As the question of the maintainability of an appeal was not raised, and was not considered, this case cannot be looked upon as an authority on the question which we have to decide particularly in view of the fact that whether an appeal lay or not it was competent to the Bench in the exercise of its revisional powers to direct the Court to exercise the jurisdiction which the Court had mistakenly refused to exercise.

One other aspect of the matter must also be considered and that is the ground on which Wort, J., decided Civil Revision No. 366 of 1939 as that ground has been again urged before us. It has been pointed out that in the case of a mortgage suit by s. 10 of the Act the Court which passes a decree is empowered to fix instalments by which the decretal debt is to be paid and that an order passed by the Court which passed the decree and forming part of the decree may be challenged in an appeal from the decree. By s. 13 of the Act, the Court is directed to value the property of the judgment-debtor which is sought to be sold and to determine how much of it is necessary to sell in order to satisfy the decree. From the Court's decision in that matter there is an appeal expressly provided. It has been contended that the only reason why an appeal has not been expressly provided in s. 11 is because the Legislature contemplated that an order under s. 11 would be viewed as an appealable order under s. 47 Civil P. C. As I have already shown, under the decisions of this and of the Calcutta High Court, it is clear that the only orders under s. 47 which are appealable are orders which finally determine the rights of the parties and that an order under s. 11 is not of that nature. I would therefore uphold the preliminary objection and dismiss this appeal with costs.

Rowland, J.—I entirely agree. There was one line of authority in the Calcutta High Court favouring the view that as argued before us any order deciding a matter between the parties to the suit in the course of execution proceedings was to be regarded as a decree under s. 47 read with the definition of "decree" in s. 2, cl. (2), Civil P. C. but the considered decision of that Court in *Deokinandan Singh* v. *Bansi Singh* (5), has since been regularly followed and if I may say so, treated as having settled the law. The order, which it was contended in that case was appealable was an order fixing the valuation for the purpose of settling a sale proclamation. The Judges pointed out that if the contention of the appellant were to prevail whereas there would be only one appeal under the Code from a decision upon the question of valuation in the course of proceedings for reversal of the sale under r. 90 of O. XXI, there would be a first and a second appeal against an order for assessment of valuation antecedent to the sale. This, they say, could hardly have been the intention of the Legislature. In this Court that decision was followed in *Surendra Nath* v. *Mritunjay Banerji* (4), in which after considering a number of authorities Dawson-Miller, C. J. accepted the view of the Calcutta High Court as explained in the decision of the Madras High Court in *Sivagami Achi* v. *Subramania Ayyar* (7) and observed that an order to be a decree must conclusively determine the rights of the parties and that if any other view were adopted the result would be that an appeal might be preferred against every order in the course of execution proceedings and this could hardly have been contemplated by the framers of the Code of 1882. Dawson Miller, C. J, thought that no wider interpretation was to be given to s. 2, sub s. 2 which defines "decree" and states that it shall be deemed to include the determination of any question within s. 47. "These words," he said,

> "must be limited by the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit it cannot be included under the definition of decree,"

otherwise it would be merely an interlocu-

(6) 21 P L T 255; 193 Ind. Cas. 224.

(7) 27 M 259; 14 M L J 57 (F B).

tory order and although it may be true to say that the Judge acts judicially in coming to the conclusion, that does not in itself make his determination a decree within the meaning of the section. As my learned brother has pointed out, there was nothing for the Court to decide as to the rights of the parties in the suit those rights having been conclusively determined by the judgment and decree in the suit itself. The point before the Subordinate Judge was a matter of procedure whether the judgment-debtor, should be given time to pay and the decree holder restrained from exercising the right which he had under the law to execute his decree at once. An order regulating the procedure in this matter was an interlocutory order, and so not appealable.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Criminal Revision Petitions Nos. 1273 and 1274 of 1939

December 1, 1939

SKEMP, J.

GHULAM QADIR—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT

Motor Vehicles Act (VIII of 1914), s. 16, rules under, Punjab Motor Vehicles Rules, rr. 24 (1), 48 and 49—Offence under—Summons not specifying nature of—Accused not given opportunity to produce defence—Conviction held could not be sustained.

Where in a case in which the accused was charged with offences under rr. 34 (1), 48 and 49, Punjab Motor Vehicles Rules the nature of the offence was not specified in the summons which was issued to the accused, and the case was somehow taken up before the date fixed and no adjournment was granted to him to enable him to produce his evidence in support of his defence:

Held, that the accused was prejudiced in his defence and consequently his conviction could not be sustained. 165 Ind. Cas. 716 (1), relied on.

Cr. R. P. reported by the Additional Sessions Judge, Hissar, dated August 22, 1939.

Order of Reference by Additional Sessions Judge.

The facts of this case are as follows: Both these revision petitions, No. 29 and 30 of 1939, shall be disposed of by this single order, as both relate to the same lorry and the petitioner is the same in both the cases. Lala Sant Ram Maini, Magistrate, first class, Gurgaon, on March 31, 1939, convicted the petitioner in two different proceedings, that is (*a*) for permitting his lorry to be driven without Punjab Driving License, without Punjab Motor Vehicle License and without inspection on due date, that is October 7, 1938, and thus breaking rr. 24 (1), 48 and 49, Punjab Motor Vehicles Rules, made under s. 16 of Act VIII of 1914; and (*b*) permitting his lorry to be driven without Punjab Motor Vehicle License in contravention of r. 48, Punjab Motor Vehicles Rules, made under s. 16 of Act VIII of 1914. Both the trials took place summarily on the same date. Regarding (*a*), it was noted that the accused pleaded guilty but said that he transferred the ownership of the vehicle to a company and had no proof regarding transfer. In proceedings (*b*), the Magistrate recorded that the accused pleaded guilty. The result was that, on conviction in proceedings (a), the petitioner was sentenced to pay a fine of Rs. 10 (ten), while, on conviction regarding proceedings (*b*), he was sentenced to pay a fine of Rs. 15 (fifteen). The Sessions Judge, Hissar, after issuing a notice to the Crown in either case, has transferred the case to me for disposal.

The proceedings are forwarded for revision on the following grounds.

Petitioner's Counsel in either case has contended that in the summons issued to the petitioner, the nature of the offence which he was called upon to explain and defend was not notified and that the omission caused a serious handicap to the petitioner in both the cases. It appears that on March 4, 1939, summons were issued to the petitioner to be present on March 27, 1939 and answer a charge under s. 16 of Act VIII of 1914. A copy of the printed summons purporting to bear the signatures of the Magistrate is on the file (p. 13), and in this summons a considerable space is to be found left blank, over which it is written in print that the space was meant for specifying briefly the nature of the offence. But the nature of the offence was not specified in either case. It was merely mentioned that he had committed an offence under s 16, Punjab Moter Vehicles Act. Again, the file shows that on March 27, 1939, the Magistrate was not present and the attendence of the accused was not noted. The only note was that the summons had been served and the case should be put up before the Magistrate on April 15, 1939. The case was not taken on that day but was taken much earlier, that is on March 31, 1939. The petitioner has filed an affidavit in

either case to the effect that he had not been given any date on March 27, but that on March 31, he had come to Court on some other business when some Court official took him before the Magistrate where proceedings were taken in both the cases and that he showed a document of transfer of the lorry to the Magistrate, and that the Magistrate did not give him any opportunity for producing his defence. In the affidavit he has contended that the lorry had been registered at Delhi Province and had been tranferred to Crossways Company at Delhi and that he did not know to whom the company made over the lorry for driving and that the lorry had been duly entered in the name of the purchaser in the Delhi Province. In my opinion, the trial was conducted in rather a hurried manner. The accused no doubt admitted the allegations of the prosecution but he denied the ownership of the lorry, for which he should have been given a date to prove his allegations of transfer, especially as March 31, was not the date fixed for trial of the case. In *Gajraj Singh* v. *Emperor* (1) the practice of issuing summons under the Motor Vehicles Act, without defining the exact offence with which the accused was being charged, was severely condemned, and it was pointed out that it was the duty of the clerk issuing such summons to define therein the exact nature of the charge which was being preferred against the person against whom the summons was being issued. The time, the place and the exact nature of the offence charged must be clearly set forth. It was laid down in this ruling

"that the conviction which followed upon a summons in which the accused was not given notice of the charge, which was brought against him, was an illegal conviction."

Counsel of the petitioner has urged that the cases are of some importance as it is general practice not to specify the nature of the offence in issuing summons under the Motor Vehicles Act. In my opinion, in the present two cases the petitioner was prejudiced in his defence: firstly because the nature of the offence was not specified in the summons issued to him, and secondly because the case was taken up before the date fixed and the petitioner was not granted adjournment to produce his evidence in support of his allegation that he had transferred the lorry, before the commission of either offence, to a third person. Therefore, I forward the proceedings under s. 438, cl. (1), Criminal P. C., to the High Court, with the recommendation that the convictions and sentences be set aside and the petitioner be acquitted of either charge.

Mr. *Qabul Chand*, for the Petitioner.

Mr. *H. L. Soni*, for The Advocate General, for the Crown.

Order.—This order will dispose of Criminal Revisions Nos. 1273 and 1274 of 1939. The facts are that the petitioner was convicted by a Magistrate with summary powers under s. 16, Motor Vehicles Act, for breaches of certain rules and sentenced in one case to pay Rs 10, in the other case Rs. 15, fine. The learned Additional Sessions Judge has sent up the case for revision on the grounds (1) that the case was taken up on a date for which the petitioner had no notice and he was not allowed to produce his defence; and (*b*) that the summons did not indicate to him the offence with which he was charged. Both these grounds appear to be well founded. The record shows that on March 27, the case was adjourned to April 15, but it was taken up on March 31. It appears that the petitioner had gone to Court on some other business, was seen by the Naib Court Inspector or somebody else and taken before the Traffic Magistrate. He is recorded as pleading guilty to both charges; but on one the register shows that he pleads that he had transferred the ownership of the vehicle. He was fined because there was no proof.

The driver had been caught driving with a defective license and without a license for the Punjab. The petitioner was prosecuted in accordance with the rules as the owner of the vehicle His defence was that some time previously he had transferred the vehicle to the Crossways Company, Delhi, who had in turn transferred it to a third person. The summons not giving him notice of the offence and the case not being taken up on the date fixed, he had no opportunity to produce his defence. I have seen the summons. It simply states that he is charged under "s. 16/-/14, Motor Act," and "16/-/14" is not very legibly written, It appears that this means that he was charged under s 16, Act VIII, of 1914, namely the Motor Vehicles Act. This is quite insufficient notice. In a similar case reported in *Gajraj Singh* v.

(1) A I R 1938 All. 761; 165 Ind Cas 716; 38 Cr. L. J. 64; I L R (1937) All 30; (1936) A L J 1611; 9 R A 300; (1936) Cr. Cas. 100; 193 A L R 932.

Emperor (1), Thom, J. remarked :

It appears that a summons was issued against the applicant in which he was charged merely with an offence under s 16, Motor Vehicles Act The offence was not defined and in the summons the applicant was given no notice of the nature of the charge which was to be preferred against him. In other words, he was hauled before the Court, tried and convicted without the ordinary notice, to which every accused is entitled before put upon trial. It appears that there is a practice in this province to issue summons under the Motor Vehicles Act without defining the exact offence with which the accused is being charged. This is a most reprehensible practice."

With these remarks I agree. Motor trials are frequently too summary and in this case I am far from satisfied that justice has been done. I accept the recommendation of the learned Additional Sessions Judge for both the reasons which he has given, set aside the conviction and order that the fines, if paid, be refunded.

D. *Conviction set aside.*

OUDH CHIEF COURT

Second Civil Appeal No. 249 of 1937

March 11, 1941

GHULAM HASAN, J.

SHEORAJ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GANGA PRASAD (DEAD) RAM KHILAWAN AND ANOTHER—DEFENDANTS—RESPONDENTS

Oudh Civil Rules, Vol. I, Paras. 53, 54, 55—*Document filed and admitted—Should not be returned before conclusion of case—Transfer of Property Act (IV of* 1882), *s.* 8—*Entire* patti *of* zemindar *sold*—Abadi *included in* patti, *if passes to purchaser—Civil Procedure Code (Act V of* 1908), *s.* 60 (1) (c)—*Party claiming benefit under—Onus—"Agriculturist," meaning of—Judgment-debtor not taking plea under s.* 60 (1) (c)—*Stranger if can raise such plea subsequent to sale—Sale of* zemindari—*Vendor's right to retain possession of house on subsequent acquisition of exproprietary right by vendor.*

A document filed and duly admitted should not be returned to the party before the conclusion of the case. [p. 677, col. 2]

Where the entire *patti* of a *zemindar* constituting a distinct unit has been sold by auction, the *abadi* numbers whose area was included in the area of the *zemindari patti* which are a part and parcel of the latter also pass to the purchaser 154 Ind. Cas. 1017 (6) and 185 Ind. Cas. 373 (1) (), distinguished. [*ibid.*]

[Case-law relied on]

A party claiming benefit of s. 60 (1) (c), Civil P. C., is bound to show that the person whose property was attached and sold was an agriculturist within the meaning of s. 60 (1) (c). The term "agriculturists" is used in cl. (c) in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. 106 Ind. Cas. 49 (8), 138 Ind. Cas. 67 (9), 157 Ind. Cas. 986 (10) and 177 Ind. Cas. 60 (11) relied on. [p. 678, col. 1.]

Where a judgment-debtor does not object to the sale of the house on the ground of his being an agriculturist within the meaning of s. 60 (1) (c) and allows the house to be sold, it would be no longer open to him, much less to a stranger to raise the same objection in answer to a suit by the auction-purchaser for possession of the property purchased by him. [p. 678 col. 2.]

Where the ownership of the house or the materials thereof has passed to the auction-purchasers by virtue of the auction sale and the vendor has lost all interest therein from that date, the subsequent acquisition of exproprietary rights by the vendor cannot have the effect of reviving the ownership in favour of the vendor. [*ibid.*]

S. C. A. against the order of the Civil Judge of Unao, dated March 2, 1937.

Mr. *Nazir Uddin* for Mr. *Hakim Uddin*, for the Appellants.

Mr. *Haider Husain*, for the Respondents.

Judgment.—This second appeal by the plaintiffs arises out of a suit for possession which was decreed by the trial Court whose decree has been set aside by the lower Appellate Court.

The plaintiffs-appellants filed a suit for possession of a house No. 64/3 and a *sahan* and *rasta* No. 66/3 on the allegation that one Chandrapal Singh owned 13 *biswansis* and 13 *kachwansis* share, which corresponds to 3 *bighas* 13 *biswas* and 15 *biswansis*, in *mahal* Ganesh, village Makoor, and *patti*, Chandrapal was constituted as a result of perfect partition of the village. On April 20, 1927, the plaintiffs purchased this *patti* in an auction sale and were put in possession of the same. This *patti* included a house and a *rasta* which also came into possession of the plaintiffs at the same time. The defendant is alleged to have wrongfully dispossessed the plaintiffs from the house and *sahan* sometime in April 1936.

The defence to the suit was that the entire share of Chandrapal Singh in the *patti* was not sold and that the plaintiffs were never put in possession of the entire share. It was pleaded that even if the entire share of Chandrapal Singh is proved to have been sold in the auction sale it did not include the house and the *sahan*. The defendant set up a village custom under which the house and *sahan* do not pass along with the *zamindari* upon a sale to the auction-purchasers. Issues were framed on October 6, 1936, and after the evidence of the plaintiffs had been recorded on October 27, 1936, Counsel for the defendant stated that he did not press the plea of custom. He also stated that his only contention in

the case was that the house in the suit did not pass to the plaintiffs along with the *zamindari* share transferred to them under the sale certificate. He admitted that in case the Court held otherwise then the plaintiffs could get a decree for possession over the house in suit as claimed.

The trial Court held that the entire *zamindari* share of Chandrapal was sold and that the house and the *sahan* were included in that share and had passed to the auction-purchasers. Upon this finding the plaintiffs' suit was decreed. It appears from the judgment of the trial Court that the defendant's Counsel contended in course of the argument for the first time before it that the defendant was an agriculturist and under s. 60 of the Civil P. C. his house could not be attached and sold with the *zamindari* share nor did it pass to the plaintiffs. The trial Court repelled the contention and observed that there was nothing to show that Chandrapal Singh was an agriculturist as required by s. 60 of the Civil P. C.

The lower Appellate Court distinguished certain decisions relied upon by the trial Court in support of its findings and held that the auction-purchasers did not get the house along with the *zamindari* share sold to them. It also found that Chandrapal Singh being a petty *zamindar* was entitled to the benefit of the provisions of s. 60 of the Civil P. C. In the result the lower Appellate Court allowed the appeal and dismissed the suit.

Two points have been urged before me in support of the appeal on behalf of the plaintiffs. The first contention raised is that the house in question actually passed to the plaintiffs by virtue of the auction sale. The second point is that s. 60 (1) (*c*) of the Civil P. C. does not apply to the case and the defendant-respondent is not entitled to the benefit of that section. I am of opinion that both the contentions are sound and must be accepted.

As regards the first point, it appears that the sale certificate (Ex. 1) clearly mentions the sale of 13 *biswansis* and 13 *kachwansis* share with an area of 3 *bighas* 13 *biswas* and 15 *biswansis* though it does not expressly mention the house in dispute. Possession over this area was duly given to the auction-purchasers (*Vide* Ex. 4, warrant of possession, Ex. 3, the report of the *qurq amin*, and Ex. 5, the final order of the Court regarding the delivery of possession). Exhibit 6 is the copy of the mutation register which duly records the entire area in dispute in favour of the plaintiffs. A reference to Ex. 7, which is a copy of the *khasra* of *paimaish* of *abadi* of village Makoor, *mahal* Ganesh, will show that the house No. 64/3 and *sahan* and *rasta* No. 66/3 are situated in *mahal* Ganesh and *patti* Chandrapal, and Chandrapal is recorded as the owner in respect of both the numbers. This *khasra* appertains to the partition proceedings. It is regrettable that this important evidence is not referred to in the judgment of the lower Appellate Court at all. Learned Counsel on behalf of the appellants referred to Ex. 2, which is a copy of the *chitti* of *abadi* Chandrapal, Nos. 64/3 and 66/3. The document was filed by the plaintiffs and was admitted by the defendant. It appears from a reference to the list of documents that Counsel appearing on behalf of the plaintiffs in a statement of the case on October 27, 1936, stated that he did not rely upon Ex. 2 and prayed that it be returned to him. The trial Court ordered that Ex. 2 be returned and the fact of its return is noted on the list of documents. This procedure was doubtless irregular. The document having been filed and duly admitted should not have been returned to the plaintiffs' Counsel before the conclusion of the case. Paragraphs 53, 54 and 55 of the Oudh Civil Rules Volume I, deal with the return of the documents and it seems to me that the action of the Court in returning the document, which was neither inadmissible nor unproved, was not warranted by the aforesaid rules. Since Ex. 2 is not on the record, the plaintiffs-appellants must thank themselves for their failure to refer to it in support of their case inasmuch as the document was returned at the special request of their Counsel. An examination of the aforesaid documentary evidence establishes beyond doubt that the entire *patti* of Chandrapal Singh without any exception or reservation had been put to sale and was purchased by the plaintiffs-appellants in auction. It is also clear that *patti* Chandrapal Singh constitutes a distinct unit like the village itself and that the *abadi* members whose area was included in the area of the *zamindari patti* were a part and parcel of the latter. Under these circumstances it would be idle to argue that the auction sale did not transfer the interest of Chandrapal Singh in the *abadi* numbers along with his *zamindari* share sold. Section 8 of the T. P. Act, lays down that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the trans-

feree all the interest which the transfer is then capable of passing in the property, and in the legal incidents thereof. Among these incidents are included, in the case where the property is land, all things attached to the earth. In *Abu Hasan* v. *Ramzan Ali*, (I. L. R. 4 All. 381) (1), the "rights and interests" of a *zamindar* in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property *qua zamindar*. It was held that, in the absence of proof that such building was excluded from sale, the sale of his "Rights and interest" in the village passed such building to the auction-purchaser.

This case was followed in *Abhanaindan Prasad* v. *Pashpat Nath Pande*, (I. L. R. 47 All. 470) (2) where it was held that in the absence of any evidence to the contrary, the houses or buildings situate within the *zamindari* are included in and pass with the *zamindari*, and a pre-emptor is entitled to get possession of such houses or buildings along with the *zamindari*.

In a case relating to the construction of certain deeds of conveyance by way of mortgage and sale of shares in a *zamindari* their Lordships of the Privy Council held that where the documents contained no words of exception or reservation, they conveyed all the interest of the vendor in the *zadindari*. It was also held that their interests in the houses on the land and in the profit rents derived from them passed in the absence of any words showing an intention to retain or exclude them (*vide Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan*, (I. L. R. 30 Calcutta 556 P. C.) (3).

There are two cases decided by this Court, which are reported in *Balram Singh* v. *Ganga Singh* (13 O. L. J. 432) (4) and *Srimati Krishna Kumari Devi* v. *Bhaiya Rajendra Bahadur Sinha Deo*, (13 O. L. J. 846) (5). In the former case it was held that if a *zamindar* sells his *zamidari* share in a village, it may be presumed that he sells the property including his share in the *abadi* unless there are words in the sale deed showing a contrary intention. This decision also proceeded on the view taken in *Abu Hasin* v. *Ramzan Ali*, (I. L. R. 4 All. 381) (1) and *Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan* (I. L. R. 30 Cal. 556 P. C.) (3). A similar view was taken in the latter case relying upon the same decisions and a few others.

The lower Appellate Court has tried to distinguish the latter cases on the ground that in both of them the entire village was transferred and not a portion therein. This distinction appears to me to be without a difference. A specific *zamindari* share of a *patti* in a village constitutes a separate entity and may well be regarded as a distinct unit like the village itself. If the sale of an entire village is presumed to convey all the interests of the owner including his interest in the *abadi*, there is neither reason nor principle in contending that the sale of a specific *zamindari patti* will not lead to the same result.

Reliance has been placed on behalf of the defendant-respondent on two cases, namely *Sheo Narain Singh* v. *Jwala Prasad*, (1935 O. W. N 365) (6) and *Bechan Lal* v. *Gobardhan*, (1940 O. W. N. 13) (7). Neither of the cases can afford any assistance to the respondent's case. The facts of the former cases are entirely distinguishable. The question in that case was whether the grove plots did or did not pass at the auction sale of the entire village consisting of 20 *biswas*. At p. 367* it is stated that the miscellaneous property consisting of grove land was not included in the 20 *biswas* share and that there was a separate *patti* consisting of 12 *bighas* 15 *biswas* of grove land. This statement was based upon the evidence afforded by the *khewats* produced in that case. Consequently it was held that the auction sale did not convey the interest in the grove. The latter case is also inapplicable to the facts of the present case. There a part of the share, and not the whole, was sold. The learned Judge observed that the presumption that a house standing on a share is sold holds good in a case where a complete share has been sold, but it does not apply to a case where only a part of the share is sold. The present is not the case where only a part of the share has been sold and the balance of the share

(1) 4 A 381; A W N 1882, 73.
(2) 47 A 470; 87 Ind. Cas. 298; A I R 1925 All. 449, 23 A L J 283.
(3) 30 C 556; 30 I A 71; 8 Sar. 439; 7 C W N 482 (P C).
(4) 13 O L J 432; 93 Ind. Cas. 287; A I R 1926 Oudh 359.
(5) 13 O L J 846; 104 Ind. Cas. 155; A I R 1927 Oudh 240; 2 Luck. 43; 6 O W N 1150.
(6) 1935 O W N 365; 154 Ind. Cas. 1017; A I R 1935 Oudh 304; 7 R O 532; 1935 R D 161.
(7) 1940 O W N 13; 185 Ind. Cas. 373 (1); A I R 1940 Oudh 118; 12 R O 227; 1939 O L R 749; 1940 R D 13; 15 Luck. 288.

*Page of 1935 O. W. N.—[*Ed.*]

remains unsold. As I have already stated above, the *zamindari* share was sold in its entirely without any exception or reservation whatsoever and the decisions relied upon will therefore have no application to the present case.

As regards the plea on the basis of s. 60 (1) (c) of the Civil P. C. which found favour with the lower Appellate Court, it is enough to state that the plea was not raised by the defendant in the written statement but was urged only at the time of the arguments before the trial Court. In my opinion such a plea ought not to have been allowed to be entertained. Under s. 60 (1) (c) houses and other buildings belonging to an agriculturist and occupied by him shall not be liable to attachment or sale in execution of a decree. Before the defendant is entitled to succeed on this plea he is bound to show that Chandrapal Singh was an agriculturist within the meaning of s. 60 (1) (c) of the Civil P. C.

In *Bachan Singh* v. *Bhika Singh*, (A. I. R. 1927 All. 601) (8) it was held that an agriculturist whose house is protected from attachment and sale by s. 60 (c) of the Civil P. C., must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation, to a certain extent, is carried on by most if not all, of the *zamindars* in U. P., but their houses cannot be designated as agriculturists' houses.

A similar view was taken in *Sampat* v. *Ram Prasad*, (A. I. R. 1932 All. 499) (9). This again was followed in a Bench decision of the Allahabad High Court in *Tirloki Prasad* v. *Kunj Behari Lal*, (A. I. R. 1935 Allahabad 448) (10). It was held in this case that the test applied in deciding whether a person is an agriculturist is whether his main source of income is derived from cultivation or not. The term "agriculturists" used in cl. (c) of s. 60 of the Civil P. C. is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation.

It was held in *Sant Ram* v. *Buta Khan*, (A. I. R. 1938 Lahore 72) (11) that the term "agriculturist" as used in s. 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land.

In the present case there is no evidence whatsoever to show that Chandrapal Singh was an agriculturist by profession and that his main source of livelihood was cultivation. I hold, therefore, that the plea under s. 60 (1) (c) of the Civil P. C. has not been substantiated. I am further of opinion that since Chandrapal Singh did not object to the sale of the house in question on the ground of his being an agriculturist within the meaning of s. 60 (1) (c) and allowed the house to be sold it would be no longer open to him, much less to a stranger like the defendant-respondent, to raise the same objection in answer to a suit by the auction-purchasers for possession of the property purchased by them. See *Lala Ram* v. *Thakur Prasad* (I. L. R. 40 All. 680) (12).

Lastly it has been urged on behalf of the defendant-respondent that Chandrapal Singh became an ex-proprietary tenant after the auction sale and as such he is entitled to retain the possession of the house as a tenant. To my mind there is no force in this contention. The ownership of the house or the materials thereof has passed to the auction-purchasers by virtue of the auction sale and the vendor has lost all interest therein from that date. The subsequent acquisition of ex-proprietary rights by the vendor cannot have the effect of reviving the ownership in favour of the vendor.

For the foregoing reasons I allow the appeal with costs, set aside the judgment and decree of the lower Appellate Court and restore that of the Court of first instance.

S. *Appeal allowed.*

(8) A I R 1927 All. 601; 106 Ind. Cas. 49; L R 8 A 229 Rev.

(9) A I R 1932 All. 499, 138 Ind Cas. 67; (1932) A L J 499; Ind. Rul. (1932) All. 361; 16 R D 506; L R 13 A 340 Rev.

(10) A I R 1935 All. 448; 157 Ind. Cas. 986; (1935) A L J 507; 1935 R D 217; (1935) A L R 899; 8 R A 242.

(11) A I R 1938 Lah. 72; 177 Ind. Cas. 60; I L R (1938) Lah. 374; 40 P L R 984; 11 R L 251.

(12) 40 A 680; 47 Ind. Cas. 947; 16 A L J 691.

MADRAS HIGH COURT

Appeal No. 253 of 1937.
April 26, 1940

VENKATARAMANA RAO AND ABDUR RAHMAN, JJ.

CHINNI VENKATACHALAM CHETTI,
—APPELLANT

versus

ATHIVARAPU VENKATRAMI REDDI—
RESPONDENT

Mortgage—Movable property, mortgage of—Validity—Produce of land realised every year mortgaged with land—Mortgage of produce operates as mortgage of movable property — Mortgage of produce of land—Subsequent lease of land—Standing crop on land claimed by mortgagee—Mortgagee's title, if prevails over that of lessee with notice of mortgage—Mortgage of movable property—How to be enforced.

Under the Indian law there can be a valid mortgage of movable property. Under s. 3, T. P. Act, immovable property does not include growing crops. Where the deeds of mortgage not only give security to the mortgagee over the immovable property comprised therein but also over the produce realised therefrom every year, the deeds of mortgage will operate in respect of the produce on the land as a mortgage of movable property. The moment the crop comes into existence the mortgagee gets title to the crop. *Misri Lal* v. *Morzhar Hossain* (1) and *Colyer* v. *Issacs* (2), relied on.

Where the produce of the land realised therefrom every year is also mortgaged with the land, so long as the mortgagee allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights will not also prevail against a *bona fide* assignee from the mortgagor without notice of the mortgage in his favour. Where however the lessee of the land takes the assignment with notice of the mortgage of the produce of that land realised every year and standing crop on the land is claimed by the mortgagee, the title of the mortgagee to the crops must prevail over that of the lessee. *Colyer* v. *Issacs* (2), *Baldeo Prasad Sahu* v. *A. B Miller* (3) and *Wilson* v. *Wilson* (5), relied on. *Ex parte National Mercantile Bank, In re Phillips* (4), explained and distinguished.

A mortgagee of movable property is not entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a Receiver to secure possession of it in order that his security may be realised.

Mr. *V. Govindarajachari*, for the Appellant.

Messrs. *M. S. Ramachandra Rao* and *D. R. Krishna Rao*, for the Respondent.

Venkataramana Rao, J.—This appeal arises out of a suit to enforce two deeds of mortgage dated June 24, 1924 and April 24, 1930 executed by the deceased father of defendants Nos. 1 to 3 to the plaintiff. Both the deeds of mortgage not only gave security to the plaintiff over the immovable property comprised therein but also over the produce realised therefrom every year. The operative portions in the deeds of mortgage run thus: "The produce realised therefrom every year have been hypothecated to you." The question for decision in this appeal is whether the plaintiff is not entitled to enforce his mortgage security over a sum of Rs. 364 which was deposited into Court during the pendency of the suit being the net sale proceeds of the crops of *Fasli* 1345 on lands which are Items Nos. 1, 2, 8, 9, 10 and 11 of Sch. A to the plaint comprised in the deeds of mortgage. The question arises in this way. On May 14, 1933 the father of defendants Nos. 1 to 3 executed a registered lease deed of the said lands in favour of defendants Nos 7 and 8 for a period of five years commencing from *Fasli* 1343. The rent reserved thereunder was ten *putties* of paddy and eighty bundles of hay worth Rs. 10. Defendant No. 6 in execution of a money decree obtained by him against defendants Nos. 1 to 3 as representatives of their father in O.S. No. 149 of 1934 on the file of the District Munsif's Court of Nellore attached the immovable properties which were comprised in the deeds of mortgage. Objections were raised as regards the sale of the properties in pursuance of that attachment and the matter was compromised by the mother of defendants Nos. 1 to 3 executing a deed of transfer of the said lease in favour of defendant No. 6 for the unexpired period of three years in satisfaction of his decree and the sale and other proceedings were stayed. The deed of transfer is dated September 24, 1935. Defendant No 6 full well knew that the property comprised in the lease deed was subject to the two mortgages in favour of the plaintiff because it was distinctly recited in the counter-affidavit filed by the guardian of defendants Nos. 1 to 3 objecting to the sale that the property was subject to two mortgages in favour of the plaintiff.

The plaintiff also obtained a money decree against defendants Nos. 1 to 3 in S. C. S. No. 117 of 1934 on the file of the District Munsif's Court of Nellore in respect of an unsecured debt due by their father and in execution of that decree attached the standing crops on the lands which were the subject matter of the lease. Two claim petitions were put in, one by the tenants defendants Nos. 7 and 8 and other by defendant No. 6. Both the claims were allowed on the ground that the possession of crops was not with the plaintiff. The crops were thereafter harvested and before they could be removed they were again attached by defendant No. 11 in execution of a money decree. The plaintiff filed the present action and applied for the appointment of a Receiver to take possession

of the said crops. By an order dated July 7, 1936 the crops were directed to be sold and after meeting certain outgoings the balance was directed to be deposited into Court and from and out of the amount so deposited defendants Nos. 7 and 8 were asked to take their lessees' share. It is with respect to the remaining amount that a controversy has arisen between the plaintiff and defendant No. 6. Under both the deeds of mortgage the plaintiff is given security over the produce. Under s. 3, T. P. Act, immovable property does not include growing crops. Therefore the deeds of mortgage will operate in respect of the produce on the land as a mortgage of movable property. Under the Indian law there can be a valid mortgage of movable property: *vide Misri Lal* v. *Morzhar Hossain* (1). The moment the crop comes into existence the mortgagee gets title to the crop. The principle of law that is usually applied is that enunciated by Jessell, M. R. in *Colyer* v. *Issacs* (2) namely:

"A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done fastens upon that property, and the contract to assign them becomes a complete arrangement."

This principle was applied in a case reported in *Baldeo Prasad Sahu* v. *A. B. Miller* (3), where the validity of a mortgage of the produce of a factory, namely indigo cakes that were manufactured, came into question. The learned Judges Brett and Mitra, JJ., referring to *Colyer* v. *Issacs* (2) observed thus:

"The property hypothecated was the indigo cakes, manufactured every season by the Pupri Indigo Factory from the crops grown on the lands of the factory from the date of the mortgage deeds, until such time as the total mortgage money with interests and costs of Court shall be paid by the mortgagor."

They held in that case that the title secured under such mortgage would prevail over the title of a purchaser under a later mortgage of the said cakes. The facts of that case were as follows: On September 22, 1891 there were two mortgages executed of the factory and its produce by the proprietor Mr. Wilson in favour of one Chowdhry Mahadeo Pershad who obtained decrees thereon and thereafter assigned his interest in those decrees to Messrs. Moran & Co. Messrs. Moran & Co., subsequently became bankrupt and the interest of the firm was represented by the Official Assignee. In 1896 Mr. Wilson mortgaged only the indigo cakes to be manufactured in 1895 and 1896 and in 1896 and 1897 to the plaintiffs who were aware of the prior mortgage in favour of Chowdhry Mahadeo Pershad. Subsequent to the date of mortgage in 1896 Mr. Wilson made over to the plaintiffs in that case a quantity of indigo cakes manufactured in 1896 and 1897. The Official Assignee intervened and claimed them and the question of title was made the subject-matter of legal proceeding. Pending the adjudication the cakes were sold and the money was brought into Court. It was held that the Official Assignee was entitled to the money in preference to the plaintiffs. The ground on which the learned Judges decided is thus put:

"We think that it is clear that where, as in this case, there were mortgages to the creditor of property which was to come into existence in futrue, and when the creditor had already paid the consideration, the property, that is to say, the indigo cakes, were bound from the moment that Mr. Wilson acquired them and from that moment he became the trustee of the property for the creditor, who as *cestui que trust* acquired an equitable estate or interest in the property. The delivery after acquisition of the cakes to the plaintiffs' servant, if there was in fact such a delivery, could not have destroyed the equitable interest of Messrs. Moran and Co., already existing in them, unless indeed the plaintiffs were *bona fide* transferees for value without notice."

It seems to us that the principle of this decision would apply to the present case. Defendant No. 6 took the assignment with notice of the mortgages in favour of the plaintiff. The standing crop on the land before it was removed was claimed by the plaintiff. Therefore, the plaintiff's title to the moneys in Court must prevail over that of defendant No. 6. But it is contended by Mr. Ramachandra Rao that so long as the plaintiff as mortgagee did not take possession of the crop, the mortgagor would be entitled to deal and dispose of it and in this case as the mortgagee never interfered with the possession of the mortgagors defendant No. 6 was entitled to receive the rent and the crop and in lieu thereof its value in preference to the plaintiff and he relied on a case in *Ex parte National Mercantile Bank, In re Phillips* (4), where Jessell, M. R. stated that under the ordinary law prevailing in England rents and profits of land in mortgage belong to the mortgagor so long as he is allowed to remain in possession and therefore the mortgagor is entitled to sever the crops, which when severed became chattels under the deed and vested in his trustee in bankruptcy. It

(1) 13 C 262.
(2) (1882) 19 Ch. D 342; 51 L J Ch. 14; 45 L T 567; 30 W R 70.
(3) 31 C 667.
(4) (1881) 16 Ch. D 104; 50 L J Ch. 23; 44 L T 265; 29 W R 227.

seems to us that before applying the principle of the English decision we must make note of the fact that in England the growing crop is treated as an interest in land and therefore immovable property. Jessell, M. R. recognizes this in the decision relied on. A mortgage of land operates as an absolute conveyance of the property. But in India mortgages such as these in question in the suit do not operate as an absolute conveyance of the property mortgaged. Further, the mortgagee is not entitled to possession of the property unless possession is stipulated for as in the case of a usufructuary mortgage. Having regard to these differences, let us see how far the contention of Mr. Ramchandra Rao is well founded. Even in English Law, in the case of a mortgage of a growing crop on the land, a mortgagee is not entitled to claim the crop when it has been removed by the mortgagor but before removal if the mortgagor intervenes and claims it and takes appropriate proceedings, the mortgagee will become entitled to it: *vide* Fisher on Mortgage, Edn. 8, p. 716. In *Wilson* v. *Wilson* (5) at p. 40, Vice-Chancellor Malins defines the right of a mortgagee thus :

"We know perfectly well that the mortgagee of rent has a right from the very day of his mortgage to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some action on the part of the mortgagee."

Here the mortgagee has really intercepted defendant No. 6 from removing the crops. Again, the argument based on the question of possession is not sound. Even in English Law a distinction is drawn between a case of mortgage of chattels and a case of mortgage of lands. In *Ex parte Official Receiver In re Moorit* (6), Cotton, L. J. in considering the exact rights of sale which a mortgagee of personal chattels possesses remarked thus:

"A pledge of personal chattels as a rule is and must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring..... A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt."

Much more so in India where, as pointed out, above, the plaintiff mortgagee will not be entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a Receiver to secure possession of it in order that his security may be realised. He applied for the appointment of a Receiver before the crops were removed from the land and it was on this application for the appointment of a Receiver that a consent order was made by which the crops were sold and the sale proceeds deposited into Court. It may be that so long as he allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights will not also prevail against a *bona fide* assignee from the mortgagor without notice of the mortgage in favour of the plaintiff. Therefore the case in *Ex parte National Mercantile Bank, In re Phillips* (4) is not of much assistance to defendant No. 6. In the result we set aside the judgment of the lower Court in this behalf and allow the appeal with costs, Rs. 100 to be paid by the respondent in the appeal. He will pay back whatever costs were paid by the appellant to the respondent in the lower Court.

N. S. *Appeal allowed.*

(5) (1872) 14 Eq. 32 (40); 41 L J Ch. 423; 26 L T 346; 20 W R 436.

(6) (1887) 18 Q B D 222; 56 L J Q B 139; 56 L T 42; 35 W R 277.

OUDH CHIEF COURT

Criminal Revision No. 161 of 1940

March 6, 1941

BENNETT, J.

Mst. KHEMANA—COMPLAINANT—APPLICANT

versus

DULAREY—ACCUSED—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 528 (2)—District Magistrate, power of, to set aside order of transfer of case by Sub-Divisional Magistrate and transfer it to other Court—Notice to opposite party, if obligatory before transfer of case.

A District Magistrate has the power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court. There is nothing in the sub-s. (2) of s. 528, Criminal P. C., which suggests that the discretion of the District Magistrate is fettered in any way. 38 Ind. Cas. 447 (4), followed, 116 Ind. Cas 751 (1), *Raghunatha Pandaram* v. *Emperor* (2) and 17 Ind. Cas. 414 (3), distinguished, 166 Ind. Cas. 83 (2) (5), referred to. [p. 683, col. 2.]

There is nothing in s. 528, Criminal P. C., itself which makes it obligatory on the District Magistrate to issue notice to the opposite party, before transferring a case under s. 528 (2) and it is undesirable to fetter his discretion. [p. 684, col. 1.]

(Case-law referred to.)

Cr. R. for revision of the order of the District Magistrate, Lucknow, dated November 11, 1940.

Mr. *G. G. Chatterji*, for the Applicant.

Mr. *Nasirullah Beg*, for the Opposite Party.

Order.—This is an application in revision under ss. 435 and 439 of the Criminal P. C. against the order of the District Magistrate of Lucknow dated November 11, 1940, setting aside the order of the City Magistrate, Lucknow, dated August 15, 1940, whereby he had transferred a case from the Honorary Bench Magistrates to a Special Magistrate of the first class named Mr. Badshah Husain Rizvi.

It appears that a complaint was made on September 11, 1939, by one *Mst.* Kemana, who is the applicant in the present application, against her son-in-law Dularey, who is the opposite party in this application, under s. 380, of the I. P. C. She alleged that she had discovered on August 24, 1939, that certain ornaments and a coin were missing from her house and that she suspected Dularey who, as her son-in-law, had access to her house. She had previously on August 31, made a report to the Police giving the same date, namely, August 24, as the date on which she had discovered the loss.

A preliminary enquiry was made by the City Magistrate before whom the complaint had been made, under s. 202 of the Criminal P. C. and the case was then transferred by him to the Bench of Honorary Magistrates. This Bench recorded all the prosecution evidence and framed a charge on May 31, 1940. This charge was that on or about August 24, 1939, about 2 or 3 P. M. the accused Dularey had dishonestly removed certain gold ornaments and a gold coin from *Mst.* Khemana's house, these articles having been buried by her in a corner of the house.

Thereafter defence evidence was produced and only two more defence witnesses remained to be examined.

At this stage the complainant, *Mst.* Khemana applied to the City Magistrate for transfer of the case from the Bench of Honorary Magistrates on the ground that they had refused to amend the charge. One of the prosecution witnesses gave evidence indicating that the offence had taken place on the 20th and not on August 24, and in view of this evidence *Mst.* Khemana had applied to the Bench Magistrates for alteration of the charge. They had rejected this application. Other prosecution witnesses, it may be noted, did not give the actual date of the offence, and *Mst.* Khemana herself does not appear to have had any definite knowledge on the point, though she may have thought that the offence had taken place on the 24th during her absence from the house. It is said that her evidence on the point is not consistent, but in any case she was not apparently in a position to know with certainty.

In the order of July 27, passed on *Mst.* Khemana's application the Bench Magistrates in dismissing her application for amendment of the charge observed that the case had reached the stage of defence and two defence witnesses had already been examined. Only one witness referred to August 20 as the date of the offence, and the complainant herself said that it was committed on the 24th. In support of this last statement they referred to the first information report in which August 24, was given as the date of the offence. The accused had produced *alibi* evidence to show that he was at work elsewhere on the day and time of the alleged occurrence and it was in view of this evidence that the Bench Magistrates thought that the application had been made to amend the charge.

The City Magistrate remarked that this order "shows beyond any doubt that the Court holds that the occurrence took place on August 24, 1939," and "that the grounds for entertaining this view are also not satisfactory." Consequently "the complainant rightly feels that her case has been prejudiced" and "it is desirable that the case should be tried by another Court."

The District Magistrate after examination of the record said that he was satisfied that the City Magistrate's order was not correct. First of all he did not consider that the order of the Bench Magistrates was a prejudiced order. The complainant had herself to blame for asking for an amendment of the charge framed at such a late stage, and the Bench Magistrates were clearly justified in refusing to amend the charge because of the statement made by one witness. The case had dragged on for an unduly long time and it would be unfair to harass the accused, who is the complainant's son-in-law, by a transfer which would enable the complainant to claim a *de novo* trial. Only two defence witnesses remained to be heard and the accused would be prejudiced if the case was transferred to another Court at this late stage. Consequently the District Magistrate accepted the transfer application made to him and re-transferred the case from the Court of

Mr. Badshah Husain Rizvi to the Bench of Honorary Magistrates

With regard to this order of the District Magistrate it may be said that the transfer by the City Magistrate would not have enabled the complaint to claim a *de novo* trial as of right. There was, however, this objection to the transfer that if there was no *de novo* trial the case would have to be decided by a Magistrate who had not seen most of the witnesses.

It is contended by the learned Counsel for the applicant that the District Magistrate was not justified in passing what was virtually an appellate order reversing the order of the City Magistrate, and further that he was not justified in any event in transferring the case without notice to the opposite-party.

In support of this contention learned Counsel referred to several rulings. In *Kishori Lal* v. *King-Emperor*, (A. I. R. 1928 All. 546) (1), it was said by a Single Judge that under s. 528 (2) the District Magistrate and the Sub-Divisional Magistrate have equal authority in withdrawing cause from a Subordinate Magistrate and the District Magistrate should not exercise powers of an Appellate Court as regards orders passed by the Sub-Divisional Magistrate. If he considers the Court to which the case is transferred by the Sub-Divisional Magistrate not the proper Court for the trial of the case, for reasons to be stated by him, he should transfer the case to any Court which he thinks proper after notice to the accused. It is implied, therefore, in this ruling that the District Magistrate has the power to reverse the order of the Sub-Divisional Magistrate, though he should not do this as if he were acting as an Appellate Court but only under the provisions of s. 528 (2).

It was said in this Allahabad case that the view was supported by a ruling of a single Judge of the Madras Court in *Raghunatha Pandaram* v. *Emperor* (I. L. R. 26 Mad. 130) (2).

In another case of the Allahabad High Court *Iltaf Husain* v. *Emperor*, (13 Cr. L. J. 782) (3), it was also held by a single Judge that the District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate. Reference was made again to this Madras case.

For the opposite party I have been referred to a later case of the Madras High Court, *Santhappa Sethuram* v. *Govindaswamy Kandiyar*, (A. I. R. 1918 Mad. 1122 (1)) (4), in which it was held that the fact that a Sub-Divisional Magistrate has refused to transfer a case at the request of a party does not preclude a District Magistrate from making an order of transfer on his own intitiative. In this case the decision in *Raghhunatha Pandaram* v. *Emperor* (2), was expressly dissented from.

In *Sugnomal Tahilram* v. *Phatandas Relumal*, (A. I. R. 1936 Sind, 237) (5) it was said that although the District Magistrate has no appellate jurisdiction under s. 528 (2) he has a concurrent jurisdiction and that jurisdiction is not barred merely because it has been exercised by the Sub-Divisional Magistrate in the first instance. Where a Sub-Divisional Magistrate transfers a case from one Court to another, it is open to the party aggrieved to go to the District Magistrate not by an appeal against the order of the Sub-Divisional Magistrate, but by moving the District Magistrate, to exercise the jurisdiction conferred upon him by sub-s. (2) and the District Magistrate after having considered the application on its merits and for good reasons can transfer the case.

It is, I think, not irrelevant in considering this question to refer to the provisions of s. 17 of the Criminal P. C. although those provisions do not appear to have been invoked in the cases referred to. Under s. 17 all Magistrates appointed under ss. 12, 13 and 14 are made subordinate to the District Magistrates, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches. It is, therefore, clear in my opinion that [a District Magistrate has the power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court.] In the present case both the application to the City Magistrate and the application to the District Magistrate were made under the provisions of sub-s. (2) of s. 528, and [there is nothing in the sub-section which suggests that the discretion of the District Magistrate is fettered in any way.] I think, therefore, that the later ruling of the Madras High Court on the point should be followed.

(1) A I R 1928 All. 546; 116 Ind. Cas. 751; 26 A L J 818; 10 A I Cr. R 1; L R 9 A 85 Cr.; 30 Cr. L J 654.

(2) 26 M 130; 2 Weir 689.

(3) 13 Cr. L J 782; 17 Ind. Cas. 414.

(4) A I R 1918 Mad. 1122 (1); 38 Ind. Cas. 447; 40 M 791; 21 M L T 281; 5 L W 501; 18 Cr. L J 335.

(5) A I R 1936 Sind 237, 166 Ind. Cas. 83 (2); (1936) Cr. Cas. 1093; 9 R S 120; 38 Cr. L J 133 (2); 30 S L R 327.

As regards the failure of the District Magistrate to issue notice to the opposite party it was said in *Kamatchi Ammal* v. *Emperor*, (A. I. R. 1929 Mad. 511) (6), by a single Judge that although s. 528 (2) does not say that notice of an application for the transfer of a case from one Court to another shall be given to the accused, still according to the practice of the Madras High Court it is desirable to give such notice. And so a transfer made without such notice must be set aside for want of notice.

Similarly in the case of *Ahmad Ghibhir* v. *Chellaram Tekchand*, (A. I. R. 1936 Sind 42) (7), it was said that it is incumbent on a Magistrate transferring a case from one Court to another on the application of the Crown to hear the other party and give his reasons for passing the order of transfer.

For the opposite party I was referred on this point to two cases *Chhotey Lal* v. *Tinke Lal*, (A. I. R. 1935 All. 815) (8) and *Bagh Ali* v. *Muhammad Din*, (A. I. R. 1926 Lah. 156) (9). In the former case it was said that though s. 528 does not provide for any notice to the opposite party yet it is desirable that notice should be given to the opposite party before an order of transfer is passed. But a mere omission to give notice will not make the order illegal and would be no ground to set aside the order. The omission to give notice is a mere irregularity. In the Lahore case it was said that the transfer under s. 528 is not illegal for want of notice to the opposite party.

As there is nothing in the section itself which makes it obligatory on the District Magistrate to issue notice to the opposite party, on this point too, I think, it undesirable to fetter his discretion. It might be advisable in some cases that notice should issue, and it might be quite unnecessary in other cases. The issue of notice would generally delay further a trial which had probably already been somewhat delayed by the transfer application.

It is not necessary to go into the merits of the present case. It is possible that the complainant had little idea of the actual date and time of the occurrence, and it is also possible that she entertained different ideas on the subject at different times. It is certainly questionable whether the Bench Magistrates would have been justified in altering the charge merely because one prosecution witness had indicated that the date entered in the charge was not correct. An error in stating the particulars in the charge is not necessarily fatal to the prosecution case. If such an error is committed the Court has to consider the effect of the provisions of s. 225 of the Criminal P. C.

On the whole I do not think that there was sufficient reason for transferring the case at the late stage which it had reached. If it was not to be tried *de novo* it would have to be tried on the order of the City Magistrate by a Magistrate who had not seen any of the prosecution witnesses or some of the defence witnesses. This would not have been satisfactory.

Finding that the order of the District Magistrate was not illegal, I see no reason to disturb it and I dismiss this application.

S. *Application dismissed.*

(6) A I R 1929 Mad. 511; 119 Ind. Cas. 385; (1929) M W N 265; 30 L W 401; 30 Cr. L J 1043; (1929) Cr. Cas. 12; Ind. Rul. (1929) Mad. 929.

(7) A I R 1936 Sind 42; 161 Ind. Cas. 939 (1); (1936) Cr. Cas. 289 (1); 37 Cr. L J 515; 8 R S 162 (1).

(8) A I R 1935 All. 815; 156 Ind. Cas. 163; (1935) A L R 546; (1935) Cr. Cas. 917; 36 Cr. L J 918; (1935) A L J 1063; 7 R A 1059.

(9) A I R 1926 Lah. 156; 93 Ind. Cas. 75; 6 L 541; 27 P L R 80; 27 Cr. L J 411.

PRIVY COUNCIL

Appeals From the Lahore High Court

December 2, 1940

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

Malik MOHAMMAD IKHTIAR AND OTHERS —APPELLANTS

versus

HIMTU RAM AND OTHERS—RESPONDENTS

Custom (Punjab)—Village proprietary body—Reclaimation of waste lands by proprietors—Agreement between proprietors and Government to surrender rights in waste land to Government after passing of Sind Sagar Doab Colonisation Act, 1902 *—Such agreements recorded in* wajib-ul-arz *prepared at subsequent settlements—Act revealed—Waste lands reclaimed during* interim *period—Effect of repeal of Act—Plaintiffs held bound by agreements.*

The plaintiffs were some of the proprietors in various villages According to the respective village *wajib-ul-arz* prepared at the time of the first settlement in 1878 a proprietor had the right under certain conditions to reclaim the *shamilat* (waste land) of the village and become Adna Maliks of the land. But this position was altered in consequence of a scheme of the Govt of the Punjab to make a canal in the Sind-Sagar Doab for the purpose of irrigating tracts in that district. In furtherance of the scheme the Sind-Sagar Doab Colonisation Act was passed in 1902. Amongst other provisions it empowered the Govt. to make agreements between proprietors in the district for the surrender of their lands to Govt. on condition that they would receive back an area equal to one-fourth in the improved land. Such surrenders, however, were only to take effect on and from the date on which the excavation of the proposed canal should be begun. Agreements were entered into by

the proprietors of all the lands in the villages in question for the surrender of the lands on the statutory terms. The agreement contained the term that from the date of the agreement up to the date of the surrender no one should notwithstanding any law or custom to the contrary acquire or be considered entitled to either proprietary or occupancy tenancy rights in the said lands. At the second regular settlement in 1902 the *wajib-ul-arz* in each case recorded the agreement between the villagers in this form, "We the proprietors of the village have signed the agreement under the Sind-Sagar Doab Act of 1902..... No one can acquire proprietary rights in the village *shamilat* till then" The same agreement was recorded in the *wajib-ul-arz* prepared at the third regular settlement in 1926. The project of the canal, however, was never carried into effect. The excavation was never begun: and in 1929 when the scheme had been finally abandoned the Sind-Sagar Act of 1902 was repealed (Act VI of 1929). The plaintiffs claimed that by reason of the repeal the rights as in 1878 revived and must be taken never to have been affected. They had during the *interim* period been engaged in reclaiming waste lands, and sought to enjoy the rignts to become proprietors of the lands so reclaimed as though the various agreements had not been made:

Held, that the effect of the repeal of the Act was determined by the Punjab General Clauses Act, 1898, s. 4, and it could not be said that the Act once repealed was to be taken never to have been passed But apart altogether from the effect of repeal the agreements recorded in the second and third *wajib-ul-arz* operated independently of the Act They expressly determined the rights of the parties during a known period of transition. The plaintiffs must be held to their agreement: a result which was the more clearly just because the other proprietors acting on their agreement had lost rights of preventing the plaintiffs from acquiring the rights over the land they claimed. 163 Ind. Cas. 864 (1), approved.

Mr. *R. Ritson*, for the Appellants.

Lord Atkin.—These are consolidated appeals from the High Court of Judicature at Lahore who affirmed a decree of the Senior Subordinate Judge at Mianwali dismissing the suit of the plainttff so far as the present dispute is concerned. The plaintiffs are some of the proprietors in various villages in the Mianwali District. According to the respective village *wajib-ul-arz* prepared at the time of the first settlement in 1878 a proprietor had the right under certain conditions to reclaim the *shamilat* (waste land) of the village and become Adna Maliks of the land. The plaintiffs claim that in the last 30 years they have reclaimed such land in their respective villages and are entitled to the rights stated in the relevant *wajib-ul-arz*. But the original position as defined in 1878 was altered in consequence of a scheme of the Govt. of the Punjab to make a canal in the Sind-Sagar Doab for the purpose of irrigating tracts in that district. In furtherance of the scheme the Sind-Sagar Doab Colonisation Act was passed in 1902. Amongst other provisions it empowered the Govt. to make agreements between proprietors in the district for the surrender of their lands to Govt. on condition that they would receive back an area equal to one-fourth in the improved land. Such surrenders, however, were only to take effect on and from the date on which the excavation of the proposed canal should be begun.

In 1901, after the Act had received the assent of the Lieutenant-Governor, agreements were entered into by the proprietors of all the lands in the villages in question for the surrender of the lands on the statutory terms. The agreement contained the term that from the date of the agreement up to the date of the surrender no one should notwithstanding any law or custom to the contrary acquire or be considered entitled to either proprietary or occupancy tenancy rights in the said lands. So far the agreement was with the Govt. but at the second regular settlement in 1902 the *wajib-ul-arz* in each case records the agreement between the villagers in this form,

"We the proprietors of the village have signed the agreement under the Sind-Sagar Doab Act of 1902 .....No one can acquire proprietary rights in the village *shamilat* till then."

The same agreement is recorded in the *wajib-ul-arz* prepared at the third regular settlement in 1926. No one disputes that all the parties were bound at the time by the agreements so recorded in the respective *wajib-ul arz*, whose function in the Punjab at least is amongst other things to record village agreements of the kind. The project of the canal, however, was never carried into effect. The excavation was never begun; and in 1929 when the scheme had been finally abandoned the Sind-Sagar Act of 1902 was repealed (Act VI of 1929). The plaintiffs claim that by reason of the repeal the rights as in 1878 revived and must be taken never to have been affected. They had in fact during the *interim* period been engaged in reclaiming waste lands, and they now seek to enjoy the rights to become proprietors of the lands so reclaimed as though the various agreements had not been made. The Act it is said, once repealed, is to be taken never to have been passed. One sufficient answer to this contention is that the effect of repeal is now determined in the Punjab by the Punjab General Clauses

Act, 1898, s. 4, which provides that unless a different intention appears repeal shall not (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder or (*c*) affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed. But apart altogether from the effect of repeal the agreements recorded in the second and third *wajib-ul-arz* operate independently of the Act. They expressly determine the rights of the parties during a known period of transition. Until the surrender under the Govt. agreement the parties agree that the ordinary rights are not to operate. The plaintiffs must, be held to their agreement, a result which is the more clearly just because as pointed out by the Courts in India the other proprietors acting on their agreement have lost rights of preventing the plaintiffs from acquiring the rights over the land they now claim. Their Lordships find themselves in agreement with the reasons given by the Subordinate Judge in these cases, and by the High Court in their judgment in a previous case of *Ahmad Khan* v. *Jiwand Ram* (1), dated January 15, 1935, which was pronounced on a similar claim and which they followed in the present case. Their Lordships will humbly advise His Majesty that these appeals be dismissed. The respondents entered an appearance, but did not lodge a printed case, nor were they represented at the hearing. The appellants must pay such costs as the respondents have properly incurred.

S. *Appeal dismissed.*

Solicitors for the Appellants :—Messrs. *Douglas Grant & Dold.*

(1) 38 P L R 133; 163 Ind. Cas. 864; 9 R L 58.

OUDH CHIEF COURT

Second Civil Appeal No. 304 of 1938
March 7, 1941
AGARWAL, J.

JWALA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS
versus
LAKSHMI NARAIN—PLAINTIFF—RESPONDENT

Limitation Act (IX of 1908), Art. 142 — Suit for possession based on title—Plaintiff alleging dispossession—Art. 142 applies—Burden to prove possession within 12 years is on plaintiff—Plaintiff applying for mutation—Defendant co-sharer in possession denying title of plaintiff — Plaintiff's suit for possession—Limitation, when begins to run.

Article 142, Lim. Act, applies to a suit for possession based on title, where the plaintiff alleges his dispossession and the plaintiff has to prove his possession within 12 years of the suit. 152 Ind Cas. 1 (2) and 185 Ind. Cas. 736 (3), relied on. 168 Ind. Cas. 309 (1), held no good law.

The plaintiff applied for mutation of his name on April 29, 1924. The defendant objected and denied the plaintiff's title on May 19, 1924. The plaintiff learnt of this denial 15 days later. The Revenue Court dismissed the plaintiff's application on March 30, 1925 holding that the defendant was in possession. The plaintiff brought a suit for possession on March 30, 1937:

Held, that the suit was barred by limitation. Even assuming that the parties were co-sharers the possession of the defendant became adverse to the plaintiff from the date the plaintiff came to know of the denial of his title, and not from the date on which the plaintiff's mutation application was dismissed. The suit having been brought after 12 years from such date was time-barred. 152 Ind. Cas. 1 (2), relied on. 9 Ind. Cas. 391 (4), 149 Ind. Cas. 1172 (5) and *Bansgopal* v. *Shahzada Basdeo Singh* (6), distinguished.

S. C. A. against the order of the Addl. Civil Judge of Gonda, dated July 25, 1938.

Mr. *Bishun Singh*, for the Appellants.

Mr. *R. B. Lal*, for Appellant No. 1.

Mr. *Hargobind Dayal Srivastava*, for the Respondent.

Judgment.—This second appeal arises out of a suit brought by the respondent Lachhmi Narain for possession of 2 annas 7 pies 4 kirants share in village Gaura Buzurg.

Ram Charan, Rasiawan and Bindhyachal made a gift of 2 annas share in Gaura Buzurg to Ram Saran by means of a deed, dated October 20, 1880. Ram Saran brought a suit for possession against Ram Charan and others in 1885 for that 2 annas share. That suit was dismissed by the first Court, but on appeal Manik Ram, the nephew and heir of Ram Charan, admitted Ram Saran's claim, and the suit was decreed. Mutation was effected in favour of Ram Saran. Ram Saran died in 1900 or 1901, but his name continued in the papers over the share gifted to him. Lachhmi Narain put in an application on April 29, 1924, before the Revenue Court that his father died on March 1, 1924, and his name be mutated in his place. The original 2 annas share had been changed to 2 annas 7 pies 4 kirants by reason of the partition in the village. Manik Ram preferred an objection on May 19, 1924, that the applicant was not in possession and had no title. The Revenue Court decided on March 30, 1925, that

Manik Ram was in possession, and the application of Lachhmi Narain was dismissed. Manik Ram subsequently died leaving Jwala Prasad and Hira Lal, his sons, who are the appellants before me.

Lachhmi Narain brought a suit which has given rise to this appeal on March 30, 1937, for the possession of the 2 annas 7 pies 4 kirants share on the allegation that the defendants were in unlawful possession of it. The learned Munsif framed several issues on the pleas of the appellants and two of them were—

(1) Was the plaintiff in possession within twelve years?

(2) Have the defendants acquired title by adverse possession?

He held that the plaintiff's suit being based both on title and possession and dispossession, the burden of proving adverse possession was on the defendants. He, however, held that the defendants have established their adverse possession and dismissed the suit. The learned Civil Judge in appeal held that the adverse possession of the defendants was not proved and decreed the suit.

It is contended before me in appeal that the plaintiff ought to have proved his possession within twelve years, and that the appellants have succeeded in proving their adverse possession for more than 12 years. The first point which is for consideration before me is whether the plaintiff ought to have proved his possession within 12 years and if so whether he has succeeded in proving it. The first thing is to see the nature of the suit. It was stated in the plaint that the defendants were in possession without any right. It was stated by the plaintiff before the learned Munsif that he was in possession of the share in dispute and lost possession when his father's name was struck off the mutation register, and that he based his claim on title and not on possession and dispossession. It is, therefore, clear that it is a case in which the plaintiff alleges his dispossession, and the learned Munsif relied on *Sheo Moorat* v. *Chhangoo*, (1937 O. W. N. p. 585) (1), for the proposition that when the plaintiff's suit is based on title and possession and dispossession, the burden of proving adverse possession is on the defendants. This is no longer the view of law.

It was held by the Allahabad High Court in a case reported in *Bindhyachal Chand* v. *Ram Gharib Chand*, (A. I. R. 1934 All. p. 993), (2), that

"Article 142 is not restricted to suits based on possessory title only, and where a plaintiff who was a co-sharer with some of the defendants who transferred a part of the property to third parties admits in the plaint that he was dispossessed by the transferee some time prior to the institution of the suit, Art. 142 and not Art. 144 of the Lim. Act applies."

This Court also held in *Jaimangal Tewari* v. *Bindeshuri Singh*, (1939 O. W. N. p. 1005) (3), that—

"Article 142 is very general in its scope and application. There is no reason to confine the word 'plaintiff' in this Article to plaintiff's bringing their suits on possessory title only, and that it will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title"

It is, therefore, clear that this is a case to which Art. 142 is applicable.

The next point to consider is whether the plaintiff has succeeded in proving his possession within twelve years of the suit which was instituted on March 30, 1937. The learned Civil Judge appears to be of the view that the parties and their predecessors were co-sharers, and so no question of adverse possession could arise, till there was a denial by the defendants of the plaintiff's title. He was further of opinion that the limitation began to run not from the date of the denial by the defendants' predecessor in the mutation case, but from the date the mutation case was decided against the plaintiff. It may be assumed that the parties' predecessors were co-sharers, though this case was not specifically taken in the pleadings. It was observed by Sulaiman, C. J., in the Allahabad case above noted that—

"If, therefore, the plaintiff, a co-owner admits that he has been dispossessed and that, at any rate, for a short period prior to the suit, the possession of his co-owner was adverse to him, then he cannot fall back on a mere presumption of joint possession in his favour and succeed without showing any other circumstances whatsoever. But if the co-owner, who has been dispossessed were to satisfy the Court that he was actually dispossessed on some date within twelve years, he discharges his burden; or even if he proved that prior to that period the parties were on good terms with each other without any denial of title and without any quarrel, the Court may record a finding that the possession of the plaintiff prior to the period of actual possession was constructive."

It cannot be denied in this case that the possession of the defendants appellants

(1) 1937 O W N 585; 168 Ind. Cas. 309; 1937 O L R 250; 9 R O 462; A I R 1937 Oudh 328; 13 Luck 266

(2) A I R 1934 All. 993; 152 Ind. Cas. 1; 1934 A L R 968; 18 R D 541; (1934) A L J 973; 7 R A 302 (F B).

(3) 1939 O W N 1005; 185 Ind. Cas. 736; 1940 O L R 36; 12 R O 257; A I R 1940 Oudh 134; 15 Luck 157.

after mutation in favour of the father has been adverse. The mutation case was decided on March 30, 1925, and the suit was brought on March 30, 1937. It is to be seen whether the plaintiff had proved his possession, actual or constructive, within twelve years of the institution of the suit. The plaintiff stated that Ram Saran, his father, died 36 years ago, and after his death his elder brother Jainath looked after the property, that Jainath died 21 or 22 years go, and after him his widow *Mst.* Brijraji was in possession for a year or two, that after the death of Jainath Manik Ram, father of the appellants, was in possession, and used to pay profits to his guardian, *Mst.* Brijraji, and that he himself began to collect rent in 1924. He stated that he realised rent in April and October 1924. The mutation application was presented on April 29, 1924, Even if the plaintiff be believed, the last act of his possession was in October 1924, and the suit was instituted twelve years after it. It is said that he must be considered to be in constructive possession before it. Manik Ram clearly denied the title of the plaintiff on May 19, 1924. The plaintiff admits that he learnt of the denial of his title after 15 days, that is, in the end of May 1924. The suit was instituted even twelve years after that date. The learned Civil Judge has held that the title of the appellants became adverse not from the date the plaintiff came to know of the denial of his title by Manik Ram, but from March 30, 1925, when the mutation order was made. I think that it cannot be said that the defendants' father was in possession on behalf of the plaintiff, after he had denied his title. The learned Civil Judge has relied on *Muhammad Bakar* v. *Nawab Mirza Muhammad Bakar Ali Khan*, (38 Indian Appeals, p. 23) (4). In that case the plaintiff had applied in 1867 for regular settlement of certain villages, and then adverse title was distinctly set up. Her application was dismissed in 1868, and the suit was instituted in 1905 . The point, whether the adverse possession began to run from the date her title was denied or from the date of the dismissal of her application, did not arise in the case, because the suit was instituted some 37 years after the dismissal of the application The other case relied by the learned Civil Judge is *Brahma Singh* v. *Raghuraj Singh*, (10 O. W. N. p. 1926) (5). That was a suit for profits by one co-sharer against another. The defendant claimed some property as exclusively his. In a previous partition case he had claimed the property as his, but his application was disallowed. It was held that as his claim was unsuccessful, so the limitation did not run in his favour. This case is quite distinguishable from the present one. In this case it was found by the mutation Court that Manik Ram had been in possession. I see no reason to hold why the possession of Manik Ram did not become adverse to the plaintiff from the date the plaintiff came to know of the denial of his title. The learned Counsel for the respondent has relied on *Bansgopal* v. *Shahzada Basdeo Singh*, (20 Oudh Cases, p. 127) (6). That was a suit for a declaration that the defendants had no proprietary or under-proprietary rights in the land. Before the institution of the suit the Assistant Collector had cancelled a notice of ejectment on the ground that the defendants had made out a *prima facie* claim to under-proprietary rights. It was held that the limitation began to run from the date the order became final. That was a suit to which Art. 120 of the Lim. Act was applicable and not Art. 142 or Art. 144, and it was virtually a suit for the setting side of the order, and so the cause of action did not arise till the order became final. So in my opinion the possession of the defendants' predecessor ceased to be on behalf of the plaintiff when he denied the latter's title within his knowledge. As the suit was instituted beyond twelve years from that date it was barred by time.

I, therefore, allow the appeal, set aside the order of the lower Appellate Court and restore that of the first Court. The appellants will have their costs throughout.

S. *Appeal allowed.*

(4) 38 I A 23; 9 Ind. Cas. 391; 33 C 125; 13 C L J 63; 8 A L J 132; 15 C W N 273; (1911) 1 M W N 127; 13 Bom.L R 75; 21 M L J 109, 14 O C 95; 9 M L T 200 (P C)

(5) 10 O W N 1326; 149 Ind. Cas. 1172; A I R 1933 Oudh 560; 18 R D 21; 6 R O 611; L R 15 A (O) 118.

(6) 27 O C 127.

OUDH CHIEF COURT

First Civil Appeal No. 85 of 1937

January 31, 1941

THOMAS C. J. AND GHULAM HASAN, J.

Syed MOHAMMAD RAZA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Syed AHMAD ABBAS—DEFENDANT —RESPONDENT

U. P. Land Revenue Act (III of 1901), *ss.* 109, 111, 112, 106—*Application for perfect partition—Rejection of, on ground that such partition was excluded by certain agreement—Order falls under s.* 111 (1) (c) *and is appealable—Agreement providing that on partition revenue shall be paid through* taluqdar lambardar—*Validity of condition.*

An application was made for perfect partition of a *taluqdari* village. An objection having been raised the Deputy Commissioner heard the parties, considered the report of the Sub-Divisional Officer and came to the conclusion that the right to perfect partition was excluded by a certain agreement and that the previous decision of the Commissioner was *res judicata* and hence he rejected the application:

Held, that the objection raised the question of proprietary title and the Deputy Commissioner acted under cl. *c*) of sub-s. (1) s. 111 of the Land Revenue Act and under the first portion of sub-s. (1) of s. 111. An appeal, therefore, was competent from his order rejecting the application. 179 Ind. Cas. 801 (1), *Mohammad Sahamat Khan* v. *Aziz-un-nissa* (2) and 77 Ind. Cas. 358 (3), distinguished *Abu Muhammad Khan* v. *Kaniz Fizza* (4), relied on.

The condition in the deed of agreement to the effect that on perfect partition the Govt. revenue shall be paid through the *taluqdar lambardar*, imposes a restraint upon partition and consequently cannot be enforced; at any rate it is not binding upon the successors to the contracting parties. *Rajendra Dutt* v. *Sham Chund Mitter* (5), *Jafri Begum* v. *Syed Ali Raza* (6), 52 Ind. Cas. 73 (7), relied on, 97 Ind. Cas. 897 (8) and 120 Ind. Cas. 387 (9), distinguished.

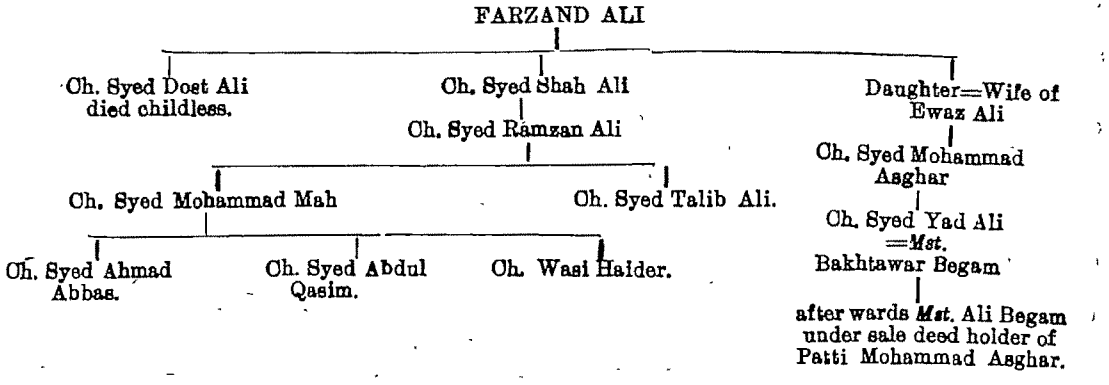
F. C. A. against the order of the Deputy Commissioner of Unao, dated April 30, 1937.

Messrs. *M. Wasim* and *Ali Hasan*, for the Appellants.

Mr. *Akhlaque Husain*, for the Respondent.

Judgment.—This is a first civil appeal by the plaintiffs against the order passed by the Deputy Commissioner of Unao dated April 30, 1937, rejecting the plaintiffs' application for a perfect partition.

A short pedigree (Ex. A-6), which is not disputed by the parties, may be given to illustrate the material facts :—


FARZAND ALI
Ch. Syed Dost Ali died childless.
Ch. Syed Shah Ali
Ch. Syed Ramzan Ali
Daughter=Wife of Ewaz Ali
Ch. Syed Mohammad Asghar
Ch. Syed Mohammad Mah
Ch. Syed Talib Ali.
Ch. Syed Yad Ali =Mst. Bakhtawar Begam
Ch. Syed Ahmad Abbas.
Ch. Syed Abdul Qasim.
Ch. Wasi Haider.
after wards Mst. Ali Begam under sale deed holder of Patti Mohammad Asghar.

Chaudhri Dost Ali was the original *taluqdar* and his name was entered in list III prepared under s. 8 of Act I of 1869. Chaudhri Dost Ali died childless and upon his death a dispute arose between his nephew Chaudhri Ramzan Ali and his sister's son Chaudhri Mohammad Asghar. A partition deed by way of compromise was effected on March 5, 1877, between Chaudhri Ramzan Ali and Chaudhri Mohammad Asghar (Ex. A-3). Under this deed it was agreed that Chaudhri Ramzan Ali shall own ten annas and Chaudhri Mohammad Asghar six annas of the properties left by Chaudhri Dost Ali. Chaudhri Ramzan Ali was to become the *lambardar* and was to make collection of rents. It was stipulated that in case of dispute between them the *ilaqa* was to be divided and each person was to remain in possession of the property according to the shares mentioned above and shall pay Govt. revenue of his share to the *taluqdar lambardar*, who shall deposit the same with the Govt. As long as they were to remain joint there was to be a rendition of accounts. It appears that Chaudhri Mohammad Asghar filed an application on April 14, 1885, for a perfect partition before the Deputy Commissioner of Unao. The Deputy Commissioner thought that as the estate was in list III and as in view of the agreement dated March 5, 1877, Chaudhri Ramzan Ali was to remain the *taluqdar* and the head of the family and Chaudhri Mohammad Asghar was to pay the Govt.

revenue through him, the application for the perfect partition could not be allowed (Ex. A-1). The Commissioner on appeal upheld this decision on July 30, 1885, (Ex. A-2).

Mst. Ali Begam acquired the interest of Mohammad Asghar in the six annas share held by his descendants. She applied on August 15, 1936, for a perfect partition in respect of village Unao proper before the Deputy Commissioner of Unao. She died during the pendency of the partition proceedings and was succeeded upon her death by her husband and her sons and daughters, who are the present appellants. The application was made against Chaudhri Ahmad Abbas, who is the grandson of Chaudhri Ramzan Ali. The application stated that the nature of the *mahal* sought to be partitioned is an imperfect *pattidari* but there had been in existence one *patti* of six annas relating to the applicant's share and the other *patti* of ten annas relating to the share of the opposite party on the basis of mutual partition. The object of the application was to equilise the area and valuation of the two *pattis* and also to get partition of a *patti* which was still held joint.

An objection was raised by the respondent to the perfect partition on the ground that the order of the Deputy Commissioner and the Commissioner in 1885 had decided the matter between the parties and held that no partition could be effected in view of the deed of agreement dated March 5, 1877. Objection was also raised that town Unao was a *taluqdari mahal* and could not be partitioned without the sanction of the Local Govt. under s. 138 of the Land Revenue Act.

The Assistant Collector, First Class, made a report to the Deputy Commissioner in which he stated the controversy arising between the parties. He rejected the objection of the respondent that no partition could take place without the sanction of the Local Govt. He, however, recorded the opinion that the history of the estate pointed out that the estate was impartible and the agreement of 1877 maintained the impartible nature of the estate. He summed up his conclusion in these words :—

"I therefore hold that the Deputy Commissioner's decision of 1885 upheld by the Commissioner is at least a piece of evidence showing that the applicant cannot apply for a perfect partition of the Unao *taluqa*. I am therefore of opinion, that this application for perfect partition should be thrown out.

To Deputy Commissioner for ordera."

The learned Deputy Commissioner recorded a somewhat laconic order, which is as follows :—

"I have heard the parties and considered the report of the Sub-Divisional Officer of Unao, in which he has clearly set out the facts of this case. I agree with the Sub-Divisional Officer that the Commissioner's judgment of 1885, *Mst. Asghari Begam* v. *Ramzan Ali* refusing a perfect partition of the *mahal* in question operates as *res judicata*. I, therefore, order that the proceeding be quashed under s. 109 (1) of the Land Revenue Acts. The application for perfect partition is rejected."

The appellants have preferred a first appeal under s. 112 of the Land Revenue Act against the aforesaid order of the Deputy Commissioner.

Our attention has been drawn by both parties to the fact that an appeal originally filed by the appellants before the Commissioner of Lucknow was dismissed on September 13, 1937, on the ground that the appeal lay to this Court.

On behalf of the respondent it has been argued that no appeal lies against the order of the Deputy Commissioner. It is urged in the first place that no question of proprietary title was raised before the Deputy Commissioner inasmuch as the objection made by the respondent merely related to the mode of partition, and in the second place even such a question had been raised it was necessary under cl. (1) of s. 111 of the Land Revenue Act to show that the question had not been already determined by a Court of competent jurisdiction. It was also suggested that the Deputy Commissioner had not taken action under s. 111 (1) (c) of the Land Revenue Act. Reliance has been placed in support of these contentions on *Bhagwan Prasad Singh* v. *Mst. Abhairaji* (A. I. R. 1939 Oudh 108) (1) and *Mohammad Shahamat Khan* v. *Mst. Aziz-un-nissa* (7 O. C., 161) (2). Lastly it was argued that the order of the Deputy Commissioner fell within the purview of s. 109 of the Land Revenue Act and as such it was appealable only to Revenue Courts and not to Civil Courts. Learned Counsel has referred to *Md. Ahsan Ali* v. *Masud Ali* (A. I. R. 1924 Oudh, 149) (3) in this connection. We are satisfied that these contentions have no substance.

It appears from a perusal of the order of the Deputy Commissioner read with the report of the Assistant Collector, which

(1) A I R 1939 Oudh 108; 179 Ind. Cas. 801; 1939 O W N 173; 11 R O 209; 1939 O L R 95; 1939 R D 113.

(2) 7 O C 161.

(3) A I R 1924 Oudh 149; 77 Ind. Cas. 358; 10 O L J 339; 10 O & A L R 146; L R 5 A (O) 18 Rev.

appears to have been accepted, that the order of the Deputy Commissioner is based upon the fact that the name of the original *taluqdar* was entered in list III of Act I of 1869, that the agreement dated March 5, 1877 by reason of its conditions, excluded the right of perfect partition and that the previous decision of 1885 passed by the Deputy Commissioner of Unao and confirmed by the Commissioner was *res judicata*. We are, therefore, of opinion that the learned Deputy Commissioner acted under cl. (c) of sub-s. (1), s. 111 of the Land Revenue Act and under the first portion of sub-s. (1) of s. 111. He enquired into the merits of the objection raised in the case as to the question of the proprietary title and came to the conclusion that the right to perfect partition was negatived by the terms and conditions of the agreement dated March 5, 1877. Having pronounced his opinion upon the merits of the matter, he went on to express the opinion recorded by the Assistant Collector that the matter having been determined in 1885 was *res judicata*. The case of *Bhagwan Prasad Singh* v. *Mst. Abhairaji* (A. I R. 1939 Oudh 108 (1)) is clearly inapplicable to the facts and circumstances of the present case. There the Partition Officer overruled the objection to the partition without deciding the question on the merits In the case reported in 7 O. C., 161 (*Mohammad Shahamat Khan* v. *Mst. Aziz-un-nissa*) (2) the objection raised to the partition was that the property was not partible. It was held that this objection certainly involved a question of proprietary title within the meaning of s. 111 of the Land Revenue Act. The Assistant Collector without going into the merits of the objection decided that s. 111 did not apply as the question had already been determined by a Court of competent jurisdiction. An appeal was preferred against the order of the Assistant Collector to the Court of the Judicial Commissioner. It was held that the order of the Assistant Collector dismissing the partition was not a decree within the meaning of s. 112 of the Land Revenue Act, 1901, and consequently no appeal lay. It was further held that it is only when the revenue Court goes into the merits of the objection that the order dealing with the objection is appealable as a decree. The latter observation is applicable to the circumstances of this case. We are further of opinion that the order of the Deputy Commissioner does not fall under s. 109 (1) of the Land Revenue Act. The Deputy Commissioner decided the objection under cl. (c) sub-s. (1) of s. 111 and as a necessary corollary to his finding upon that objection quased the proceedings under s. 109 of the Act. We are not prepared to hold that the Deputy Commissioner disavowed his intention to proceed under s. 111 of the Land Revenue Act and instead proceeded under s. 109 of the Land Revenue Act.

The case in *Md. Ahsan Ali* v. *Masud Ali* (A. I. R. 1924 Oudh 149) (3) has no application whatever to the facts of the present case.

Learned Counsel on behalf of the appellants has cited *Abu Muhammad Khan* v. *Kaniz Fizza* (I. L. R. 28 All., 185) (4) where it was held that an agreement amongst the members of a family holding property jointly that the family property should not be partitioned, could not bind the property in the hands of the descendants of the parties to the agreement; also that the question whether such an agreement could be binding on the property in the hands of the descendants of the parties thereto was a question of proprietary right within the meaning of s. 113 of Act XIX of 1873, and an appeal would, therefore, lie from the finding therein. Our decision upon the preliminary objection is that the present appeal is competent.

It has been argued on behalf of the appellants before us that the agreement dated March 5, 1877 expressly provides for partition and the fact that the revenue was to be paid by Chaudhri Mohammad Asghar through Chaudhri Ramzan Ali the *lambardar*, is no bar to a perfect partition after the death of the two contracting parties. It is argued that the agreement in question may be valid and binding between the contracting parties thereto but it is of no legal effect as against their heirs or transferees. Reliance has been placed in support of this contention on *Rajendra Dutt* v. *Sham Chund Mitter* (I. L. R 6 Calcutta, 108), (5), *Jafri Begam* v. *Syed Ali Raza* (I. L. R. 23 All. 383) (6) and *Sakhawat Ali* v. *Abu Said* (22 O. C., 100) (7).

In the first case it was provided by the agreement between five brothers of the joint Hindu family that none of the

(4) 28 A 185; 2 A L J 652; A W N 1905, 240.
(5) 6 C 106.
(6) 23 A 383; 8 I A 111; 5 C W N 585; 11 M L T 149; 3 Bom. L R 311; 8 Sar. 27 (P C).
(7) 22 O C 100; 52 Ind. Cas. 78.

parties, nor their representatives, nor any person, shall be able to divide the real and personal property belonging to the family into shares. A son of one of the brothers sold his share in the family property. In a suit by the purchaser for partition it was held that the general scheme of the arrangement between the brothers could only be binding on the actual parties to it and not upon a purchaser from one of the parties. It was observed that the clause in the agreement against partition must be regarded as a mere restraint on partition and that a man cannot by gift *inter vivos* or by will give property absolutely to another and yet control the mode of enjoyment in respect of partition or otherwise.

The case of *Jafri Begam* v. *Syed Ali Raza* (I. L. R. 23 All. 383) (6) was a case of an award in which the arbitrator had directed that the property awarded to the heirs should not be partitioned as it was calculated to lead to ruin and destruction. It was held that the arbitrator had no power to make property, which was divisible by law, indivisible for ever and the direction in restraint of partition was inoperative against the heirs of the contracting parties.

These two decisions were followed in *Sakhawat Ali* v. *Abu Said* (22 O. C., 100) (7) here it was held that owners of property which is in its nature partible cannot, by an agreement among themselves, impress upon it permanently the character of impartibility.

The position taken up on behalf of the appellants is not seriously contested by learned Counsel on behalf of the respondent. His argument, however, is that the condition in the deed of agreement dated March 5, 1877 to the effect that the Govt. revenue shall be paid through the *taluqdar lambardar*, does not impose any restraint upon partition and consequently neither of the cases cited above has any application to the present case. Learned Counsel on behalf of the respondent concedes that he has no objection to the perfect partition being made if the condition as regards the payment of the Govt. revenue by the appellants through the respondent is complied with. We are of opinion, that this position is not legally maintainable. Section 106 of the Land Revenue Act provides that in "perfect partition" the whole *mahal* is divided and the several portions become separate *mahals*, each severally responsible for the revenue distributed thereon. Once the right of the appellants to a perfect partition is either admitted or established there can be no doubt that the responsibility for payment of the Govt. revenue shall fasten under the provisions of the Land Revenue Act upon each separate *mahal*, which is formed as a result of the perfect partition and it is not open to the parties to enter into an arrangement whereby the statutory liability to pay the Govt. revenue imposed by the Act is contravened. We are also of opinion that such a condition cannot be imposed and is at any rate not binding upon the successors to the contracting parties. To allow such a condition to operate is, in other words, to bar the right of a party to a perfect partition to which he is otherwise entitled. It has been suggested in course of the arguments on behalf of the respondent that although such a condition may be invalid in an ordinary deed, it must be regarded as legal and binding in the agreement dated March 5, 1877, as it was of the nature of a family settlement. We are, however, of opinion that the condition about the payment of Govt. revenue through the *taluqdar* is a condition which imposes a restraint upon partition and cannot be enforced against the plaintiffs. None of the cases in *Ahmad Azim* v. *Safi Jan* (A. I. R. 1926 Oudh, 561) (8) and *Honuman Sahu* v. *Abbas Bandi Bibi* (A. I. R. 1929 Oudh, 193), (9) which were relied upon by the learned Counsel for the respondent has any bearing upon the present case.

The result is that we allow the appeal with costs set aside the order passed by the Deputy Commissioner of Unao and direct that the application for partition filed by the appellants shall be proceeded with according to law.

S. *Appeal allowed.*

(8) A I R 1926 Oudh 561; 97 Ind. Cas. 897; 3 O W N 102 Sup.; 2 Luck 335.

(9) A I R 1929 Oudh 193; 120 Ind. Cas. 387; 6 O W N 169; 4 Luck. 452; Ind. Rul. (1930) Oudh 3.

CALCUTTA HIGH COURT

Suit No. 51 of 1938

January 25, 1940

PANCKRIDGE, J.

PULIN KRISHNA MUKHERJEE —PLAINTIFF,

versus

ADYA NATH MUKHERJEE AND OTHERS— DEFENDANTS

Hindu Law—Religious endowment—Shebaitship—

Suit about—Parties—Deity, if necessary party—Turn of worship (joint pala*)—Partition of—Extent of—Partition—Consent decree not to partition, if acts as estoppel.*

Where in a suit merely questions of *deb-sheba* arise, the idol is not a necessary party to be brought on the record, for the transferability of *shebaitship* does not depend upon the will of the idol. 102 Ind. Cas. 409 (2), relied on, 87 Ind. Cas. 305 (1), distinguished.

The joint *pala* cannot be put up for sale as it would be wrong to compel the holder of a religious office to part with it against his wishes for a pecuniary consideration but the joint *palas* can be partitioned by giving each *shebait* a turn of worship in rotation when, the *shebaits* have a material and proprietary interest in the offerings and it has become impossible owing to disputes and differences to carry on the *sheba* jointly. *Sri Raman Lalji Maharaj* v. *Gopal Lalji Maharaj* (3), distinguished:

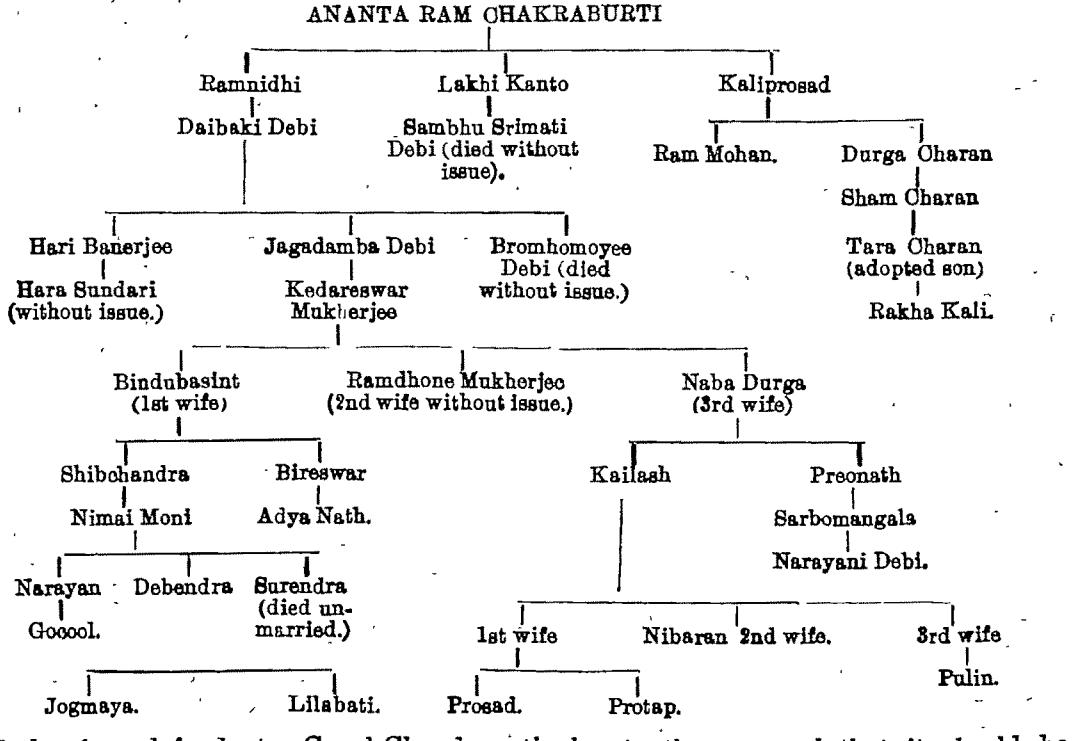
Held, that the custom existed whereby the *palas* of the deity were trasferable.

A subsisting consent decree providing *inter alia* that the land in suit should not be partitioned, so long it stands operates as an estoppel between the parties and their representatives. 11 Ind. Cas. 984 (4), followed.

Messrs. *J. N. Majumdar* and *S. C. Mitter*, for the Plaintiff.

Messrs. *M. N. Dutt* and *J. C Sett*, for the Defendants.

Judgment.—In this suit the plaintiff seeks to obtain a declaration that he is entitled to the *shebaitship* and *pala* or turn of worship, particulars of which are given in para. 10 of the plaint. His claim is based on a registered deed of gift of August 14, 1929, whereby the plaintiff's father, Nibaran Chandra Mukherjee, purported in consideration of natural love and affection to transfer to the plaintiff his (the donor's) right, title and interest to and in the worship of the deity Sree Sree Sidherwari Thakurani and in his several *palas* or turns of worship. The plaintiff also asks for the partition of a certain joint *pala* among the parties entitled thereto, or in the alternative a direction for the sale of the said joint *pala* to the highest bidder among the parties to the suit. The most complete pedigree of the family with which we are concerned is to be found in the written statement of the defendant Adya Nath Mukherjee.



Of the four defendants, Gocul Chandra Mukherjee and Panchcowrie Banerjee do not appear. The defendant Adya Nath Mukherjee does not contest the plaintiff's claim to a declaration, and his opposition has been limited to the plaintiff's demand to have the joint *pala* partitioned, and in particular to the proposal that it should be sold to the highest bidder among the parties. The substantial contest is that between the plaintiff and the defendant Narayani Debi. In para. 14 of the plaint the plaintiff alleges that by custom the *pala* is transferable. This allegation is

traversed in para. 4 of Narayan's written statement, which goes on to state that the *shebaitship* was all along vested in the heirs of the founder and there was no custom to the contrary. All parties agree that the Hindu Law as regards the transferability of the office of *shebait* by way of gift is accurately summarized at p. 487 of the late Sir Dinshaw Mulla's Principles of Hindu Law, Edn. 8. It will be convenient to set out the relevant passage:

"*Gift.*—Though a sale of a religious office is void, there is no absolute prohibition against a gift of such an office. Cases of this kind generally arise where the founder of an endowment has reserved the right of management to his own family, or has conferred it upon some other family. In such a case, it is competent to the *shebait* to renounce his right of management and transfer it to a person standing in the line of succession, provided the transferee is not disqualified by personal unfitness. Similarly, where there are several joint *shebaits*, they may renounce their right in favour of any one of them, provided the arrangement is for the benefit of the endowment. But a gift of the right of management made to a stranger is not valid, unless it is sanctioned by custom."

The first document relied on by the plaintiff is the will of Shamboo Chandra Chakravarti, a grandson of the founder of the endowment, Ananta Ram Chakravarti. That document is dated November 24, 1923 and a copy is annexed to a bill of complaint filed on the equity side of the Supreme Court in 1842. The testator specifically mentions his interest in the *shebaitship* in the words,

"and as to, for, and concerning my interest in and to the idol Sree Sree Sideswari Thakurani and her temple and all her estate and effects and also to the profit arising from the offering to the said Thakurani and to perform her ceremonies,"

and he bequeathed this interest along with the rest of his estate to Ramdhone Mukherjee. Another testamentary document which has been put in evidence is the will of Shib Chandra Mukherjee, dated July 17, 1880. This document in itself does not seem to me to carry matters any further, because the *shebaitship* is not specifically referred to, for the will is a simple document, bequeathing a life interest in the testor's entire estate to his wife with remainder to his sons and grandson in equal shares. It must however be mentioned here that in Suit No. 244 of 1891, which was a partition suit in which Nibaran was the plaintiff, Shib Chandra's will was considered by Sale, J., who held that the terms of the will were sufficiently wide to pass the whole estate including the right to worship to the testator's widow for life. In this suit a compromise was effected by a deed of settlement, to which Nibaran, Bireswar, Sarbomangala (widow of Preonath) and Nemaimoni were parties, dated December 6, 1892. Clause 3 deals with those days of the *sheba* when the worship is "cyclical" and not joint, and contains a provision whereby Sarbomangala leases her *pala* for consideration to Bireswar for a period of five years. With regard to the joint *pala* the position is as follows: Since the days of Ramdhone, the grandfather of Nibaran and Adya Nath, the *sheba* has been performed jointly on certain festival days when the offerings are unusually valuable, these offerings being subsequently divided among the *shebaits* according to their shares. These days are six in number, being four days of the Durga Puja, one day of the Kali Puja, and one day of the Ratami Puja. With regard to this joint *sheba*, cl. 4 of the deed provides as follows:

"It is further declared that keeping the joint *pala* joint, that is, in common, we have divided and take our ancestral separate seventeen days *pala* in the above manner, and we four persons declare that none of us four persons and our heirs and representatives shall ever be at liberty to urge objection or plea with regard to the holding of the said *palas* in the above manner. Should we or they raise any objection or plea it would be void and rejected by the Court."

Some time after the termination of the leasehold interest granted by Sarabomangala to Bireswar under the deed of December 6, 1892, she again leased out her *pala* of four and a quarter days by way of mortgage to Adya Nath for a period of seven years. Narayani was a party to this document in which she acknowledged that its terms were binding on her. With regard to the interest of defendant No. 4 Panchcowrie Banerji the position is this. The line of Kali Prosad, the founder's third son, came to an end with the death of Tara Charan Chakravarti, the adopted son of Shama Charan, Kali's grandson. Tara Charan died childless his sole heir being his widow Rakha Kali. This lady on May 17, 1905, executed a conveyance wherein she recited that she was absolutely entitled to a *pala* of thirteen days in every month and to a two-fifths share in the joint *sheba*. She then proceeded to convey her *pala* and her share in the joint *sheba* to her brother Kalipada Banerjee, for the consideration therein named, such consideration being the payment of the balance of the profits of the *sheba* to herself for her natural life. Kalipada is now dead, and his interest has devolved upon his son, the defendant Panchcowrie. On September 8, 1913, shortly after the death of Rakha Kali

Nibaran instituted a suit against Kalipada (No. 942 of 1913), asking for a declaration that the defendant Kalipada had no interest in the deity, or its *sheba*, or its properties. This suit was compromised in terms of a deed of settlement executed on April 2, 1914. To this deed the defendant, Adya Nath was a party, though Narayani, in spite of the fact that she was impleaded in the suit, was not. The deed recites that there is a long standing custom of alienation of *shebaitship* by deed and will or either of them. In the face of this recital, Adya Nath's Counsel has felt it impossible to question the existence of the custom. The operative part of the deed conveys certain days of the thirteen days of Kalipada's *pala* to Nibaran and Adya Nath and also fractional shares in the joint *pala*. Kalipada died in 1926. Prior to this Jogmaya and Lilabati daughters and heiress of Debendra, the second son of Shib Chandra, had sold one-third of their *pala* to Gocool. These are all the relevant facts. A technical issue as to non-joinder was raised. First it was said that the deity should have been made a party. Since the decision of the Judicial Committee in *Promotha Nah* v. *Pradhyumna Kumar* (1), this is a contention which is advanced almost as a matter of course.

However, as was pointed by C. C. Ghose, J. delivering the judgment of the Court in an appeal from the original side, *Brojendra Nath* v. *Lalit Mohan* (2), that case *Promotha Nath* v. *Pradhyumna Kumar* (1), is no authority for the broad proposition that in every case where questions of *debsheba* arise, the idol is a necessary party to be brought on the record. In the present case the main question, *i. e.*, the transferability of the *shebaitship*, cannot depend upon the will of the idol. As to the secondary issue which is concerned with the claim for partition of the joint *pala*, inasmuch as I do not propose to disturb the status *quo*, I see no reason to have the idol separately represented. It was further suggested, though the contention was not very vigorously urged, that Nibaran's other two sons, the plaintiff's half-brothers Protap and Prosad, as also Jogmaya and Lilabati should have been impleaded. I confess that I do not see on what principle these parties should be joined, although of course any decree made in the suit in no way binds them. On the main question I have come to the conclusion that the plaintiff has succeeded in proving that a custom exists whereby the *palas* of the deity are transferable. The language of the will of Shamboo Chandra, which was executed as long ago as 1823, is to all intents and purposes a specific bequest of the *pala*. The only instance in which a transfer has been called in question is Nibaran's suit of 1913 which was eventually compromised in terms of a document which expressly recognizes the transferability of the *pala*.

There is force in the contention that some of the transfers on which the plaintiff relies, as for example the leases by Sarbomangala and Narayani and the sale by Jogmaya and Lilabati, are open to attack on the ground that they are for consideration, but the fact remains that, although they might possibly have been set aside at the instance of the other *shebaits*, they have in fact been accepted. In these circumstances I hold that the plaintiff is entitled to the declaration for which he asks in para. (a) of the prayer to the plaint. On the other hand I reject his claim for partition of the joint *palas*. In so far as he seeks to have the joint *pala* put up for sale, I consider that it will be contrary to principle to make such an order as in my view, it would obviously be wrong to compel the holder of a religious office to part with it against his wishes for a pecuniary consideration. As to partitioning the joint *palas* by giving each *shebait* a turn of worship in rotation there is in my opinion, no general legal objection to such a course, since cases like *Sri Raman Lalji Maharaj* v. *Gopal Lalji Maharaj* (3), do not apply when, as here, the *shebaits* have a material and proprietary interest in the offerings. I find however the plaintiff has failed to show that, as he alleges in para. 13 of the plaint, it has become impossible owing to disputes and differences to carry on the *sheba* jointly.

But, apart from this, I consider that the deed of settlement of September 6, 1912, to which Nibaran was a party is a bar to any claim on the part of a *shebait* to partition. In an earlier part of this judgment I have set out the terms of cl. 4 of that document *in extenso* and there is no no need to repeat them. They have become part of a decree of the Court, and I think that

(1) 52 I A 245; 87 Ind. Cas. 305; A I R 1925 P C 139; 52 C 809; 23 A L J 537; 49 M L J 30; (1925) M W N 431; 41 C L J 551; 2 O W N 557; 27 Bom. L R 1064; 22 L W 492; 30 C W N 25; 3 Pat. L R 315 (P C).

(2) A I R 1927 Cal. 262; 102 Ind. Cas. 409; 45 C L J 41.

(3) 19 A 428; A W N 1897, 103.

in the circumstances *Cowasji* v. *Kisandas* (4), is of assistance. In that case certain predecessors-in-title of the parties had consented to a decree which provided *inter alia* that the land in suit should not be partitioned. In dealing with the plaintiff's claim for a partition decree the Court observed :

"Apart from that clause in the consent decrees which affects to prohibit partition, we think it clear that, as tenants-in-common, the plaintiffs would be entitled to partition.

But the question is whether in this suit the plaintiffs are entitled to give the go-by to a particular clause in an existing decree on the ground that that clause, if resting on no higher authority than the agreement between the parties, would be bad in law. We think that this question must be answered in the negative. It may be though we express no opinion as to this that in a suit properly framed for that purpose the plaintiffs might have been able to get the decree set aside. But no such such has been brought and the decree is a subsisting decree nor does it, we think, make any difference that it was taken by consent of the parties who were all *sui juris*. The decree stands, and, while it stands, it operates as an estoppel between the then parties and their present representatives."

In the result the plaintiff has partly succeeded and partly failed. I see no reason why the *debutter* estate should be burdened with the entire costs of the litigation. I therefore make no order as to the costs of the plaintiff and of the defendant Narayani. The defendant Adya Nath has not resisted the declaratory decree for which the plaintiff asked, but he has successfully opposed the prayer for partition or sale of the joint *sheba*. In these circumstances he may have his taxed costs out of the *debutter* estate.

D. *Order accordingly.*

(4) 35 B 371; 11 Ind. Cas. 984; 13 Bom. L R 649.

MADRAS HIGH COURT

Civil Revision Petition No. 218 of 1940

February 26, 1940

HORWILL, J.

In re MUNIRATNA GURUKKAL —PETITIONER

Madras Hindu Religious Endowments Act (II of 1927), s. 84 (1)—Villagers actively managing temple since 1904—Presumption that they had right to manage even prior to 1904—Archakas allowed to manage small portion—Effect.

Where the villagers were managing a temple since 1904 though prior to that date they had allowed the *archakas* to manage the small property of the temple for some years:

Held, that the presumption was that even before that year the villagers had the right of management and the villagers by allowing the *archakas* for some years before 1904 to manage the small property of the temple, did not lose their right of management of the institution, or even of its property.

C. R. P. to revise the order of the District Court, North Arcot dated August 28, 1939.

Facts.—Petition under s 84 (2), Madras Hindu Religious Endowments Act, to set aside the order of the Board declaring that the Selva Vinayakar Temple at Shevpakkam is a non-excepted temple on the ground that the petitioners have been in the management of the temple and its properties, including a piece of land, endowed for specific purposes not connected with the temple, that some of the leading members of the village were enlisted by the petitioner's father along with him some time back only for the conduct of Brahma Utsavam. On evidence it was found by the District Judge that there was a *dharmakartha* in 1904, and in the subsequent period also and that petitioner and his ancestors were only styled as *archakas* and that therefore they were not hereditary trustees and the temple was, therefore not an excepted temple within the meaning of the Madras Hindu Religious Endowments Act.

Mr. *K. Umamaheswaran*, for the Petitioner.

Order—There can be no doubt that after 1904, the villagers have been actively managing the suit institution. The presumption is, therefore, that even before that year they had the right of management—or the petitioners would not have acquiesced in the loss of their authority. Moreover, the petitioners have on more than one occasion described themselves only as *archakas*, and have allowed others to be called *dharmakarthas*. The villagers, by allowing the *archakas* for some years before 1904 to manage the small property of the temple, did not lose their right of management of the institution, or even of its property. The petition is dismissed.

N.-D. *Petition dismissed.*

ALLAHABAD HIGH COURT

First Appeal No. 323 of 1938
August 30, 1940
COLLISTER AND BAJPAI, JJ.
Maharaj DHARAM NARAIN—DEFENDANT—APPELLANT
versus
Maharaj SURAJ NARAIN—PLAINTIFF—RESPONDENT

Limitation Act (IX of 1908), Arts. 124, 120, s. 10—Art. 124, applicability to appointment to office by nomination—Distinction between claim to religious office and to property of endowment as also between movable and immovable property of endowment, if can be made—Suit against trustee de son tort, for accounts—S. 10, if applies—Article applicable—Civil Procedure Code (Act V of 1908), s. 92—Suit by person calling himself trustee against defendant alleged to be trespasser for possession of waqf property and office of mutwalli by dispossession of defendant—Competency—S 92, if bar—Hindu Law—Religious endowment—Shebaitship—Devolution of—Principles as to, stated.

Article 124, Lim. Act is not applicable where the appointment to the office is made by nomination and applies only when the appointment is by succession through inheritance. [p. 702, col. 1.]

There is no distinction as regards limitation between a claim to an office and a claim to the property of endowment. Nor is there any distinction between movables and immovables in a matter of endowment. *Gnanasambandha Pandara Sannadhi* v. *Velu Pandaram* (5), relied on. [p. 702, col. 2.]

In a suit for accounts against the trustee *de son tort* s. 10, Lim. Act, will not apply, for, it applies to cases of express trust alone. Such a point is governed by Art. 120. [p. 705, col. 1.]

[Case-law referred to]

Where an ordinary suit for ejectment is filed by a plaintiff who calls himself a trustee against a defendant who is alleged to be a trespasser, the plaintiff can ignore s. 92, Civil P. C., and can sue for possession of *waqf* property and of the office of *mutwalli* and *amin* of the *waqf* by dispossession of the defendant 24 Ind. Cas. 501 (7), relied on. 69 Ind. Cas. 990 (9) 84 Ind. Cas. 631 (10), explained. 106 Ind. Cas 389 (8), not approved. [p. 703, col. 1.]

The principles applicable to a case where the *shebait* is dead are as follows: (*a*) If there is a provision in the deed of endowment about the mode in which the office is to be filled up, the next *shebait* is to be appointed in pursuance of the provision, that is, the devolution of the trust depends upon the terms on which it was created; (*b*) If there are no such provisions, then it depends on the usage of a particular institution; (*c*) In the absence of all these, the office of *shebait* reverts to the heirs of the founder. [p. 699, col. 2; p. 700, col. 1.]

The founder of the endowment did not nominate anybody as the next *shebait*, although she had reserved that right in herself, nor did the managing committee to whom she had given such right nominate anybody as the *shebait*. Indeed the managing committee never took the slightest interest in this endowment and they did not care to fill the vacancies as they occurred by the death of the members and so their number was reduced to two:

Held, that the title to the property and its management and control followed the line of inheritance from the founder, and the next heir-at-law of the founder became the *shebait*. Such a vesting could not be prevented by the likelihood of any power if there was any such power left outstanding in the committee of two being exercised. The office became hereditary in the hands of the heir-at-law and after his death it was not necessary again to go back to the original founder and see as to who would be her heirs as it would be in contravention of the Hindu Law of inheritance to say that the endowment should be held in a series of successive life estates by the heritors. *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1), and *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (2), relied on. [p. 700, col. 2; p. 702, col. 1.]

Held, further that after the death of one of the two members of the managing committee the sole surviving member of the committee could not constitute the committee and, the son of the heir-at-law who succeeded him after his death obtained an indefeasible title from the very start and in any event after the death of the sole surviving member of the committee his title became absolutely indefeasible. 32 Ind. Cas. 823 (3) and *Ganendro Mohan Tagore* v. *Juttendro Mohan Tagore* (4), relied on. [p. 700, col. 2]

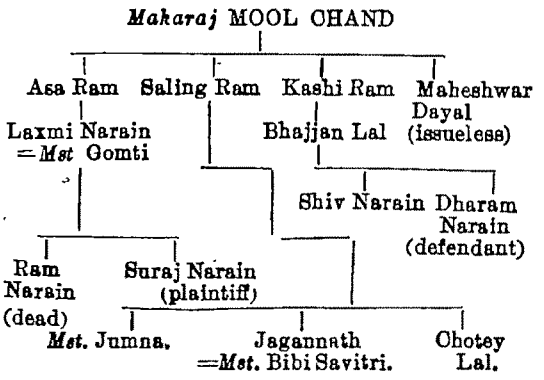
F. A. from the decision of the Civil Judge, Farukhabad at Fatehgarh, dated September 17, 1938.

Messrs. *S. N. Sen*, *B. Malik*, and *B. R. Avasthi*, for the Appellant.

Messrs. *P. L. Banerji*, *G. S. Pathak* and *B. L. Gupta*, for the Respondent.

Bajpai, J.—This is an appeal by the defendant Dharam Narain. The plaintiff Suraj Narain brought a suit for "possession of the entire *waqf* property, movable and immovable, and all the funds of the *waqf* created under a document dated May 14, 1900 executed by *Mst.* Bibi Sabitri and of the office of *mutwalli* and *amin* of the aforesaid *waqf* by dispossession of the defendant." It was also prayed that the defendant may be ordered to render all accounts of the funds and income of the property appertaining to the *waqf* from 1926 up to the institution of the suit and that a decree for the amount found payable by the defendant for the period of his possession with reasonable interest may be passed in favour of the plaintiff against the person and property of the defendant. The Court below decreed the plaintiff's suit "for possession over the office of trustee and over the property, movable and immovable, belonging to the trust." A preliminary decree for account was also passed in favour of the plaintiff against the defendant directing the latter to render accounts relating to the trust from 1926 onwards upto the date of the judgment (September 17, 1938) and the plaintiff was allowed full costs against the defendant. The allegations on which the plaintiff brought the suit may be stated, but in order to appreciate them it would be better to

give the following pedigree:



The common ancestor of the parties was Mool Chand and one of his sons, Salig Ram was possessed of considerable property. His two sons, Jagannath and Chotey Lal, died in his lifetime and Salig Ram on January 7, 1895 gifted his property absolutely to his widowed daughter-in-law Bibi Savitri and the latter on May 14, 1900 created an endowment of some of her properties in favour of three idols, Sri Savitri Swami Ram Chandra Ji, Sri Savitri Swami Janki Ji and Sri Savitri Lachhman Ji by means of a formal deed of gift and constituted herself as the first *muwalli* of the *waqf* property during her own lifetime. She died on April 17, 1917 and then, according to the plaintiff, Lachhmi Narain as the heir of the founder became the *mutwalli* and remained in possession of the *waqf* property during his lifetime, although the endowed estate was managed by one Puttu Lal, the *Mukhtar-i-am* of Bibi Savitri and an employee of Lachhmi Narain. Lachhmi Narain died on September 30, 1921 and then the plaintiff succeeded to the *mutwalliship*, but he was a minor and his estate was under the superintendence of the Court of Wards. Puttu Lal however continued to manage the endowed property up till 1926 on behalf of the plaintiff and then mutation was effected in favour of Dharam Narain in August 1926, but he had absolutely no title and his possession was the possession of a trespasser. During his time he was guilty of gross mismanagement and waste. The defendant was therefore liable to be dispossessed and was liable to render accounts. The plaintiff was entitled to obtain actual possession of the endowed property.

In defence it was pleaded that the plaintiff was not entitled to the *mutwalliship* and therefore he had no cause of action. The plaintiff's suit was said to be barred under s. 92, Civil P. C., and by the twelve years' rule of limitation. The defendant alleged that Lachhmi Narain never obtained possession over the *waqf* property, but, on the death of Bibi Savitri, the defendant and his brother Shiv Narain under an oral will became the *mutwallis* of the *waqf* property and, according to the same oral will Puttu Lal was authorized to carry on the management during the minority of Shiv Narain and Dharam Narain. The defendant took up the management in his own hands on attaining majority and his management throughout has been satisfactory and honest. The plaintiff was said to have attained his majority more than three years prior to the institution of the suit. The Court below decided every issue in favour of the plaintiff and decreed the suit in its entirety. It is not perhaps quite accurate to say that all the issues were decided in favour of the plaintiff because, although there is no definite finding of the Court below on the point, the learning of the Court is undoubtedly in favour of the defendant's contention on the question of the plaintiff's age, but that did not in any way have any effect, in the judgment of the Court below, on the ultimate decision of the case.

The defendant in this appeal has raised several contentions and we shall notice them as we proceed with our judgment. The first question that we have got to decide is whether the title to *shebaitship* vested in Lachhmi Narain or not on the death of Bibi Savitri. At this stage, it will be convenient to discuss the scheme of the endowment created by Bibi Savitri on May 14, 1900. This document, which is styled as a deed of gift, is printed at p. 107 of our record. The lady says that the property given at the foot of the document was owned and possessed by her and she was making a gift of the same in favour of Sri Thakur Savitri Swami Ram Chandra Ji, Sri Savitri Jati Lachhman Ji and Sri Savitreshwari Janki Ji Maharani installed in the temple. The property made a gift of, was to remain in her possession as *amin* and the income of the property was to be spent according to the directions in the deed for the benefit of Sri Thakurji, donee aforesaid, Sanskrit, Pathshala and daily *Sadabart*. She reserved to herself and to the succeeding *amins* the right of appointing *karindas* and servants for realising the income of the property and spending it according to the instructions contained in the deed. She appointed the following resi-

dents of Farrukhabad as managing *amins*: (1) Maharaj Prag Narain, son of Mangala Charan, caste Brahman Bajpai, resident of Mohalla Lohai, (2) Maharaj Behari Lal, cashier, adopted son of Chhote Lal, caste Brahman, resident of Mohalla Bazar Kirana, (3) Maharaj Chandra Sen, son of (torn) of Mohalla Lohai, (4) Jhangiri Lal, son of Govind Prasad, caste (torn) of Mohalla Nazir Chhakka Lal, (5) Pandit Prag Datt son of Pandit Lachman, caste Brahman, resident of Mohalla Bolraj, (6) Sita Ram, son of (torn) caste Mahajan, resident of Mohalla Manihari, (7) Jawala Prasad, son of (torn), caste Restogi rsident of Mohalla Chaudhri Khiali Ram.

The document, due to the oversight of the scribe, does not contain para. 5. There is a little mistake in the printed document before us for paras. 5, 6, 7, 8 and 9 therein should be read as paras. 6, 7, 8, 9 and 10. In para. 7 she said that after her or in her lifetime when she wanted to give up the work of *amin*, Maharaj Prag Narain son of Mangala Charan, her son-in-law, was to be appointed *amin* by means of a document, and in para. 8 she reserved to herself the power to renew, cancel or amend the terms relating to the appointment of an *amin* by means of a registered deed of Amanat, but after her death her heirs and representatives were not to have the said power. In para. 9 it was said that if the *amin* acted contrary to the terms and directions (which were to be given out under a separate document which would be executed) this is clear from para. 3 it would be the duty of the managing *amins* to force the *amin* to carry out the said terms and directions, and if the *amin* adopted any fresh course of action contrary to Dharamshastra, the managing *amins* shall have power to remove him from the office and to appoint another *amin* in his place and to execute a deed of Amanat and have it registered. It was also provided that if any one out of the managing *amins* died or wanted to give up the work, another person was to be appointed as managing *amin* in his place under a document with reference to a majority of opinion of the remaining *amins*. But it was to be kept in mind that the managing *amin* appointed was to be a Brahman or Vaish by caste who was a believer in idol worship. In para. 11 it was provided that if the *amin* acted contrary to the terms or misbehaved or acted dishonestly or did not discharge the duties of an *amin* properly or wanted to resign the office of *amin* or died, then it would be the duty of Bibi Savitri herself so long as she lived and after her of the managing *amins* to appoint, in place of the deceased or unfit *amin* or the *amin* who might refuse to work, another person who might be a Hindu, a Kanujiya Brahman, a follower of Hindu Dharamshastra, a firm believer in idol worship and an honest and God-fearing man as *amin*. It is clear that this provision contemplated the retirement of Bibi Savitri while she was alive. We have quoted the relevant paragraphs of the endowment. A number of properties were mentioned at the foot of the document as being dedicated to the deities, but by virtue of another deed of *waqf* by way of *Tamliknama* dated March 10, 1916 several properties were transferred to a Pathshala about which also a scheme of management was laid down, and it is of some importance to note that one Puttu Lal son of Raghubir Dayal, caste Khattri, her general attorney was appointed as one of the members of the managing committee. After this diversion of some of the properties to the Pathshala the endowment of 1900 was confined to certain shops, houses and *malikana* allowance of Rs. 1,100 in the 10 *biswas muafi* share situate in *Mouza* Aseha.

On July 30, 1900 she cancelled the appointment of Maharaj Prag Narain as the trustee in succession to herself and as also a member of the managing committee and she further directed that Prag Narain should never be appointed a trustee and manager. It would thus appear that the managing *amins* now became six instead of seven and Bibi Savitri remained the *amin* or *mutwalli* or *shebait* during her lifetime. It is admitted by Dharam Narain defendant that Behari Lal, Chandra Sen, Pragdat and Jhinguri Lal, four out of the six amins, died in the lifetime of *Mst.* Savitri and nobody was appointed in their place as they died one after the other. In fact, the managing committee of the six persons did not function at all—these are the very words of Dharam Narain. When, therefore, Bibi Savitri died on April 17, 1917 only two members, namely Sita Ram and Jwala Prasad, of the managing committee were in existence and nobody seems to have taken any trouble whatsoever to fill the vacancies caused by the death of the other four. The principles applicable to a case where the *shebait* is dead are as follows: (*a*) If there is a provision in the deed of endowment about the mode in which the office is to be filled up, the next *shebait* is to be appointed

in pursuance of the provision, that is, the devolution of the trust depends upon the terms on which it was created; (*b*) If there are no such provisions, then it depends on the usage of a particular institution; (*c*) In the absence of all these, the office of *shebait* reverts to the heirs of the founder. In *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1) their Lordships of the Privy Council held that:

"according to Hindu Law, when the worship of a Thakur has been founded, the office of a *shebait* is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance showing a different mode of devolution."

Again in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (2), they observed that there being no reliable evidence as to the terms or conditions of a religious endowment the legal inference was that the title to the property or to its management or control followed the line of inheritance from the founder. Now in the present case Bibi Savitri did not nominate anybody as the next *shebait*, although she had reserved that right in herself, nor did the managing committee to whom she had given such right nominate anybody as the *shebait*. Indeed the managing committee never took the slightest interest in this endowment and they did not care to fill the vacancies as they occurred and so it is argued that when their number was reduced to two it could not be said that they retained any such power because it was not the intention of the author of the trust that a committee of two should have the right to nominate a *shebait*. The appellant argues that either these two could have appointed four more members to act on the managing committee and then could have appointed a *shebait* by a majority of vote or that these two alone could have appointed a *shebait*. The respondent, on the other hand, argues that the committee of two had lapsed almost into nothingness and they lost all power in the matter inasmuch as the directions of the author could not be reasonably carried out. The fact, however, remains that even these two did not exert in this direction, and we are of the opinion that the title to the property and its management and control followed the line of inheritance from the founder, and Lachhmi Narain, who was the next heir-at-law of Bibi Savitri became the *shebait*. Such a vesting could not be prevented by the likelihood of any power if there was any such power left outstanding in the committee of two being exercised. At best, it may be said that the vesting could be defeated when the power was exercised supposing the power was outstanding. It is not necessary for the purposes of this case to say whether the reasonable exercise of any power was left outstanding in view of the next circumstance, namely the death of Sita Ram on May 10, 1921.

There is a death register (p. 153) which shows that Sita Ram died on May 10, 1921. Dharam Narain has also admitted the same. Lachmi Narain died on September 30, 1921 and as long as he was alive Sita Ram and Jwala Prasad did nothing in matter and after the death of Sita Ram on May 10, 1921 the matter was not capable of being argued that Jwala Prasad, the solitary member of the managing committee, could have exercised any power reasonably according to the wishes of Bibi Savitri. In any event no such power was ever exercised by any member of the committee. The learned Judge of the Court below has discussed this matter with great thoroughness. The position, therefore, is that Lachhmi Narain did succeed to the *shebaitship* on the death of Bibi Savitri and remained a *shebait* till his death on September 30, 1921. This is what took place as a matter of law and we shall have to revert to this aspect later when we shall discuss whether he did succeed as a matter of fact also or whether somebody else usurped that position. We further hold the view that as a matter of law Suraj Narain, his son, succeeded to the *shebaitship* on the death of Lachhmi Narain. The only remaining member of the managing committee, Jwala Prasad, died on November 15, 1925, as is clear from the copy of the extract of a death register produced in this case (p. 173), and thus all the members of the committee died. Jwala Prasad as the sole surviving member of the committee could not constitute the committee and, Suraj Narain obtained an indefeasible title from the very start and in any event after the death of Jwala Prasad his title became absolutely indefeasible. In *Kunjamani Dassi* v. *Nikunja Bihari Das* (3) a Bench of the Calcutta High Court held

(1) 17 C 3; 16 I A 137; 5 Sar 350; 13 Ind. Jur 211 (P C).

(2) 32 C 129; 31 I A 203; 8 C W N 809; 8 Sar 698; 6 Bom L R 765; 1 A L J 585 (P C).

(3) 20 C W N 314; A I R 1916 Cal 312; 32 Ind. Cas 823; 22 C L J 404.

Council observed at p. 252 as follows:

"By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait* But it did not constitute him the *shebait* for the time being or affect in any way the title to the office."

The position of Dharam Narain before us is virtually the same as the position of Jharula Das in the case before their Lordships of the Privy Council In *Ganga Charan* v *Ram Chandra* (8) it was held that

"s 92, Civil P. C, has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is duly appointed trustee and that the defendant is a trespasser. Section 92 has reference to those cases and to those cases alone where there is an allegation of breach of any express on constructive trust created for public purposes of charitable or of religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust."

It is true that in *Ram Bilas* v. *Nityanand* (9) a Bench of this Court held that a suit under s. 92. Civil P. C., was competent against a trustee *de son tort*, that is, against a person who without any title chooses to take upon himself the character of a trustee and in *Bihari Lal* v. *Shiv Narain* (10). Dalal, J., one of the members constituting the Bench which decided the case also held the same view. But it has not been held in either of the above two cases that if an ordinary suit for ejectment is filed by a plaintiff who calls himself a trustee: against a defendant who is alleged to be a trespasser, s 92, Civil P. C., would be a bar. Indeed it was conceded by learned Counsel for the appellant that if the defendant was a trespasser the present suit was not incompetent. We do not wish to go as far as the learned Judges, who decided *Ganga Charan* v. *Ram Chandra* (8) seems to go, but we think that the plaintiff could ignore s. 92, Civil P. C., and bring his suit in the present form. Coming to s. 10, Lim. Act, before we discuss its applicability, it is necessary to decide another issue, namely the question of the plaintiff's age. He alleged that he was born on July 3, 1913 and as his estate was taken under the Court of Wards he attained his majority on July 3, 1934 and the present suit instituted on January 5, 1937 within three years of his attaining majority is in time for all purposes. His suit therefore does not in any way offend s. 8, Lim. Act, which provides that:

"nothing in s. 6 or in s. 7 (sections dealing with disabilities).....shall be deemed to extend, for more than three years from the cessation of the disability.....the period within which any suit must be instituted....."

The defendant's contention however is that the plaintiff was born on June 30, 1912 and thus he attained his majority on June 30, 1933 and by reason of s. 8, Lim. Act, the suit having been instituted more than three years after the cessation of the disability of minority, is barred. It would not be necessary for the plaintiff to invoke the aid of s. 10, Lim. Act, if his contention on the question of age is accepted. The learned Judge of the Court below "refrained from expressing anything definitely on this point" although he was 'inclined to be more partial towards the defendant on the subject." We however consider that it is necessary for us to give a definite finding on the point. (Their Lordships discussed the plaintiff's evidence relating to his age and proceeded.) On the whole, after a careful comparison of the evidence tendered by the parties, we have come to the conclusion that the plaintiff has failed to establish that he was born on July 3, 1930. Section 8, Lim. Act, therefore adversely affects the plaintiff's case. The result therefore is that unless s. 10, Lim Act, helps the plaintiff, his suit for rendition of accounts could not be decreed for all the period during which the defendant was in possession, that is, from 1926, but for only six years prior to the institution of the suit, as is conceded by learned Counsel for the defendant, the article applicable being the omnibus Art. 120.

We now come to a consideration of s. 10, Lim. Act. That section prior to its amendment by the Lim. Act, (Amendment) Act I of 1929, which came into force on January 1, 1929, read as follows:

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purposes of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

There was some divergence of opinion in the Courts in India as to whether a *shebait* of a Hindu endowment could be said to be a person in whom property was vested in trust, but in the year 1921, their Lordships

(8) A I R 1928 All 33; 106 Ind. Cas. 389; 25 A L J 902; 50 A 165.

(9) 21 A L J 105; 69 Ind. Cas. 990; A I R 1923 All 542; 44 A 652.

(10) 47 A 17; 84 Ind. Cas. 631; A I R 1924 All 884; 22 A L J 866; L R 5 A 697 Civ.

of the Privy Council in *Vidya Varuthi Thirthaswamigal* v. *Balusami Ayyar* (11), made the following observations :

"The language of s. 10 gives the clue to the meaning and applicability of Art. 134. It clearly shows that the article refers to cases of specific trust ; and relates to property 'conveyed in trust.' Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a *shebait* or a *mutawalli* in the case of a dedication. Nor is any property vested in him ; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interest regulated by custom and usage. Under the Muhammadan Law, the moment a *waqf* is created, all rights of property pass out of the *waqf* and vest in God Almighty. The curator whether called *mutawalli* or *sajjadanashin* or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system."

After this Privy Council decision it became clear that the *shebait* could not be said to be a person in whom property was "vested in trust." In 1929 the following paragraph was added to s. 10 :

"For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

The Statements of Objects and Reasons are as follows :

"The (Civil Justice) Committee's recommendation refers, it is understood, to the decisions of the Privy Council in *Vidya Varuthi Thirthasawamigal* v. *Balusami Ayyar* (11) and *Abdur Rahim* v. *Narayan Das* (12) which lay down that a *dharmakarta, mohant* or manager of a Hindu religious property or the *mutawalli* or *sajjadanashin* in whom the management of Muhammadan religious endowments is vested are not trustees within the meaning of the word as used in s. 10, Lim. Act, for the reason that the property does not vest in them. The result is that when a suit is brought against a person, not being an assign for valuable consideration, endowments of this nature are not protected. The committee's recommendation is that s. 10 of the Act should be amended so as to put Hindu and Muhammadan religious endowments on the same footing as other trust funds which definitly vest in a trustee. After consulting the Local Govt. the Govt. of India have come to the conclusion that Hindu, Muhammadan and Buddhist religious as well as charitable endowments should be included within the scope of s. 10 of the Act. The bill gives effect to this conclusion."

Learned Counsel for the plaintiff says that by reason of s. 10 and more particularly by reason of the amendment the plaintiff's suit for an account of the trust property is not barred "by any length of time" as against the defendant. In our judgment, the plaintiff's contention is not sound. All that the amendment has done is to do away with the effect of the Privy Council decision in *Vidya Varuthi Thirthaswamigal* v. *Balusami Ayyar* (11), and to make a Hindu *shebait* or a Muhammadan *mutawalli* a trustee in whom property may be said to have vested. But the plaintiff has to prove, according to the section as amended and unamended, that the property had vested in trust for any specific purpose so far as the defendant was concerned. The question is whether the defendant is an express trustee or only a trustee *de son tort*. It is the plaintiff's own case that the defendant is a rank trespasser and his position at best can, therefore, be only of a trustee *de son tort*. Whatever may be the view of the other High Courts as to the applicability of s. 10 so far as trustees *de son tort* are concerned, this Court has definitely held in *Bibari Lal* v. *Shiv Narain* (10), that in a suit for accounts against the trustee *de son tort* s. 10, Lim. Act, will not apply, for it applies to cases of express trust alone. The Oudh Chief Court has followed this decision in *Chandrika Bakhsh Singh* v. *Bhola Singh* (13). Their Lordships of this Court then applied Art. 120, Lim. Act and directed that the defendants in that case must render accounts of the profits for the period of six years prior to the suit, and, as we said before, the defendant in the present case would be liable to render accounts only for six years. In this view of the matter, it is not necessary for us to consider whether the defendant has been guilty of mismanagement or waste because under the law the defendant is accountable to the plaintiff whether he is guilty of malpractice or not. Certain actions of the defendant appeared to the Court below to amount to breaches of trust and if we felt constrained to give any finding on the point we would have said that they were justified by the exigencies of circumstances and did not amount to misfeasance. Learned Counsel for the defendant placed all the facts in this connection and argued that the defendant throughout acted *bona fide* in the interest of the trust.

Learned Counsel for the plaintiff contended himself with the submission that the defendant was an accountable party and did not attempt to meet the arguments advanced by the defendant's Counsel. We feel inclined to agree with the case of the defendant and hold that it has not been

(11) 44 M 831; 65 Ind. Cas. 161; A I R 1922 P C 123; 48 I A 302; (1921) M W N 449; 41 M L J 346; 3 U P L R (P C) 62; 15 L W 78; 30 M L T 66; 3 P L T 245; 26 C W N 537; 24 Bom L R 629; 20 A L J 497 (P C).

(12) 50 C 329; 71 Ind. Cas. 646; A I R 1923 P C 44; 50 I A 84; 17 L W 509; 33 M L T 153; 44 M L J 624; 25 Bom L R 670; (1923) M W N 441; 38 C L J 242; 28 C W N 121 (P C).

(13) A I R 1937 Oudh 373; 168 Ind. Cas. 593; 1939 O W N 745; 13 Luck 344; 9 R O 485; 1937 O L R 288.

established that the defendant has been guilty of any grave dereliction of duty. For the reasons given above, we confirm the decree of the Court below so far as it relates to possession over the office of the trustee and over the property movable and immovable belonging to the trust. We however, modify it so far as the decree for rendition of accounts is concerned and hold that the defendant is liable to render accounts relating to the trust from January 5, 1931. As the plaintiff has succeeded in both Courts in almost all the points and has failed only so far as rendition of accounts for about five years is concerned, we direct that the plaintiff will get four-fifths of his costs from the defendant in both Courts, and the defendant will bear his own costs throughout.

S. *Order accordingly.*

MADRAS HIGH COURT

Civil Revision Petition No. 49 of 1937
April 5, 1940

KRISHNSWAMI AYYANGAR, J.

SAIT SOGMULL LACHIRAM FIRM, TENALI—PETITIONER

versus

VALLABHANENI PARANDHAMAYYA AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 78 (2)—Proof of debt—Meaning and nature of—S. 78 (2) incorporates principle of s. 14, Limitation Act (IX of 1908).

Before a party can claim the benefit of the exclusion enacted by s. 78, Prov. Insol Act, two conditions have to be satisfied The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. Proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the Schedule and none other. Evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by s. 49, his name cannot be entered in the Schedule; and, however, true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above.

Section 78 (2), Prov. Insol. Act was intended to incorporate the principle of s. 14, Lim. Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say a failure to prove for the debt, would deprive a party of the benefit of the section.

C. R. P. to revise the decree of the Sub-Judge, Tenali, in S. C. S. No. 600 of 1934

Mr. *V. Subramaniam*, for the Petitioner.

Messrs. *K. Kameswara Rao* and *B. S. Ramachandra Rao*, for the Respondents.

Order.—A somewhat interesting question relating to the construction of the proviso to s. 78 (2), Prov. Insol. Act, 1920, arises for consideration in this revision petition. The petitioner was the plaintiff in a small cause suit in which he sued to recover a sum of Rs. 1,000 on foot of a promissory note executed on April 10, 1930 by respondent No. 1. The other respondents are the undivided sons of respondent No. 1. The suit was filed on November 12, 1934, that is to say one year seven months and two days after the period of limitation and is therefore *prima facie* time-barred unless the plaintiff could claim the benefit of an exemption. To this end he relies on s. 78 (2), Prov. Insol. Act, which runs as follows:

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-s. (2) of s. 28) which might have been brought or made but for the making of an order of adjudication under this Act the period from the date of the order of adjudication to the date of the order of annulment shall be excluded;

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

, Respondent No. 1 had been adjudicated an insolvent on January 14, 1935, by an order which fixed January 14, 1934 as the last day for applying for discharge. The insolvent defaulted to make the application within time, with the result, that the adjudication was annulled under s. 43 on August 16, 1934. It will be seen that if the period which elapsed from the date of the order of adjudication to the date of the order of annulment, namely one year seven months and two days, is excluded the suit would just be in time. The question is whether the petitioner is entitled to have this period excluded. It may be mentioned that he would be entitled to have one more day excluded as November 11, 1934 the day previous to the institution of the suit happened to be a Sunday. If the section is applicable, there can be

no doubt that the suit is in time. The District Munsif dismissed the suit on the ground that s. 78 is not applicable and that the suit is barred by limitation, as the petitioner's debt though one provable under the Act had not been proved in the manner directed by the Act. It is clear on a consideration of the provisions of ss. 28 and 78 of the Act that two conditions have to be satisfied, before a party can claim the benefit of the exclusion enacted by the latter section. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. There can be no doubt that the debt in suit is one provable under the Act. The question is whether the second requisite has been satisfied in this case; in other words whether the debt had been proved under the Act.

The petitioner here was the petitioning creditor on whose petition respondent No. 1 had been adjudicated insolvent. It is common ground that the promissory note in suit was the debt on which the petitioner successfully founded his right to present the insolvency petition. It may therefore be presumed that proof of the debt was given under s. 24 of the Act, before the adjudication order came to be made. It is also common ground that no proof as required by s. 49 had been made. Mr. Subramaniam appearing for the petitioner has urged that the word "proved" in s. 78 should receive a liberal interpretation, that s. 49 merely indicates one method of proof, which should not be regarded as the only method of proof recognized by the Act. He has relied on a ruling of the Calcutta High Court in *Krishnachandra Das* v. *Jotindra Nath* (1), where Ghose and Bose, JJ. have expressed the opinion that s. 49 only specifices a simple mode of proof but does not exclude any other mode of proof, and that a debt should be held proved under s. 78, if it had been proved in the course of the proceedings leading to the adjudication of an insolvent. With respect, I find myself wholly unable to accept this interpretation as correct, whether we look at the meaning of the word itself, or the object behind the proviso to s. 78.

Proof of a debt in insolvency is an expression well known to Courts and lawyers, and there can be little doubt that it is the kind of proof that a creditor is called upon to give in order to enable him to obtain a dividend in the rateable distribution of the assets of the insolvent. "Proof" in this connection has almost become a word of technical import, and is not to be understood as meaning any kind of proof at any stage of a proceeding without reference to the purpose for the manner in which it is given. Proof given and accepted in a Civil Court, and not open to challenge there is still open to question when its validity is impugned in an insolvency Court. Proof of a debt for the purpose of ss. 11and 24 is merely proof that a person is insolvent and is in the nature of a preliminary step which leads to the Court taking up the administration of an insolvent's estate but proof in insolvency is proof adduced after the Court has taken up the administration and in order to enable it to make a proper distribution. Proof under s. 11 is ordinarily in a proceeding between the petitioning creditor and the insolvent, but proof under s. 49, which is proof proper in insolvency, is one to which objection can be taken by the Official Receiver or any of the creditors.

Section 34 defines debts provable under the Act, and includes all debts and demands except demands in the nature of unliquidated damages arising otherwise than by a contract or a breach of trust. Section 33 calls upon all persons alleging themselves to be creditors in respect of debts provable under the Act to tender proof of their respective debts by producing evidence of the amount and particulars thereof, and then the Court is directed by order to determine the persons who have proved themselves to be creditors, and the amount of their debts, so that it may be enabled to frame the all important Schedule which is to form the basis of the distribution of the realized assets in dividends, subject, of course, to the provisions of ss. 56, 63 and 64. To no person whose name is not included in the Schedule can a dividend be paid. Section 61 (5) provides that subject to the provisions of the Act, all debts entered in the Schedule shall be paid rateably, and s. 64 relating to the final dividend makes it clear that the property of the insolvent is to be divided among the creditors entered in the Schedule only and without regard to the claims of any other persons.

I feel no doubt whatever that proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the Schedule and none

(1) A I R 1929 Cal. 159; 114 Ind. Cas. 415; 48 C L J 574; Ind. Rul. (1929) Cal. 239.

other. The opposite construction is in my judgment entirely opposed to the fundamental scheme of the Act. It follows that evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by s. 49, his name cannot be entered in the Schedule; and however true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above. The decision of this Court in *Ramalinga Iyer* v. *Rajalu Ayer* (2) proceeded on the special circumstances that a decree for the debt had been obtained, after adjudication against the insolvent and the Official Receiver, and the learned Judges while holding that the debt must be taken to have been proved within s. 78 by the decree being obtained, expressly guarded themselves against being understood as laying down a general rule as regards the meaning of the word 'proved.

It is to be observed that s. 78 was newly introduced into the present Act, in view of the Full Bench decision of this Court in *Lingayya* v. *Chinna Narayana* (3) that the general provisions of the Lim. Act could not be held applicable to proceedings under the old Act, *viz.*, III of 1907. In *Ramaswami Pillai* v. *Govindasami Naicker* (4) a Division Bench of this Court held that the provisions of s. 15, Lim. Act, could not be invoked so as to secure an exclusion of the time during which an insolvency might be pending, inasmuch as an order of adjudication did not amount to an absolute injunction or stay, but only made it necessary that leave of Court should be obtained before a suit could be filed. The position would be different if leave had been asked for and refused as in that case the creditor would be precluded from pursuing his remedy by suit against the debtor until the adjudication is annulled. It was to meet this situation, that s. 78 was inserted in the new Act. This section and the amended s. 29, Lim. Act, have tended to remedy the hardship arising out of the Full Bench decision to which reference has been made.

The question which arises for consideration here is somewhat different from the question of the applicability of the general provisions of the Lim. Act to a special Act such as the Insol. Act is, though it does appear to me that the intention behind s. 78 was not to extend the Lim Act but rather to exclude it. In my judgment, s. 78 (2) was intended to incorporate the principle of s. 14, Lim. Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. The section withholds help to a person who not shown due diligence, as where he obtains leave of Court under s. 28 (2) but omits to take action. Similarly, it insists that the creditor should so far as the Act permits, prosecute his claim to recover the whole or portion of the debt, by tendering a proof under s. 49, by which he will be deemed to have proved the debt as held in *Lakshmi Rai* v. *Rukmáji Rao* (5). Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say a failure to prove for the debt, would deprive a party of the benefit of the section. From what has been said, the petition fails as neither s. 78 (2), Prov. Insol. Act, nor s. 14, Lim. Act, can avail a party in respect of a debt provable but not proved under the Act The civil revision petition is accordingly dismissed with costs.

N. S. *Petition dismissed.*

(2) 58 M L J 170; 122 Ind. Cas. 341 (1); 31 L W 75; Ind. Rul (1930) Mad. 309; A I R 1930 Mad. 356 53 M 243; (1930) M W N 408.

(3) 41 M 169; 44 Ind. Cas. 805; A I R 1918 Mad. 213; 33 M L J 566; 7 L W 443 (F B).

(4) 42 M 319; 49 Ind. Cas. 625; A I R 1919 Mad. 656; 36 M L J 104; 25 M L T 247; (1919) M W N 698.

(5) 57 M 767; 151 Ind. Cas. 284; A I R 1934 Mad 46; 67 M L J 45; 40 L W 199; 7 R M 120; (1934) M W N 934.

NAGPUR HIGH COURT

Civil Revision No. 61 of 1939
September 13, 1940
BOSE, J.

K. C. MAJUMDAR—DEFENDANT—APPLICANT

versus

Thakur SURAJSINGH—PLAINTIFF—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. III, r. 1,

O. XI, r. 1, Appendix Form No 3, s. 115 (c)— Interrogatories—Defendant not entitled to answer personally — Defendant, if can answer it through recognized agent — Adjournment costs — Court, if can order, against party, on non-compliance — Court wrongly rejecting interrogatories — Interference in revision.

On the whole, O. III, r. 1, governs O. XI, r. 1, The former order is a general one and has general application. Therefore unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought to be applied.

In O. III, r. 1, the expression "except where otherwise expressly provided by any law for the time being in force" refers to laws other than the Code.

When a party to a suit is ordered to answer interrogatories, he is not bound in the absence of a special direction to that effect to answer personally, and he can answer through some recognised agent who knows the facts; that is to say, an affidavit need not be sworn to by the party himself but this can be done by a recognised agent. As a general rule it is salutory and wholesome that the defendant himself should be made to swear to what he says. But there will always be exceptions, and in any case as the Code allows an alternative a party cannot be penalised for following it, unless he has been expressly ordered to do the contrary.

Where by an order of the Court the interrogatories ought to have been answered in person within the ten days but they were not answered, it is within the competence of the Court to order adjournment cost against the person (defendant) though he had given a reasonable explanation as to why this was not done.

When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do If the Court rejects the act, it is a material irregularity on a question of procedure and justifies interference in revision under s. 115 (c).

C. R. App. for revision of the order of the Court of the A. S. J. II Sihora, dated August 31, 1939.

Mr. *J. Sen* for the Applicant.

Mr. *T. B. Pendharkar*, for the Opposite Party.

Order.—The question here is whether, when a party to a suit is ordered to answer interrogatories, he is bond in the absence of a special direction to that effect to answer personally, or whether he can answer through some recognised agent who knows the facts; that is to say, must an affidavit be sworn to by the party himself or can this be done by a recognised agent?

The plaintiff administered a set of interrogatories and the defendant was required to file a reply to them by August 31, 1939. The reply was filed but the affidavit was made by an agent of the defendant and not by the defendant. The lower Court thereupon stated that the defendant was at fault and saddled him Rs. 20 adjournment costs and the defendant was told to file his reply to the interrogatories in proper form within ten days. On the next hearing September 12, 1939, the defendant's Pleader put in an application for stay because the defendant desired to contest the correctness of the previous order in the High Court. This application was not signed by the defendant either and it was rejected on that ground. On the following day September 13, 1939, the defendant's Pleader asked for further time to enable his client to comply with the Court's order about swearing the affidavit personally. Time was granted, but on condition that Rs. 25 was paid as adjournment costs. The revision is against these two orders, that is to say, against the first order of August 31, 1939, in which the reply to the interrogatories was rejected because the affidavit was not sworn to by the defendant personally and in which the defendant was required to pay Rs. 20 as adjournment costs, and against the order of September 13, 1939, where the defendant was required to pay further adjournment costs of Rs. 25.

The learned Counsel for the plaintiff-non-applicant relies on O. XI. r. 1, of the Civil P. C. read with Form No. 3 to Appendix C. Order XI, r. 1, states that in any suit the plaintiff or defendant may by leave of the Court deliver interrogatories in writing for the examination "of the opposite parties or any one or more of such parties." The Form in Appendix C indicates that the answer contemplated by the Form should be given by the party himself.

As against this, however, there is a more general rule, O. III, r. 1, which states that

"any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader appearing, applying or acting on his behalf."

Then there is a proviso which states that the Court can, if it so desires, direct that such appearance or act shall be made by the party in person. The question is whether this rule, which is a general one, governs O XI, r. 1, or not.

I have not been referred to any authority on the point and it does not seem as if there are any Indian cases bearing on the subject. Mulla in his Code of Civil Procedure 10th edition, at p. 615, refers to some English cases under O. XI, r. 8, which state that a party to a suit is not excused from answer-

ing interrogatories on the ground that they relate to matters which are not within his own knowledge but are within the knowledge of his agents or servants if such knowledge has been acquired by him in the ordinary course of their employment. But this does not touch the matter in question here because the question here is not whether the defendant can refuse to answer the interrogatories at all (because they have been answered) but whether he must answer personally instead of through a recognised agent. On the whole, it seems to me that O. III, r. 1, governs O. XI, r. 1. The former order is a general one and has general application. Therefore, unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought in my opinion to be applied.

It is contended, however, that O. III, r. 1, expressly states that it is to apply "except where otherwise expressly provided by any law for the time being in force" and it is argued that O. XI, r. 1, read with Form No. 3 to Appendix C is such other law. A similar expression was considered by a Full Bench of this Court in *Ram Dayal* v. *Sheo Dayal* (1). The words under consideration there are to be found in s. 89 of the Civil P. C. and are almost identical with the words in O. III, r. 1. It was held by the Full Bench that the words "any other law" in s. 89 do not mean other parts of the Code but refer to laws other than the Code, and it is pointed out that when the intention is to exclude other parts of the Code the language used is "except as hereinafter provided" or something of that kind. As those or similar words are not used in O. III, r. 1, I am of opinion that the words used refer to laws other than the Code. In the circumstances the lower Court was, in my opinion, wrong in rejecting the answers to the interrogatories forthwith on August 31, 1939, and in requiring the defendant to pay Rs. 20 adjournment costs. The Court had power to order the defendant to answer the interrogatories in person. Had the learned Judge done so in the first instance, then of course this order would have been perfectly correct; but it appears that no such order was passed when the interrogatories were ordered to be answered. Therefore, the defendant was at liberty to act either through himself or through a recognised agent as provided by O. III, r. 1. He chose to act through a recognised agent. He, therefore, did what the law allowed him to do and if he did that, the learned Judge could not saddle him with costs. All he could do was to state that in the circumstances he required the defendant to answer the interrogatories personally, and if thereafter the defendant disobeyed them he could either strike out the defence or give him another chance on terms that he pay costs.

I must not, however, be interpreted as in any way encouraging the practice of answering through agents. As a general rule it is salutory and wholesome that the defendant himself should be made to swear to what he says. But there will always be exceptions, and in any case as the Code allows an alternative a party cannot be penalised for following it, unless he has been expressly ordered to do the contrary.

Turning next to the order of September 12, 1939, the application there was rejected because it was not signed by the applicant. But there again the defendant, who was the applicant, had every right to apply through his Pleader unless the Court directed otherwise. It had not directed otherwise up to that point and, therefore, all that the Court ought to have done was to require the defendant to make the application in person. This matter has been expressly decided in *Boro Bai* v. *Ram Sundar* (2).

As regards the adjournment costs of Rs. 25 ordered on September 13, 1939, the lower Court had jurisdiction to pass such an order. The interrogatories ought to have been answered in person within the ten days allowed but they were not answered. Of course the defendant has given a reasonable explanation as to why this was not done and it appears that it was not due to any contumaciousness on his part, but at the same time the order, whether right or wrong, was within the competence of the Court to make. The only question is whether, if the learned Judge had realised that the Code allows a defendant to answer through a recognised agent unless otherwise ordered, he would have required the answers to the interrogatories to be made in person. If he had not required that, then these adjournment costs would have been unnecessary. As I am interfering with the first order I think that in the interests of justice I ought to interfere with this order also.

The question then remains whether I

(1) I L R (1939) Nag. 250 (257); 183 Ind. Cas. 128; 1939 N L J 228; A I R 1939 Nag. 186; 12 R N 43 (2).

(2) I L R (1939) Nag. 157; 177 Ind. Cas. 409; A I R 1938 Nag. 272; 1938 N L J 98; 11 R N 141.

have jurisdiction to interfere in revision with orders of this kind. In my opinion the matter falls within s. 115 (c) of the Civil P. C. When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the defendant in costs because he has chosen to do that which the Code expressly allows him to do. That, in my opinion, is a material irregularity on a question of procedure and justifies interference in revision.

It appears that the defendant has now complied with the Court's order and has answered the interrogatories in person. Therefore, all that it is necessary for me to do is to set aside the two orders of August 31, 1939, and September 13, 1939, in so far as they relate to the payment of adjournment costs of Rs. 20 and Rs. 25 respectively.

The application is allowed. Costs will be paid by the non-applicant. Counsel's fee Rs. 15.

D. *Revision allowed.*

ALLAHABAD HIGH COURT

Criminal Appeal No. 185 of 1940
December 6, 1940
ALLSOP, J.
PARMANAND—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 124 — Scope—Defamation of Government — Duty of Court—Speech held seditious—Sedition.

The provisions of s. 124-A, I. P. C., are very wide and in strict law they would cover everything that amounts to defamation of the Govt. excluding any criticism in good faith of any particular measures or acts of administration. If the Govt. comes into Court and asks for a decision from a Judge or a Magistrate whether particular conduct is or is not within the terms of s. 124-A, the Court must express a perfectly fair opinion as between the parties apart from its own ideas of political expediency and the terms of s. 124-A are so wide that much that may generally be regarded as justifiable speech would come within its terms.

A speech suggesting generally that the Govt. established by law in British India was thoroughly dishonest and unfair and that steps should be taken either by violence or by threat of violence to abolish it comes within the provisions of s 124-A.

Cr. A. from an order of the District Magistrate, Benares, dated March 1,1940.

Mr. *Gopalji Mehrotra*, for the Appellant.

The Assistant Govt. Advocate, for the Crown.

Judgment.—This is an appeal by one Pandit Parmanand, who has been sentenced to rigorous imprisonment for a period of eighteen months under s. 124-A, I. P. C. for bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards the government established by law in British India. The appellant is alleged to have made a speech in Benares which was reported by a Sub-Inspector of Police. Learned Counsel argues that the speech as repored does not substantially represent what the appellant said, but I cannot accept this argument In the first place, it was the duty of the Sub-Inspector to write down what the speaker was saying at the meeting and the natural assumption is that he would have written down what he heard rather than invent some passages which had never been spoken. There is no suggestion that the Sub-Inspector had any particular grudge against Pandit Parmanand or any desire to get him into trouble by representing that he had said something which he never had said. On the other hand, the appellant produced two witnesses in defence who did not pretend to remember everything that the appellant said but whose evidence seems to me to imply a certain measure of corroboration for the evidence of the prosecution. I do not propose to discuss the speech at any length. If it was delivered as reported, I do not think that anybody could reasonably say that it was not intended to bring the Govt. established by law in British India into hatred and contempt. Both the witnesses for the defence admit that the appellant spoke against imperialism. I have no doubt that imperialism, though it means very little, was supposed by the appellant to mean the Govt. at present established in British India.

Learned Counsel has urged that the appellant was not preaching violence, although passages in the reported speech suggest that he was. The witnesses for the defence say that the appellant's object was not to preach violence, but, on the other hand, they have admitted that certain remarks were made which seem to suggest the contrary. The Police report of one sentence in the appellant's speech was that freedom could not be obtained by sitting in the Anand Bhawan behaving like *sanyasis*. The first witness for the defence admits that that sentence was spoken by the appellant. I imagine that can mean nothing except that a policy of non-violence is of no value in attaining freedom for India. Another passage in the Police

report is that the British Govt. that is, the Govt. established by law in British India, is practically a gang of dacoits and that the people of the country are entitled to defend themselves by violence against dacoits. Both the witnesses for the defence admit that there was some mention of dacoits and they do not say that it was in some other connexion that this word was used. On the whole I have not the slightest doubt that the report of the Sub-Inspector represents substantially what the appellant said. It appears that the appellant had no notes and I doubt very much whether he himself could remember what he did say in the excitement of making a public speech extempore.

I do not think I need say very much about the provisions of s. 124-A, I. P. C. These provisions are very wide and in strict law they would cover everything that amounts to defamation of the Govt. if one excludes from the meaning of that term any criticism in good faith of any particular measures or acts of administration. It may often be that the executive Govt. is willing to ignore allegations and charges made against it in pursuance of a policy of admitting a certain measure of criticism or certain suggestions for constitutional reform or something of that kind, but if the Govt. comes into Court and asks for a decision from a Judge or a Magistrate whether particular conduct is or is not within the terms of s. 124-A, the Court must express a perfectly fair opinion as between the parties apart from its own ideas of political expediency and the terms of s. 124-A are so wide that much that may generally be regarded as justifiable speech would come within its terms. In the present case there is no doubt that the appellant was suggesting generally that the Govt. at present established by law in British India was thoroughly dishonest and unfair and that steps should be taken either by violence or by threat of violence to abolish it. A speech of that kind certainly comes within the provisions of s. 124-A, I. P. C. There is no force in this appeal and I dismiss it.

S. *Appeal dismissed.*

RANGOON HIGH COURT

Suit No. 52 of 1940
June 5, 1940
BA U, J

R. M. P. L. S. CHETTIAR FIRM —PLAINTIFF
versus
KOORMIAH AND ANOTHER— DEFENDANTS

Court Fees Act (VII of 1870), s. 17—Section, if controlled by s. 67-A, Transfer of Property Act (IV of 1882)—Suit embracing two or more mortgages—Court-fees should be paid on each mortgage and not on aggregate amount of claim.

What s. 17, Court Fees Act, means is that in a suit which embraces two or more distinct causes of action court-fee shall be paid on each cause of action. Each mortgage constitutes a distinct cause of action. Consequently, in a suit which embraces two or more mortgages court-fee shall be paid on each mortgage and not on the aggregate amount of the claim. Section 67-A, T P. Act, does not control, s 17, Court Fees Act. 156 Ind. Cas. 435 (6) and *Radha Ranee Dassya* v. *Kshettra Mohan* (7), relied on.

Mr *V. S. Venkatram*, for the Plaintiff.

Mr. *U Tun Byu*, Govt. Advocate, for the Crown.

Order.—In this suit the plaintiff sues for recovery of two sums of money, Rs. 1,310-2-6 and Rs. 1,139-3-6, secured by two separate mortgages but he has paid court-fees on the aggregate amount of Rs. 2,449-6-0. The question that therefore arises now is how court-fee is to be assessed in suit which embraces two or more mortgages. In his order of reference, the Taxing Master says that, having regard to the provisions of s. 17, Court Fees Act, court-fee should in his opinion be assessed on each mortgage. Section 17, Court Fees Act, provides that:

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

The words "distinct subject," as used in this section, have been interpreted as meaning distinct causes of action, *Mul Chand* v. *Shib Charan Lal* (1), *Kishore Lal Roy* v. *Sharut Chunder* (2), *Perchiappa Chetty* v. *Po Kin* (3) and *Nauratan Lal* v. *Stephenson*, (4). What s. 17, therefore means is that in a suit which embraces two or more distinct causes of action court-fees shall be paid on each cause of action. There is no dispute that such mortgage constitutes a distinct cause of action. Consequently, in a suit which embraces two or more mortgages

(1) 2 A 676 (F B).
(2) 8 C 593; 10 C L R 359; 4 Shome L R 253 (F B).
(3) 5 L B R 94; 4 Ind. Cas. 289.
(4) 4 P L J 195; 50 Ind. Cas. 470; A I R 1922 Pat. 359; (1922) Pat. 79.

court-fees shall be paid on each mortgage. Learned Counsel for the plaintiff submits that this would be the logical view to take if s. 67A, T. P. Act. were not to come into play. According to him, what s. 17, Court Fees Act, contemplates is a suit which embraces two or more causes of action in respect of which a plaintiff can file separate suits, if he chooses to, but if he does not choose to he can unite them in one suit. He contends that it does not contemplate a suit which embraces two or more causes of action in respect of which a plaintiff cannot file separate suits. He says that under s. 67-A, T. P. Act, a mortgagee who holds two or more mortgages executed by the same mortgagor must enforce all of them in the same suit and so s. 17, Court Fees Act, does not apply to a mortgage suit which embraces two or more mortgages: in other words, his contention is that s. 17, Court Fees Act, must be read subjct to s. 67A, T. P. Act. I cannot accept this contention. In *Barker* v. *Edger* (5) p. 754, their Lordships of the Privy Council observed :

"The general maxim is '*generalia specialibus non derogant.*' When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enachment must be construed in that respect according to its own subject-matter and its own terms."

When a subsequent general enactment cannot override or interfere with a special Act, I do not know how one special Act can override, or interfere with, the provisions of another special Act if there is no special provision made to that effect. The Court Fees Act is an Act which deals with the method of collecting a tax; while the T. P. Act deals with the transmission of property between living persons. They are thus two distinct Codes. Therefore, in my opinion, s. 67A, T. P. Act, does not control s. 17, Court Fees Act. This is also the view held by Venkatansubba Rao, J. in *Pollachi Town Bank Ltd.* v. *Krishna Ayyar* (6) where the learned Judge says :

"Nor is the view contended for by the petitioner correct. What is argued is is that as under s. 67A, T. P. Act, a person is bound to include in the same suit different mortgages held by him, it follows from this, that the suit relates to one subject only and does not comprise as many subjects as there are mortgages. I am not prepared to accept this contention. The principle of consolidation applied by s. 67A, T. P. Act, has no bearing upon the interpretation of s. 17, Court Fees Act. The very basis of s. 67A is that there is more than one subject. The mortgages sued on may be different from one another in their terms and incidents; even the causes of action may have accrued on different dates. All that s. 67A enacts is, that the mortgagee is bound to sue on all the mortgages in respect of which the mortgage money has by the time of the suit become due."

This was quoted with approval by Mitter and Patterson, JJ. of the Calcutta High Court in *Radha Ranee Dassya* v. *Kshettra Mohan* (7), the headnote of which is in the following terms :

"The proper court-fee to be paid on a plaint in a suit to enforce several mortgage bonds, by which different properties are hypothecated, is not on the aggregate amount of the claim but the total of the fees payable separately on the sums claimed in respect of each of the bonds. Section 67A, T. P. Act, is not intended to affect in any way the provisions of s 17, Court Fees Act."

For these reasons the order of the Taxing Master is correct and the plaintiff must pay court-fees on each of the mortgages sued upon in this suit.

D. *Order accordingly.*

(5) (1898) A C 749 (754); 67 L J P C 115; 79 L T 151 (P C).

(6) A I R 1935 Mad. 262; 156 Ind. Cas. 435; 68 M L J 316; (1935) M W N 198; 41 L W 327; 7 R M 700.

(7) 63 C 720; 40 C W N 406.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 172/67 of 1939

November 28, 1940

ALMOND, J. C. AND MIR AHMAD, J.

SOHAN LAL GULAB RAI—PLAINTIFF—APPELLANT

versus

FIRM MUHAMMAD DIN MUHAMMAD YUNIS THROUGH MUHAMMAD DIN AND OTHERS—DEFENDANTS—RESPONDENTS

***Provincial Small Cause Courts Act** (IX of 1887), s. 35—New Small Cause Court Judge having no pecuniary jurisdiction to execute decree of predecessor can transfer it to himself on regular side and deal with it as Sub-Judge—He can order attachment in latter capacity—Civil Procedure Code (Act V of 1908), ss. 64, Explanation, 73—Explanation to s 64, scope of—Court ordering execution application to be filed but mentioning that attachment should continue—No such order made on application for rateable distribution which was also filed — Decree-holder for rateable distribution, if can take advantage of order on execution application.*

Where a new Small Cause Court Judge has no pecuniary jurisdiction to execute the decree passed by his predecessor he can transfer it to himself on the ordinary side and deal with it as a Sub-Judge. Hence an attachment order by him in his latter capacity would be perfectly valid. 29 Ind. Cas 996 (2), relied on. 178 Ind. Cas. 127 (1), distinguished.

The Explanation to s 64, Civil P. C., clearly indicates that applications for rateable distribution go hand in hand with the application for execution. Hence where the Judge orders execution petition to

be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application.

C A. from an order and decree of the Additional Judge, Peshawar, dated September 18, 1939.

Sardar *Raja Singh*, for the Appellant.

Messrs. *Abdul Latif Khan* and *Manohar Lal Oberoi*, for Respondents Nos. 1, 2 and 4, and 3, respectively.

Mir Ahmad, J.—On January 12, 1932 Firm Muhammad Din Muhammad Yunis of Nowshera Cantonment obtained a decree against Chaudhari Abdur Rahim of the same cantonment for Rs. 496-13 0 from the Judge of the Court of Small Causes. It so happened that the Judge who passed the decree was transferred and his successor had powers of trying small cause cases of the value of Rs. 100 only. He, however, exercised the powers of a Sub-Judge on the ordinary side which gave him jurisdiction to execute decrees for Rs. 500. The decree-holders took out execution in 1934 and asked for the attachment of house No. 503 situated in Nowshera Cantonment. The Sub-Judge dealt with the case on the ordinary side. Attachment was ordered which was effected on February 16, 1934. A suit had been instituted about the house by a third party in the meanwhile. The proceedings were therefore filed on February 17, 1934 and the attachment was ordered to subsist. This latter order was obviously made under O. XXI, r. 57, Civil P. C., as amended by this Court.

In 1935 the Executive Officer, Nowshera Cantonment, took out the execution of a decree which had been passed in his favour against Chaudhri Abdur Lahim and asked for the sale of house No. 503. Muhammad Din Muhammad Yunis applied to the executing Court for rateable distribution. The house was not sold, however, because the application of the Executive Officer was filed on July 28, 1936. He stated that he did not wish to proceed with it further. It was mentioned in the order that the attachment shall continue. The application of Muhammad Din Muhammad Yunis was also filed infructuous on the same day at their own request. No separate order for the attachment to subsist was made on this application. In 1937 another application was presented by Muhammad Din Muhammad Yunis for the execution of their decree. It was requested that house No. 503 should be sold. On June 22, 1937 the Court ordered that notice of sale should be issued. The Judge took it for granted that the old attachment subsisted. On June 23, 1937 Chaudhri Abdur Rahim executed a mortgage deed in favour of one Sohan Lal. He mortgaged house No. 503 to him for Rs. 2,000 and agreed to pay Rs. 17 8-0 per month as rent. The consideration for the mortgage consisted of old debts. On August 25, 1937, one Abdul Qayum purchased house No. 503 for Rs. 1,505 in the auction ordered by Court. On December 31, 1937 Chaudhri Abdur Rahim executed another tacking mortgage in favour of Sohan Lal for Rs. 99 and agreed to pay Rs. 1-8-9 per month more to him. On January 5, 1938 Sohan Lal objected to the sale. His objection was dismissed.

Sohan Lal brought the present suit for a declaration that the sale was subject to his mortgagee rights. He failed in the Court of the trial Judge and also in the Court of first appeal. He has come up on further appeal to this Court. The learned Counsel for the appellant argued that the original decree being that of a Court of Small Causes the Judge who took up execution on the ordinary side had no jurisdiction to proceed with it. He therefore urged that the order of the Judge dated February 17, 1934 to the effect that the attachment shall continue was *ultra vires*. We do not find ourselves in agreement with this proposition of law. Section 35, Small Cause Courts Act, runs thus:

"35 (1). Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court, which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the Civil P. C., as extended to Courts of Small Causes, or in any other enactment for the time being in force."

It is admitted that at the time when the application for execution was presented in 1934 there was no Judge of the Court of Small Causes available having power to execute a decree of the Court of Small Causes of the value of Rs. 500. It may therefore safely be presumed that the Judge meant to act under s. 35, Small Cause Courts Act, when he took over the case on the ordinary side. Learned Counsel for the appellant has referred to a ruling reported

in *Sital Ram Kali Charan* v. *Thakur Das* (1). In that ruling a Bench of this Court has laid down that a Judge of the Court of Samll Causes cannot attach immovable property in execution of a decree passed by him and for the purpose of avoiding this result the Judge cannot transfer the decree to the ordinary side and then proceed to do so. Learned Counsel argued that the act of the Sub-Judge in executing the Small Cause Court decree as a Sub-Judge amounted to a transfer of the execution from the small cause side to the ordinary side. The facts of the case dealt with by the ruling referred to above were different from those which are before us in this appeal. There the Judge had power as a Judge of the Court of Small Causes to execute the decree. He found that he could not attach immovable property when executing it as such Judge and therefore transferred the case to the ordinary side of the Court to be able to do it. It was held that the Judge could not arrogate to himself the power of attaching the immovable property by merely transferring the case to the ordinary side. In the present case the Judge had no jurisdiction to execute the decree and under s. 35, Small Cause Courts Act, had the only alternative to deal with it on the ordinary side. The ruling which really bears on the facts of this case is *Sarju Parshad* v. *Mahadev Pande* (2). Their Lordships of the Allahabad High Court have held that where a new Judge has no small cause powers he can transfer the Small Cause Court work to the ordinary side under s. 35 of the Act and deal with it as a Sub-Judge.

The result is that we hold that the attachment made on February 16, 1934 and ordered on February 17, 1934 to continue was validly effected. The next point taken by the learned Counsel for the appellant is that although the original attachment was ordered to continue on February 17, 1934 it ceased to subsist after July 28, 1936 when the application for rateable distribution of Muhammad Din Muhammad Yunis was filed infructuous. He pointed out that although there was an order dated July 28, 1936 on the application of the Executive Officer that attachment should subsist there was no such order on the application of Muhammad Din Muhammad Yunis for rateable distribution and he concluded that the attachment in their case therefore ceased to operate from the date on which their application was filed, that is to say on July 28, 1936. We do not see any force in this contention also. The application for rateable distribution went with the application for execution presented by the Executive Officer. They were both filed on the same day. Section 64, Civil P. C., runs thus:

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under and attachment include claims for the rateable distribution of assets."

The proviso to s. 64, Civil P. C. clearly indicates that applications for rateable distribution go hand in hand with the application for execution. Muhammad Din Muhammad Yunis can therefore take advantage of the order made by the execution Judge on the application of the Executive Officer to the effect that the attachment shall subsist. The attachment having been held by us to be valid from the very beginning and to have subsisted throughout till the sale was made, s. 64, Civil P. C., would come into play and the first mortgage for Rs. 2,000 in favour of Sohan Lal plaintiff is consequently void as against the claim of the auction-purchaser. The tacking mortgage had been executed after the property had been sold. It is absolutely clear that this mortgage is invalid because at the time when it was made Chaudhri Abdur Rahim had no subsisting interest in the house to encumber. The two Courts below have arrived at a correct conclusion. We dismiss the appeal with costs.

D. *Appeal dismissed.*

(1) A I R 1938 Pesh. 70; 178 Ind. Cas. 127; 11 R Pesh. 47.

(2) A I R 1915 All. 219; 29 Ind. Cas. 996; 37 A 450; 13 A L J 639.

SIND CHIEF COURT

Reference No. 46 of 1938

September 19, 1940

DAVIS, C. J. AND WESTON, J.

COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN—APPLICANT

versus

INDIAN LIFE ASSURANCE CO., LTD., KARACHI—ASSESSEES—OPPONENTS

Income Tax Act (XI of 1922), s. 8, Proviso 2—Life Assurance Company holding tax free securities, if entitled to ask that whole interest of tax free securities should be deducted from the total income before tax is assessed even if that total income is calculated according to statutory rules—In obedience to directions of Income-tax Authorities, assessee company inserting

certain figure as interest on tax-free securities in their return—Whether can challenge in appeal.

The mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in r. 25, Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities, given by the proviso to s. 8, Income Tax Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed: it is sufficiently real to them, and if the assessee-company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the interest of their tax-free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules. Views of *Derbyshire, C. J.*, in *In re North British and Mercantile Insurance Co., Ltd.* (1), approved. [p. 715, col. 2; p. 716, col. 1.]

Even if the assessee-company in obedience to the direction of the Income-tax Department and under protest accepted a certain figure as interest on tax-free securities and inserted it in their return, they are free to challenge it in appeal within the time allowed. [p. 717, col. 2.]

Ref. made by the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, dated May 20, 1938.

Mr. *Partabrai D. Punwani*, Advocate-General, for the Applicant.

Mr. *D. N. O'Sullivan*, for the Opponents Assessees.

Davis, C. J.—This is a reference by the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, relating to the income-tax assessment of the Indian Life Assurance Co. Ltd., for the year 1937-38 and the question for our decision put briefly is, whether the assessee company is entitled to deduct from the total income the whole or only part of the interest on tax free securities. The assessee company claims that it is entitled to deduct the whole of the interest of tax-free securities relying on the proviso to s. 8, Income Tax Act, and the Calcutta case in *In re North British and Mercantile Insurance Co. Ltd.* (1), while the learned Income-tax Commissioner claims that the assessee company is entitled to deduct from the income or actuarial surplus only such part of the interest on tax-free securities as, to use the words of the Advocate-General, "finds its way" according to the calculation of the actuary into this actuarial surplus.

The question for our decision as stated by the learned Commissioner is as follows:

"In view of the expert evidence of the actuary of the assessees certifying that the total actuarial surplus for the quinquennium dated May 31, 1932 included Rs. 4,21,468, only on account of receipts from interest on tax-free securities and in view of the declaration by the assessees in the return of income put in by them saying that the annual average of such interest was only Rs. 84,294, were they entitled to a deduction from the aforesaid surplus of a greater amount *viz.*, Rs. 7,63,945, than the one thus proved to have been included therein and that too when there was no evidence whatever to show that anything beyond the aforesaid amount of Rs. 4,21,468 was included in the said surplus on account of such interest?"

It was agreed, however, that this question could more conveniently be divided into two, with the arguments omitted, *see Khemchand Ramdas* v. *Commissioner of Income tax, Bombay Presidency* (2) and the questions arising out of the stated case were agreed as follows:

(1) whether the whole or part of the income earned from tax-free securities by the assessee-company is to be deducted from total income, and

(2) whether the assessee-company can challenge the figure of Rs. 84,294 shown as interest on tax-free securities in the return for 1937-1938.

Our answer to the first question is that the whole income from tax-free securities is to be deducted, and our answer to the second question is that the assessee-company can challenge the figure given. The decision of the first question appears to us to depend upon the question whether the provisions of s. 8, Income Tax Act, apply to the calculation of the assessable income of a Life Assurance Company and we think the mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in r. 25, Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities, given by the proviso to s. 8, Income Tax Act.

It is argued that a Life Assurance Company has no real income in the ordinary sense of the words; it has a mere notional income, a mere actuarial profit which is a fictitious figure, and that this must be so in view of the fact that the actuarial account is not a profit and loss account, in it are taken contingent liabilities and no actual profit is ascertained. For instance, it cannot be said what part of this actuarial surplus is derived from the

(1) I L R (1937) 2 Cal. 540; 51 C W N 905.

(2) 28 S L R 174; 149 Ind. Cas. 1204; A I R 1934 Sind 46; 6 R S 255.

interest on tax-free securities; it cannot be analysed or split into its component parts so that it can be said that so much derives from tax-free securities; and so much from securities which are not tax-free. But the different sources of the income of the company are to be shown. Schedules III and IV of the Life Assurance Companies Act require this. As Derbyshire, C. J. said in *In re North British and Mercantile Insurance Co. Ltd.* (1):

"It is clear, therefore, that the actuarial valuation prescribed for by the Life Assurance Companies Act is not simply concerned with a final figure like the answer to an arithmetical sum but sets out the various assets of the company and the interest derived from them. In fact, it informs and is intended to inform all concerned, what the assets and the income and liabilities of the company are in a way which goes much beyond the ordinary company balance-sheet. It may be that the forms in Sch. III and Sch. IV, of the Act do not provide for each individual investment and item of interest to be set out. Nevertheless, they do show the different classes of investment, the interest as a whole derived therefrom and the income-tax paid thereon. If the assessee making a full and proper return chooses to show that he has has certain tax-free investments and the income derived therefrom, it is, in my view, impossible to say that he had not made a proper return in accordance with the Life Assurance Companies Act of 1912. Where the return shows that some of the interest has been derived from securities of the Govt. of India declared to be tax-free, it is impossible, in my view, for the income tax authorities to ignore the plain provisions of the proviso to s. 8, Income Tax Act, which says that no income-tax shall be payable on the interest receivable on any security of the Govt. of India issued or declared to be income-tax free."

We do not think the fact that the income or balance or actuarial surplus, however it be called, be calculated in a particular manner excludes the operation of the proviso to s. 8 of the Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee-company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the interest of their tax-free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules.

We do not think that there is any real conflict between r. 25 and s. 8 of the Act. Rule 25 merely provides for the manner in which the income shall be calculated; it does not deal with the manner of assessment of the tax. We see no reason why credit should not be given to the assessee for the tax upon tax-free securities as it is admittedly given in the case of taxes deducted at source: see, for instance, the form in r. 18 and deductions on account of tax at source in the assessment of the Income-tax Department for 1937-1938, Ex. C. In *Institute of Patent Agents* v. *Joseph Lockwood* (3), at p. 360, dealing with this question of the conflict between a statutory provision and a rule with the force of law, Herschell, L. C. said:

"No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two section to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

And in *Hughes (Inspector of Taxes)* v. *Bank of New Zealand* (4), at p. 268, Green, L. J. said:

"Section 46, Income Tax Act, 1918, provides that the interest of certain securities shall be exempt from tax and super-tax. The securities in question are securities which have been issued with a particular condition annexed to them, that condition being: 'that the interest thereon shall not be liable to tax or super tax, so long as it is shown, in manner directed by the treasury that the securities are in the beneficial ownership of persons who are not ordinaryily resident in the United Kingdom.' Speaking for myself, I find in that language a perfectly clear legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest on them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade appears to me to override the perfectly plain language of the section."

But the Advocate-General distinguishes this case before us from the Calcutta case in *In re North British and Mercantile Insurance Co. Ltd.* (1), because in this case the income-tax authorities asked and obtained an analysis of the actuarial surplus into its component parts and the actuary states as his opinion that for the quinquennium ended May 31, 1932 the actuarial surplus consisted as to Rs. 4,21 468 of interest from tax-free securities, and this divided by 5 would give the figure of Rs. 84,294, which it is stated, the assessee-company accepted and which was shown as a deduction in the assessment by

a (3) (1894) A C 347 (360).

(4) (1938) 53 T L R 258 (268).

the Income-tax Officer. It is admitted that this is not one-fifth of the total of the interest on tax-free securities held by the assessee-company for the quinquennium. This it is admitted, is Rs. 1,52,789, for which sum, indeed, until the Income-tax Department revised its views, allowance had been made, for instance, in the assessment for 1934-1935, a copy of which is now on the record. It is, of course, only right and proper that the officers of the Income-tax Department should revise their views on such a matter if they think they have good reason for so doing, but when we asked the Advocate-General if he could refer us to any statutory authority or any case in which the actuarial surplus had been split up into its component parts and the income from interest on tax-free securities proportioned to the income from other sources, all together constituting the actuarial surplus, he could not do so, but he referred to the following passage in the judgment of Derbyshire, C. J. at p 555*:

"In the conflict here between the income-tax authorities' contention under r. 25 and the assessees' contention under the proviso to s. 8 of the Act, it seems to me that the true position is that in this particular case the actuarial valuation as prescribed by law discloses the existence of an item of interest Rs. 48,08,196. That item of interest was (at the request of the Income-tax Officer) shown to contain an item of Rs 8,32,858 as interest derived from tax-free securities of the Govt. of India. That item of interest does not affect the liabilities of the company and clearly contributes *pro tanto* to the total profit concerned. In my view, therefore, it is not open to the income-tax authorities to disregard that item or to say that it cannot be differentiated from the total. In my view, that tax free interest or its annual one-fifth part must be deducted from the income, profits and gains and is not assessable to income-tax."

The learned Commissioner also refers to this passage but relies upon it to justify the splitting up of the actuarial surplus into its component parts, but when the Chief Justice uses the phrase *pro tanto* he is referring to the whole of the items of income on tax-free securities as contributing to the total profit; as to its whole extent it contributed to the total profits; and it did not affect the liabilities of the company; but the phrase '*pro tanto*" was not intended to be used to reduce the item of interest on tax-free securities from the whole to a part, as the learned Commissioner argues. We think ourselves that it was not the intention of Legislature, provided s. 8 of the Act applies to the income of life assurance companies, that the income-tax prayer should receive only part of the statutory benefit of his holding of tax-free securities and not the whole. We see no reason to suppose that the Legislature did not intend the proviso to s. 8 to apply to all appropriate cases, and, indeed, we observe that in the Act as recently amended under s. 10 (*vii*), s. 8 is excluded in the case of an insurance business, and the profits and gains are to be determined in accordance with the schedule to the Act. In r. 3 in that schedule occurs the following:

3. (*c*) the whole amount of interest received in respect of any securities of the Central Govt. which have been issued or declared to be income-tax free shall be deducted."

It is true that interest on tax-free securities issued or declared to be so by a Provincial Govt. is no longer to be deducted, but we do not think this affects the principle. We appreciate the fact that this new rule may have been made not to remove doubts but to give a relief not hitherto granted, and we mention this only by the way. We prefer on the merits, with all respect, the judgment of Derbyshire, C. J. in the Calcutta case in *In re North British and Mercantile Insurance Co. Ltd.* (1), to the dissenting judgment of Panckridge, J. and we think it makes no difference that an actuary had in response to a request of the Income-tax Department divided or purported to divide the actuarial surplus into parts proportioned to the income of the company from different sources. Nor do we think that because the assessee-company in obedience to the direction of the Income-tax Department and under protest accepted this figure of Rs. 84,294 and inserted it in their return, they were not, free to challenge it in appeal within the time allowed, as they did. It was suggested to us that some form of estoppel operated against the company by reason of their obedience to the direction of the Income-tax Department, but this argument was not elaborated or pressed before us, and we see no room for an estoppel in this matter at all. We, therefore, answer the two questions accordingly. The assessee-company is entitled to the costs and the refund of the fee of Rs. 100. Order accordingly.

D. *Answer accordingly.*

*Page of I.L.R. (1937) 2 Cal.—[*Ed.*]

BOMBAY HIGH COURT

Letters Patent Appeal No. 53 of 1938
July 29, 1940
BROOMFIELD AND DIVATIA JJ.

KRISHNADAS GOVARDHANDAS MADIVALE—INSOLVENT—APPELLANT

versus

RATANBAI GOKULDAS LAXMANDAS—CREDITOR—RESPONDENT

Provincial Insolvency Act (V of 1920), s. 28 (5)—Transaction and deeds held created trust entitling beneficiary to priority — Trustee — Person accepting trust in relation to specific sum and agreeing to invest it in his firm and undertaking duties of trustee —Whether can plead that transaction was not trust—Insolvency of such person—Beneficiary and co-trustees, if entitled to preferential charge over outstanding debts—Trusts Act (II of 1882), ss. 63, 66—Mixing of trust amount with other assets of trustee—Insolvency of trustee—Assets in hands of Official Assignee, whether can be followed for amount of trust

Under an oral will of his brother, one *K* an insolvent held a sum of Rs. 11,000 which his brother had instructed him to pay to his wife *R*. *K* formally handed over the amount of Rs. 11,000 to her for which she passed a receipt, and then she formally handed back Rs. 10,000 out of that amount to *K* to be kept by him as a deposit, and she created the trust deed in respect of the same. It was to bear interest at eight annas per cent per month. Certain beneficiaries were mentioned in the trust deed, the principal one being *R* herself for the amount of Rs. 8,000 from the income of which she was to be maintained during her life-time. With regard to the balance of Rs. 2,000 she was to be given it in two instalments if she wanted to go on pilgrimage, and after her death the corpus was to be distributed to certain temples. It was further provided that the majority of the trustees, of whom *K* was one, was empowered to invest the trust moneys either in authorized securities or with several reputed merchants. That the trust deed was written on October 14, but its actual execution was on October 20. On the latter date *K* stated in the receipt of the amount passed by him to *R* that he had received the amount of Rs. 10,000 by way of deposit for which he was to pay interest at eight annas per cent. per month, and he further stated that according to her husband's directions *R* was to make a trust deed in respect of the said amount, that he was to be one of the trustees, that as stated in the trust deed the amount was to be dealt with according to the opinion of the majority of the trustees and that he was bound to pay the amount on demand by them :

Held, that the deposit and the trust were parts of one and the same transaction and that even though the receipt might have been passed in order of time before the execution of the trust deed, the intention of the parties was to enter into one transaction on that date. It could not be said that *K* was not a trustee when the amount was deposited with him. As a trust had been created, *K* must be deemed to be holding the amount as a trustee, even though it was agreed that he was entitled to invest the trust fund in any security that he liked and pay interest to the beneficiary. The widow *R* was therefore entitled to claim priority under s 28 (5), Pro. Insol Act. 143 Ind. Cas. 162 (2), relied on. 161 Ind. Cas. 891 (3) and 125 Ind. Cas. 533 (8), approved. 134 Ind, Cas. 161 (1), held **Overruled** by 143 Ind, Cas. 162 (2), 170 Ind Cas. 329 (10), 176 Ind. Cas. 906 (11) and 27 Ind. Cas. 343 (12), distinguished. [p 722, col. 2.]

Per *Wassoodew, J* —Where a person accepts a trust in relation to a specific sum of money and agrees to invest it in his firm and also undertakes the duties of a trustee in respect thereto and further agrees to conform to the terms of the instrument creating the trust, the defence that the transaction in relation to the amount is not a trust is not open to him. In those circumstances the beneficiary and the co-trustees will be entitled to a preferential charge over the outstanding debts in the event of his bankruptcy. It is not open to the trustee to claim that the character in which he holds the property is different from that of a trustee. 143 Ind. Cas. 162 (2) and 121 Ind. Cas. 603 (4), relied on. [p. 720, col 2.]

Where a trustee mixes up trust amount with his other assets which on his insolvency vest in the Official Assignee the assets can be followed in the hands of the Official Assignee for the trust amount and the right to do so does not depend upon whether the trust property had been properly or improperly disposed of. [p 721, col. 1.]

[Case-law relied on]

L. P. A. from the decision of Wassoodew, J., in S. A. No. 157 of 1937.

Messrs. *A. G. Desai* and *G. S. Gupte*, for the Appellant.

Messrs *G. N. Thakor*, *Y. V. Dixit* and *A. B. Acharya*, for the Respondent.

Wassoodew, J.—This is a second appeal from the order of the District Judge of Poona in proceedings arising out of the insolvency of the respondent Krishnadas Govardhandas Madiwale. The facts giving rise to those proceedings are not disputed. The appellant Ratanbai was the widow of one Gokuldas Lakshmandas, the brother of the said Krisnnadas. Gokuldas had directed by his oral will that his brother Krishnadas should pay Ratanbai Rs. 11,000 out of his estate on certain terms as to investment of the corpus. After payment of all expenses for charity and pilgrimage, the interest upon such investment was to be paid to Ratanbai for her maintenance, and other expenses. The will also provided that the widow Ratanbai should make a settlement in respect of the corpus. Accordingly on October 20, 1925, a formal trust deed was executed and registered. On the same day the said Krishnadas formally handed over the cash to Ratanbai and at the same time received the sum of Rs. 10,000 back from her on executing a formal receipt thereof, agreeing to repay the amount when the same was demanded by the trustees, and to pay interest to Ratanbai every month as long as the amount was in deposit with his firm. That receipt is in the following form :

"To Gan. (*i. e.* widow) Ratanbai, husband's name Gokuldas Laxmandas (of) Poona...That according to the oral will of your husband, you are to be

paid Rs 11,000, eleven thousand rupees, from his estate. The same have been paid this day, by me to you, as per his instructions. In respect of that I have taken from you a separate receipt in writing. Out of those Rs. 11,000, eleven thousand rupees, you have kept with us, as deposit (*i. e. thewa*) Rs 10,000 ten thousand rupees, (in words) .. According to the command (or order) of your husband, you have to execute a trust deed in respect of this sum of Rs. 10,000 ten thousand rupees... And I am also to be one of the trustees, out of the trustees which you are to appoint therein (*i e* in the trust deed). According to the said trust deed, the management (*i. e. vyawastha*) of this amount is to be made according to the opinion of the majority of the trustees. For the said reason, this principal amount will be paid by us when the same will be demanded by the trustees."

By the trust deed executed by the said Ratanbai among the trustees appointed for this trust fund of Rs. 10,000 was the respondent Krishnadas Govardhandas. The latter applied in insolvency on August 19, 1933, and was adjudicated an insolvent. Thereupon all his property was taken charge of by the assignee in insolvency. When the schedule of creditors was prepared, Ratanbai who was described as a creditor of the said insolvent therein, applied to the Court in December 1933, claiming priority over all the other creditors of the insolvent in respect of the amount of Rs. 10,000 which she claimed, was held in trust by the insolvent. The Insolvency Court held that she was entitled to priority, the amount being in the hands of the insolvent as trust money. Accordingly the Court directed that the amount should be paid to Ratanbai for being utilized in accordance with the trust deed. The Receiver in insolvency, respondent No. 1, appealed, and the District Judge took the view that the amount of Rs. 10,000 was a mere debt due to Ratanbai by the insolvent, that the trust itself was constituted on the footing that the amount had been placed in deposit with one of the trustees, and that the said trustee was only a debtor liable to the co trustees to pay the amount. He therefore held that Ratanbai was entitled to rank as a creditor along with others and claim rateable distribution. Against that order Ratanbai has filed this second appeal, and the Official Receiver along with the insolvent were made parties-respondents.

I am told that after the appeal there has been a composition of the creditors' debts, that the order of adjudication has been annulled, and that the assignee in bankruptcy has ceased to act as such in this case. The only respondent interested in this appeal is therefore the insolvent. The important question that arises in this appeal is whether the relationship between the trust and the respondent Krishnadas was merely one of creditor and debtor in respect to the said amount of Rs. 10,000. The ground upon which the learned District Judge negatived fiduciary relationship of the respondent Krishnadas in relation to the amount was that upon reading the two documents, namely, the trust deed and the receipt, it appeared to him that the insolvent did not hold the amount in his capacity as trustee. Upon a supposed admission of Ratanbai, which is not supported by the record, he further held that the deposit was made before the creation of the trust. There is no such admission in the deposition of Ratanbai. It seems to me on reading the two documents that they were inseparable and contemporaneous. The trust deed was referred to in the receipt as follows:

"According to the said trust deed the management of this amount is to be made according to the opinion of the majority of the trustees."

The respondent makes references therein to the terms of the trust deed appointing him as trustee, and agrees to retain the amount subject to the terms of that deed. The learned District Judge's conclusion was based also on the following grounds that the respondent could use the money as his own, that he agreed to pay interest on the amount and that these two circumstances had the effect of engrafting a contract upon the trust, whereby the title to the money was transferred and the trust no longer could look to that particular sum of money, as its subject-matter. That reasoning was adopted from the ruling in *Nagappa Chettiar* v. *Official Assignee, Madras* (1) which was followed by him. In that case the uncle and nephew separated and upon partition both subscribed certain sums of money for being set apart for charities, and agreed that they were to act as co-trustees. The amount was drawn by two *hundis* and handed over to the uncle. The latter kept the amount in deposit with his firm and it was by consent used in his business. The question arose whether under the circumstances he was a trustee for the specific sum in question. There Curgenven, J. made the following observations (p. 254*):

"I find it very hard to see how when trust money

(1) A I R 1931 Mad. 251; 134 Ind. Cas. 161; 60 M L J 355; (1930) M W N 277; Ind. Rul. (1931) Mad. 817.

*Page of A I R 1931 Mad.—[*Ed.*].

is handed over to any person, he be or he be not a trustee, to use in his business, and subject to the payment of interest, no relationship of creditor or debtor is set up. The circumstances that he may use the money as his own, and that he has to pay interest, seem to me to point clearly to the engrafting of a contract upon the trust, whereby title to the money is transferred, and the trust no longer can look to that particular sum of money, as its rest or subject-matter, but to a promise to pay an equal sum."

Curgenven, J. was himself in doubt as to the correctness of that reasoning for he preferred to base his conclusion upon the doctrine of 'tracing' or 'following', and he ultimately held that in the absence of proof of continuing identity from one transformation to another there could not be a traceable continuity and therefore the trust money could not be recovered.

It seems the question is set at rest by the decision of the Privy Council in *Official Assignee, Madras* v. *Krishnaji Bhat* (2). In that case one T. Sivasankar Bhat, who was the father of the respondent, had instructed his uncle Sadasiva Tawker by letter to invest in his firm, which was known as T. R. Tawker & Sons, a sum of Rs. 10,000 lying with the firm, such investment to be made in the name of the respondent and the money to be handed over to him on attaining twenty-one, and the interest in the meanwhile to be paid to the father. The firm gave him a receipt for the amount. The firm was adjudicated insolvent and the respondent, who had already instituted a suit for recovery of the amount, made the Official Assignee a party and claimed preference over the other creditors of the insolvents. The argument before the Board was that the transaction did not constitute a trust, but a mere deposit in respect of which the respondent would only be entitled to rank with the other crediters. That contention was overruled by the Board.

It is argued by Mr. Abhyankar for the respondent that the Privy Council case is distinguishable on the facts for there the trust was admitted and their Lordships did not allow the question to be agitated before them. But in this case too the trust has been admitted and notwithstanding that fact the character in which the fund was held by the trustee through the settlor direct has been questioned. The question is whether the fact that the trustee had agreed to pay interest on the fund, assuming that the agreement and the trust deed were executed simultaneously, would affect the liability of the trustee to account for it as trust property. A trust implies an obligation annexed to the ownership of property and the subject-matter of the trust is called trust property: *see* s. 3, Trusts Act, II of 1882, Mr. Abhyankar has expressly admitted that the respondent was a trustee and also further that the trust property was the fund referred to in the trust deed. But he argued that the character in which the property was possessed by the respondent was merely that of a debtor. The argument is based upon the reasoning in *Nagappa Chettiar* v. *Official Assignee of Madras* (1). It seems to me difficult to accept the reasoning in *Nagappa Chettiar* v. *Official Assignee of Madras* (1). In a later case, *Veerappa Chetty* v. *Official Assignee, Madras* (3), the Madras High Court held that *Nagappa Chettiar* v. *Official Assignee of Madras* (1), was overruled by *Official Assignee, Madras* v. *Krishnaji Bhat* (2) With respect I agree with that view. I fail to see how it could be said that the subject-matter of the trust was the promise involved in the receipt to recover back the amount. Where a person accepts a trust in relation to a specific sum of money and agrees to invest it in his firm and also undertakes the duties of a trustee in respect thereto and further agrees to conform to the terms of the instrument creating the trust, the defence that the transaction in relation to the amount is not a trust is not open to him. In those circumstances the beneficiary and the co-trustees will be entitled to a preferential charge over the outstanding debts in the event of his bankruptcy: *Official Assignee, Madras* v. *Minakshi Vidyasalai* (4). It is not open to the trustee to claim that the character in which he holds the property is different from that of a trustee. In *Official Assignee, Madras* v. *Krishnaji Bhat* (2), where the nature of the transaction which was essentially a trust was conceded, it was held that the defence that the amount was held as a deposit by the trustee in his capacity as a debtor of the beneficiary was not open to him. In the view I take of this case the relationship created by the terms of the deposit and the trust deed is not that of a creditor and debtor merely but that of a trustee.

(2) 60 I A 203; 143 Ind. Cas. 162; A I R 1933 P C 148; 56 M 570; 35 Bom. L R 756; Ind. Rul. (1933) P C 138; 37 L W 780; 37 C W N 713; (1933) A L J 637; 57 C L J 433; (1933) M W N 575; 65 M L J 1 (P C).

(3) A I R 1935 Mad. 686; 161 Ind. Cas. 891; 8 R M 889.

(4) A I R 1930 Mad. 24; 121 Ind. Cas. 603; 52 M 919; 57 M L J 99; 30 L W 188; Ind. Rul. (1930) Mad. 219.

The next question is whether the amount can be followed if it is mixed up with the other assets of the trustee so long as the value of those assets has never fallen below the amount involved. That point also is covered by the authority of the Privy Council in *Official Assignee, Madras* v. *Krishnaji Bhat* (2). There the rulings in *In re Hallet's Estate*; *Knatchbull* v. *Hallet* (5) and *Pannell* v. *Deffell* (6), were referred to with approval, and it was held that the assets of the firm so vested in the Official Assignee could be followed and the right to do so did not depend upon whether the trust property had been properly or improperly disposed of. The learned District Judge seems to me to have fallen into error in holding that this case could be brought within the ruling in *Nagappa Chettiar* v. *Official Assignee of Madras* (1), or could be distinguished from that of the Privy Council. I think, therefore, the order passed by him must be set aside and that of the Insolvency Court restored with costs throughout, subject to this modification that the amount deposited in Court, which I understand is Rs. 10,000, should be paid to Ratanbai and such of her trustees as may be alive for investment in accordance with the trust deed. The interest as claimed on that amount shall be paid to Ratanbai.

Latters Patent Appeal

Divatia, J.—This is an appeal under the Letters Patent against the decision of Wassoodew, J. in Second Appeal No. 157 of 1937. The dispute arose in the insolvency proceedings of one Krishnadas Govardhandas Madiwale. He was adjudicated insolvent in 1933 and a Receiver was appointed of his property. Krishnadas was adopted in another family and his natural brother Gokuldas died in 1915 leaving a widow named Ratanbai. Ratanbai applied in the insolvency proceedings praying that she should be given a first charge over the property of the insolvent in respect of an amount of Rs. 10,000 which, according to her, was in possession of the insolvent as trust property on her behalf. The Receiver opposed that application on the ground that the applicant Ratanbai was only an ordinary creditor and not a beneficiary under any trust, and that she was not, therefore, entitled to priority over other creditors. The trust on which Ratanbai relied and of which she herself was the main beneficiary was created by her in 1925. It is admitted by Krishnadas that under an oral will of his brother, he held a sum of Rs. 11,000 which his brother had instructed him to pay to Ratanbai. Ratanbai's case is that under the trust deed made by her on October 20, 1925, a sum of Rs. 10,000 out of this amount was to be managed by several trustees of whom Krishnadas was one, that on that date there were three transactions under which Krishnadas formally handed over the amount of Rs. 11,000 to her for which she passed a receipt, and then she formally handed back Rs. 10,000 out of that amount to Krishnadas to be kept by him as a deposit, and she created the trust deed in respect of the same.

The trust deed is a long document but its material provisions are these: The amount of Rs. 10,000 had been handed by Krishnadas to her for which a receipt was passed. It was given back to Krishnadas to be kept as a deposit on taking a receipt from him, and it was to bear interest at eight annas per cent. per month. Certain beneficiaries are mentioned in the trust deed, the principal one being Ratanbai herself for the amount of Rs. 8,000 from the income of which she was to be maintained during her life-time. With regard to the balance of Rs. 2,000 she was to be given it in two instalments if she wanted to go on pilgrimage, and after her death the corpus was to be distributed to certain temples. It was further provided that the majority of the trustees, of whom Krishnadas was one, was empowered to invest the trust moneys either in authorized securities or with several reputed merchants. It may be stated here that the trust deed was written on October 14, but its actual execution was on October 20. On the latter date Krishnadas stated in the receipt of the amount passed by him to Ratanbai that he had received the amount of Rs. 10,000 by way of deposit for which he was to pay interest at eight annas per cent. per month, and he further stated that according to her husband's directions Ratanbai was to make a trust deed in respect of the said amount, that he was to be one of the trustees, that as stated in the trust deed the amount was to be dealt with according to the opinion of the majority of the trustees and that he was bound to pay the amount on demand by them. The case for Ratanbai was that even though the amount of Rs. 10,000 remained as a deposit with Krishnadas, he did not cease to be a trustee with respect to this fund, and, that, therefore, under s. 23 (5),

(5) (1879) 13 Ch. D 696; 49 L J Ch. 415; 42 L T 421; 28 W R 732.

(6) (1853) 4 De G M & G 372; 23 L J Ch. 115; 18 Jur. 273; 1 W R 499.

Prov. Insol. Act, she was entitled to first preference for this amount over all the other creditors of Krishnadas. The trial Court held in favour of the applicant Ratanbai that the money was in the hands of the insolvent as trust money as alleged by her, and that, therefore, she was entitled to the priority claimed by her.

On appeal by the Receiver, the learned District Judge was of the opinion that the deposit and the alleged trust were different transactions, and that the amount of Rs. 10 000, had been deposited by Ratanbai with Krishnadas before the creation of the trus . The learned Judge further held, relying upon the decision in *Nagappa Chettiar* v *Official Assignee of Madras* (1), that the agreement that Krishnadas was to pay interest on the amount deposited and that he was to invest it where he liked, engrafted a contract upon the trust and so far as the investment was concerned, he was only a debtor of the body of trustees for the amount. The learned Judge distinguished the decision of their Lordships of the Privy Council in *Official Assignee, Madras* v. *Krishnaji Bhat* (2), relied upon by the respondent, on the ground that there the trust was admitted while here it was disputed and was alleged to be a transaction of deposit. He, therefore, set aside the order of the trial Court and directed that Ratanbai was not entitled to priority but should rank with the other creditors for rateable distribution of the assets of the insolvent.

On second appeal, Wassoodew, J., reversed that decree mainly on the ground that the learned Judge was wrong in holding that the deposit and the trust were two different transactions. In his opinion the deposit did not precede the trust as a separate transaction. As these two documents were executed on the same day and there was a distinct reference in the receipt to the trust deed and as some of the provisions of the trust deed were also inserted in the receipt itself, the learned Judge was of the opinion that they were contemporaneous and parts of one and the same transaction. He further held that the decision in *Nagappa Chettiar* v. *Official Assignee of Madras* (1), on which the respondent before him relied, was overruled by the decision of the Privy Council in *Official Assignee, Madras* v. *Krishnaji Bhat* (2). The question according to him was whether the fact that the trustee had agreed to pay interest on the fund, assuming that the agreement and the trust deed were executed simultaneously, would affect the liability of the trustee to account for it as trust property. In his opinion, the point was concluded by the decision of the Privy Council and it cannot be said that a contract was engrafted on the trust. On these grounds he reversed the decree of the learned District Judge and allowed Ratanbai's appeal.

This appeal has been filed against the decision of Wassoodew, J. Two points have been urged before us by Mr. Desai for the appellant who is now the insolvent himself as the Receiver has ceased to act after a composition with the creditors. The first point is that no trust was in existence in respect of this amount at the time when it was deposited with him. He relies upon the contents of the receipt, Ex. 1250, passed by the appellant, in which it is stated that a trust deed was to be passed in which he was to be one of the trustees, and also upon a recital in the trust deed to the effect that Krishnadas was to pay Ratanbai Rs. 10,000 out of his estate for making the trust deed. He also relies on the deposition of Ratanbai in the trial Court, but there is no admission by Ratanbai therein that the deposit took place before the trust and that it was an independent transaction. We think Wassoodew, J., was right in concluding on the evidence, especially from the contents of the receipt in which some of the provisions of the trust deed are recited, that the deposit and the trust were parts of one and the same transaction and that even though the receipt might have been passed in order of time before the execution of the trust deed, the intention of the parties was to enter into one transation on that date. As I have observed before, the trust deed was written on the 14th though it was executed on the 20th when the receipt was also passed. In our opinion, therefore, the trust and the deposit formed one transaction, and it cannot be said that Krishnadas was not a trustee when the amount was deposited with him. On that finding itself, the appellant, in our opinion, would not be entitled to succeed in this appeal; because on the authority of *Official Assignee, Madras* v. *Krishnaji Bhat* (2), if it is either admitted or found on evidence that a trust had been created, the appellant must be deemed to be holding the amount as a trustee, even though it was agreed that he was entitled to invest the trust fund in any security that he liked and pay interest to the beneficiary.

Mr. Desai however very strongly relies upon the decision in *Nagappa Chettiar* v. *Official Assignee of Madras* (1). That

decision is to the effect that when trust money is handed over to any person, whether he be trustee or not, to use in his business subject to the payment of interest, a relationship of creditor and debtor is set up, and that the circumstance that he could use the money as his own and that he had to pay interest had the effect of engrafting a contract upon the trust whereby title to the money was transferred and the trust could no longer look to that sum of money as its *res* or subject-matter but to a promise to pay an equal sum. It may be stated here that it was admitted by the parties in that case that a trust had been created from the beginning. The question was whether the provision that the amount was to be invested by the trustee himself in any way he liked and pay interest amounted to an agreement or contract which had the effect of changing the relationship between the parties from that of trustee and beneficiary to that of debtor and creditor. The learned Judges in their judgment discussed a previous judgment of the Madras High Court, which was referred to during the course of the arguments in *Krishnajee* v. *Sadasiva* (7), wherein Kumaraswami Sastri, J. obeserved as follows (page 252*):

"If the author of the trust deed agrees that the trustee can use the money for his own benefit there seems to me to be no reason for saying that the trust goes and that it cannot be trust property in any sense of the term because of this liberty given to the trustee"

The learned Judges distinguished that case on the ground that the question was not so much as to whether the trust goes in such a case, but that when the trustee was authorized to use and accordingly uses the trust money in his own business for interest, the object-matter of the trust is no longer the money but the personal obligation of the trustee which alone fetched the interest, and that the trust will subsist subject to that modification. This case, *Krishnajee* v. *Sadasiva* (7) ultimately went in appeal to their Lordships of the Privy Council whose decision is reported in *Official Assiganee, Madras* v. *Krishnaji Bhat* (2), mentioned above. The facts shortly were that a sum of Rs. 10,000 was left by the father of a minor in the hands of a firm for investment in their business at a fixed rate of interest in the name of the minor, to whom the amount was to be paid on his attaining twenty-one years. Subsequently the members of that firm were adjudicated insolvents, and thereafter the minor, who had become major at that time, asked for priority with respect to the amount of Rs. 10,000 lying with the firm. It may be noted that the contention of the appellant in the lower Courts was that assuming that a trust was created, the relationship of trustee and beneficiary had been superseded by the relationship of debtor and creditor when the amount was invested on interest with the firm. That argument had been repelled by the Madras High Court in appeal and that decision is reported in *Official Assignee, Madras* v. *Kishnaji* (8). The learned Judges here held that even though there was an agreement between the minor's father and the members of the firm that interest was to be paid on the money invested in the firm, the agreement did not affect the fiduciary relation created between the parties, and they therefore held that as the firm continued to be a trustee for the amount, the respondent was entitled to priority over the other creditors of the firm.

On appeal to the Privy Council, their Lordships held that the assets of the firm vested in the Official Assignee subject to a charge for Rs. 10,000 in favour of the respondent, and that the right of the beneficiary to follow the trust fund did not depend upon whether the fund had been properly or improperly disposed of. It was sought to be contended before their Lordships on behalf of the Official Assignee, who was the appellant, that the transaction under which the money was given to the firm did not constitute a trust at all but was only a deposit. Their Lordships stated however that they were unable to accept that contention. No issue on that question was raised at the trial and it was clear that the trust was admitted in both the lower Courts. They held that on the basis that there was a trust and that there was an agreement that the firm had to pay interest on the amount kept with it, the person on whose behalf the money was deposited was entitled to priority on the ground that the fund still retained its characteristic of a trust fund in spite of the alleged deposit in the firm.

Mr. Desai has sought to distinguish this case from the present case on the ground that there the trust was assumed or admitted and here there is no such admission and that it is to be found whether a trust existed at the time of the deposit. But the question before their Lordships was not simply whe-

(7) A I R 1927 Mad 249; 99 Ind. Cas. 713.

*Page of A I R 1927 Mad.—[*Ed.*]

(8) A I R 1930 Mad. 693; 125 Ind. Cas. 533; 59 M L J 718; (1930) M W N 362; Ind. Rul. (1930) Mad. 789; 31 L W 792.

ther the fund invested was a trust fund, but what would be the result if the amount was to be regarded as a trust fund, and their Lordships' decision was that on the footing that it was a trust fund, it continued as such and that it could be followed in the assets of the insolvent firm. Wassoodew, J. was of the opinion that the decision in *Nagappa Chettiar* v. *Official Assignee of Madras* (1) had been, in effect, overruled by this decision of their Lordships, and indeed the Madras High Court itself took the view in *Veerappa Chetty* v. *Official Assignee, Madras* (9) that that decision had been overruled by the Privy Council in *Official Assignee, Madras* v. *Krishnaji Bhat* (2). Mr. Desai however contends that that is not so and the question which arose for decision in *Nagappa Cheittar* v. *Official Assignee of Madras* (1) had not been agitated in the argument before their Lordships of the Privy Council, and they did not say that a contract could not be engrafted upon a trust. But we think that the decision of their Lordships is entirely inconsistent with the decision in *Nagappa Chettiar* v. *Official Assignee of Madras* (1). It had been contended in appeal before the High Court that the relationship of debtor and creditor had been substituted in place of trustee and beneficiary. Their Lordships held that the trusteeship continued even after the deposit and they did not say that the agreement to pay interest on the amount deposited had the effect of engrafting a contract upon it. In our opinion therefore the view taken in *Nagappa Chettiar* v. *Official Assignee of Madras* (1) is no longer good law after the decision in *Official Assignee, Madras* v. *Krishnaji Bhat*(2) that even if a trustee be allowed to invest a trust fund as he liked and interest on it, he does not cease to be a trustee with respect to that fund.

Mr. Desai has relied upon two decisions of the Privy Council, *viz.*, in *Murugappa Chetti* v. *Official Assignee, Madras* (10) and *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil* (11), but in our opinion they have no bearing on the facts of the present case. In the first of them the decision on the facts of the case was that the moneys were entrusted to a firm for investment and that it had no authority to employ any part in their own business ; it was further held that there could be no ratification of a trust fund being treated as a mere deposit. In the second decision it was held on the particular facts of the case that there was no intention on the part of the firm, which had become insolvent, to hold the property as trustee for a temple. We do not think, therefore, any of those two decisions supports the appellant's case.

Mr. Desai has lastly relied upon the decision in *Malvankar* v. *Credit Bank of India Ltd.* (12) where a person had paid a certain amount to a bank as security for the faithful discharge of his duties. The amount was invested with the company and bore interest at six per cent. When the company went into liquidation, the claimant urged that he was entitled to recover the amount in full in preference to the creditors of the bank as he had paid it to the bank as an employee and not as a creditor. It was held that the claimant ranked merely as an ordinary creditor and that the bank was only a debtor and not a trustee. This decision was based on the ground that the amount given to the bank had not been ear-marked for any specific purpose, and that therefore, the bank did not constitute itself as a trustee in respect of that amount. On the facts of the present case it is clear that this amount of Rs. 10,000 had been ear-marked in the trust deed and that Krishnadas was specifically made one of the trustees thereof. He further says in the receipt that he would pay the principal amount on demand by the trustees. It is clear, therefore, that on his own admission he held the ear-marked amount for the respondent.

We, therefore, argee with Wassoodew, J., in holding that tne capacity of the appellant with regard to the amount of Rs. 10,000 was that of a trustee and had not been changed into that a creditor, with the result that Ratanbai was entitled as a beneficiary to claim priority for this amount. For these reasons the decision of Wassoodew, J. is confirmed and the appeal is dismissed with costs.

S. *Appeal dismissed*

(9) A I R 1935 Mad. 686; 161 Ind. Cas. 891; 8 R M 889.

(10) 40 Bom. L R 1; 170 Ind. Cas. 329; A I R 1937 P C 296; 64 I A 343; 31 S L R 678; 1937 O L R 478; 1937 A L R 731; 10 R P C 71; 3 B R 770; 46 L W 399; (1937) O W N 928; (1937) M W N 1179; 46 C L J 118 18 P L T 1007 (1937) A L J 1381; 42 C W N 8 (P C).

(11) 40 Bom L R 1236; 176 Ind. Cas. 906; A I R 1938 P C 259; 32 S L R 598; 1939 Rang. 59; 42 C W N 1125; 11 R P C 77; 1938 A L R 731; 1938 O L L 395; 48 L W 466; (1938) M W N 1002; 5 B R 1; (1939) 1 M L J 192 (P C).

(12) 16 Bom. L R 733; 27 Ind. Cas. 343; A I R 1914 Bom. 118.

ALLAHABAD HIGH COURT

Miscellaneous Application No. 728 of 1938
September 18, 1940
COLLISTER AND BAJPAI, JJ.
KANHAIYA LAL GOENKA—ASSESSEE—APPLICANT
versus
COMMISSIONER OF INCOME-TAX, U. P.
OPPOSITE PARTY

Income Tax Act (XI of 1922), ss. 64 (3), 66—Place of assessment decided under s. 64 (3)—Income-tax Officer accepting final order of Commissioner and proceeding to make assessment—Plea of jurisdiction, if can be raised in appeal before Assistant Commissioner—High Court whether can under s. 66 deal with that question — Proviso to s. 64 (3), construction.

It is not permissible to an assessee to create a question arising out of the appeal by putting it in the grounds of appeal when as a matter of fact the assessee is not competent to raise the plea and the Assistant Commissioner is not competent to decide the plea. Where the place of assessment has been decided under the provisions of s. 64 (3), Income Tax Act, and an Income-tax Officer accepting the final order of the Commissioner or Commissioners or the Central Board of Revenue proceeds to make an assessment, the plea of jurisdiction cannot be raised before the Assistant Commissioner on appeal and the High Court cannot deal with that question under s. 66 of the Act

The words occurring in the proviso to s. 64 (3), Income Tax Act, are that the assessee should have had an opportunity of representing his views and not that the assessee should have been formally heard on his objection.

Mr. *S. B. L. Gour*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

Bajpai, J.—This is an application by an assessee Seth Kanhaiya Lal under s. 66 (3), Income Tax Act, praying that this Court should require the Commissioner to state a case and refer the same to us after formulating certain question for our decision. The learned Commissioner refused to state a case on the ground that the questions on which reference was sought did not arise out of the appellate order of the Assistant Commissioner.

The facts may now be stated. The assessment year with which we are concerned is 1934-35, and on April 3, 1934 the Additional Income-tax Officer of Meerut issued a notice under s. 22 (2) to the assessee asking him to submit a return. The return was submitted in June 1934, but by an application in September 1935 the assessee objected to the jurisdiction of the Income-tax Officer of Meerut. A question about the place of assessment thus arose within the meaning of s. 64 (3) of the Act and the Income-tax Officer referred the matter to the Commissioner of the Central and United Provinces for determination. The Commissioner by an order dated October 21, 1935 asked the Income-tax Officer to obtain an affidavit from the assessee and an affidavit containing all the statements upon which the assessee objected to being assessed in the United Provinces was given. The contention of Seth Kanhaiya Lal was that his principal place of business and his residence was in Calcutta and he should, therefore, be assessed there. The Commissioner of Income-tax, Central and United Provinces, then entered into correspondence with the Commissioner of Bengal and it was ultimately decided that so far as assessment of 1934-35 and 1935-36 were concerned, they should be completed in the United Provinces at Meerut and assessments thereafter beginning from 1936-37 should be made in Calcutta. There was some misunderstanding by the Income-tax Officer of Meerut and he seems to have transmitted the records for the years 1934-35 and 1935-36 to Calcutta, but the Income-tax Officer of Calcutta drew the attention of the Meerut Officer to the agreed orders passed by the Commissioners of the two Provinces and requested him to proceed with the assessments for the years 1934-35 and 1935-36.

The Income-tax Officer of Meerut then became apprised of the correct situation and proceeded with the assessment of 1934-35. The assessee continued to object to the jurisdiction of the Meerut Income-tax Officer, but the assessment for 1934-35 was completed on June 23, 1937. There was an appeal to the Assistant Commissioner and amongst other points which dealt with the amount of the tax a point was taken regarding the jurisdiction of the Income-tax Officer of Meerut. The Assistant Commissioner on this latter point after stating the entire proceedings by which the question of the place of assessment was ultimately determined observed:

"In fact no fresh proceedings under s. 64 were needed afterwards and if the appellant has any grievance in this respect, I cannot adjudicate upon it as no appeal is provided by s. 30, Income Tax Act, against any order under s. 64."

It is clear that the Assistant Commissioner was of the opinion that an appeal to him on a question of jurisdiction was incompetent. He then proceeded to dispose of the other questions raised in the appeal and dismissed the same. There was then, as is usual in cases of this kind, an application to the Commissioner under s. 33 of the Act and an application requesting the Commissioner to state a case under s. 66 (2) of the Act. The learned

Commissioner refused to give any relief under s. 33 of the Act and has referred one question of law for our decision arising out of the appellate order of the Assistant Commissioner as regards the amount of the assessment (Connected Miscellaneous Case No. 409 of 1938) but has refused to refer any questions as regards the jurisdiction of the Income-tax Officer, being of the opinion that as no appeal is provided under s. 30 against an order passed under s. 64 the said questions did not arise out of the appellate order of the Assistant Commissioner and, as such, they could not form the subject of reference to the Hon'ble High Court under s. 66 (2). By this application it is contended before us that this decision of the Commissioner is not correct and that we should therefore ask him to state a case on the point of jurisdiction also. From the facts which we have given above it is clear that the assessee before assessment questioned the jurisdiction of the Income-tax Officer of Meerut and that officer rightly referred the question to his Commissioner, and then the Commissioner, obtained from the assessee an affidavit in support of the objections of the assessee and ultimataly in consultation and in agreement with the Commissioner of Bengal decided the question of the place of assessment. The question therefore was decided in strict conformity with s. 64 (3) of the Act, and we hold the view that the matter has become final and we are not competent under s. 66 to interfere with that decision.

Our powers are circumscribed by s. 66 of the Act and only a question of law arising out of the appellate order of the Assistant Commissioner can be referred to us. The Assistant Commissioner obtains his jurisdiction to decide an appeal against the decision of an Income-tax Officer under the provisions of s. 30 of the Act, and as was pointed out by one of us who delivered the principal judgment in the case of this very assessee against the Commissioner of Income-tax *Kanhaivalal v. Commissioner of Income-tax, C. P. & U. P.* (1), at p. 744 it is not permissible to an assessee to create a question arising out of the appeal by putting it in the grounds of appeal when as a matter of fact the assessee is not competent to raise the plea and the Assistant Commissioner is not competent to decide the plea. It was said:

"There is, of course, nothing to prevent an assessee from putting any plea he may choose into his memorandum of appeal and in that way it can be said that a decision of any such point will create a "question arising out of the appeal;" but what is to be seen is whether the question is one that properly arises out of the appeal. In other words, was the assessee competent to raise this plea before the Assistant Commissioner?"

We think that we have said enough to show the circumstances under which an order under s. 64 (3) was passed and we have only got to say that under s. 30 an assessee has been given the right to appeal to the Assistant Commissioner against the Income-tax Officer's decision on certain points only and those points do not cover a decision under s. 64. The wisdom of the Legislature in not allowing an appeal under s. 64 is obvious because, as pointed out by the Assistant Commissioner in this very case, it could not be expected that a subordinate officer should have the right to question the decision of his superior officer.

Some arguments were then advanced before us as to the desirability of this Court interfering where there has been a manifestly wrong decision of the income-tax authorities or a patent usurpation of jurisdiction by them. It is said that it has been held by this Court in *In the matter of Dina Nath Hem Raj* (2), that where an Income-tax Officer proceeded to decide the question of the principal place of business, when a dispute on the point had arisen in flagrant disobedience of the provisions of s 64, he had no jurisdiction whatsoever to make the assessment and "to refuse to answer the questions on the ground that the procedure by which this stage has been reached is irregular would be a denial of justice." It is not necessary for the purpose of deciding this case to state in detail the complicated facts in *In the matter of Dina Nath Hem Raj* (2) and to elaborate the reasoning given by the learned Judges therein for deciding certain questions. It appears to us that their Lordships were very much impressed by the fundamental irregularity about the assessment by reason of lack of jurisdiction and then by the *ex parte* decision of the Income-tax Officer when, as a matter of fact, the assessee had committed no default and by the fact that the only proper inference which any Court of Law could draw from the circumstances was that the principal place of business was in Calcutta and not in Cawnpore (where the assessment was made). They thereto held that it would be denial of justice either;

(1) 5 I T R 739 (744).

(2) 19 A 616; 100 Ind. Cas. 758; A I R 1927 All. 299 25 A L J 225.

for their Lordships to refuse to answer the questions raised by the case or for the Commissioner to deal finally with the matter otherwise than in accordance with the answers which they then proceeded to give. The facts of the case were very different from the facts of the present case, but we wish to quote what was observed on a point which is strictly relevant to the present case. They said :

"Where such a question, as we have indicated arises as to the principal place of business, and such question has been determined by the Commissioner, or where the question is between places in more Provinces than one, by the Commissioners concerned, or by the Board of Inland Revenue, such decision is final. There is no right of appeal, and no power in the High Court to interfere with it, nor do the provisions of s. 66 which give the assessee a right to require the Commissioner to refer to the High Court any question of law or, in the event of his refusal, to apply to the High Court for a statement of the case, apply to a decision made under s. 64."

We are not called upon to say as to what we ourselves would have done on facts which arose in *In the matter of Dina Nath Hem Raj* (2) and we should not be deemed to agree with everything that was said in the case, but we agree that where the place of assessment has been decided under the provisions of s. 64 (3) and an Income-tax Officer accepting the final order of the Commissioner or Commissioners or the Central Board of Revenue proceeds to make an assessment, the plea of jurisdiction cannot be raised before the Asistant Commissioner on appeal and the High Court cannot deal with that question under s. 66 of the Act.

It was then contended that the final order of the Commissioners of this Province and Bengal was passed not in strict conformity with s. 64 (3) and was therefore an illegal and invalid order and could be questioned in this Court and the illegality that was pointed out was that the proviso to s. 64 (3) was ignored and the assessee was not given an opportunity of representing his views. The words occurring in the proviso are that the assessee should have had an opportunity of representing his views and not that the assessee should have been formally heard on his objection. This very Act draws a distinction between the two expressions. In s. 31 it is provided that the Assistant Commissioner shall fix a day and place for the hearing of the appeal and may from time to time adjourn the hearing. In s. 32 (2) it is provided that in disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit. The Legislature used a different phraseology in s. 64 and we hold the view that the assessee had an opportunity in the present case of representing his views by stating them in the affidavit which was called for by the Commissioner. It was not necessary that the Commissioner, U. P., after he had consulted the Commissioner, Bengal, should have apprised the assessee of their joint decision and given him an opportunity of showing cause why that decision should not be given effect to.

It was also argued by the learned Counsel for the Department that even if such an opportunity of representing his views had not been given to the assessee, the order nonetheless would have been an order under s. 64 (3) and could not be challenged in the way in which it is attempted to be challenged by the assessee in the present application ; but it is not necessary for us to decide this point, because we have come to the conclusion that the formalities enjoined by the proviso were complied with in the present case.

The conclusion at which we have arrived is that the decision of the learned Commissioner that the questions formulated by the assessee on the point of jurisdiction cannot form the subject of a reference to the High Court is correct. We, therefore, reject this application with costs. The Counsel for the Department is entitled to a fee of Rs. 75.

S. *Application rejected.*

OUDH CHIEF COURT

Civil Revision Application No. 130 of 1938
and
Second Civil Appeal No. 274 of 1938
February 10, 1941
GHULAM HASAN, J.

SANWALEY RAI—DEFENDANT—APPLICANT
versus
SANT RAI—PLAINTIFF—OPPOSITE PARTY

Civil Procedure Code Act V of 1908), ss. 151, 152, 153—Redemption suit—Misdescription of property in plaint, judgment and decree — Mortgage amount paid in full—Mistake held could be treated as clerical one and plaint, judgment and decree could be amended—Case decided and decree satisfied — Power of Court to allow amendment subsequently — Amendment — Lapse of time, if bar.

A mistake in the description of the mortgaged property, had crept into the plaint, judgment and decree of the redemption suit. The mortgagor, however, paid to the mortgagee the entire amount of the mortgage money, including the amount due on the further charge and obtained possession of the entire pro-

perty. The mortgagee subsequently attempted to take advantage of the mistake. The mortgagor applied for amendment of the plaint, judgment and the decree under ss. 151, 152 and 153, Civil P. C.

Held, that under these circumstances the mistake could be treated as one of a clerical nature arising from an accidental slip or omission. The Court could therefore amend the plaint, judgment and the decree. 81 Ind. Cas 186 (1), 150 Ind. Cas 791 (2), 153 Ind. Cas. 378 (3) and 139 Ind. Cas 491 (4), relied on. 186 Ind. Cas. 667 (5), dissented from [p. 730, col 1.]

Although after the case has been decided and the decree has been satisfied the Court becomes *functus officio*, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval. *Henry William Hatton* v. *Hugh Harris* (6), 88 Ind. Cas. 396 (7) and 123 Ind. Cas. 355 (8), referred to. [p 731, col. 1.]

It is well-settled that lapse of time, however, considerable, is no bar to the correction of errors either under s. 151 or under s. 152 of the Civil P. C. [p. 731, col. 2.]

C. R. App. from the order of the Munsif of Ramsanehighat at Barabanki, dated February 26, 1938.

Mr. *S. D. Misra*, for the Applicant.

Mr. *B. K. Dhaon*, for the Opposite Party.

Judgment.—This is an application for revision under s. 115 of the Civil P. C. directed against the order of the Munsif of Ramsanehighat at Barabanki, allowing the application of the opposite-party for amendment of the plaint, judgment and decree of the redemption suit No. 223 of 1911.

The facts are as follows:

One Ajudhia Rai executed in *Aghan* 1285 *Fasli* a possessory mortgage in favour of Ram Adhin Rai of the entire plot No. 1863 situate in village Hoalpur, Tahsil Hydergarh, District Barabanki for Rs. 48. The area of the plot was described in the mortgage-deed as 1 *bigha* 16 *biswas* and 18 *dhurs*. On May 26, 1911, Ajudhia Rai brought a suit for redemption against Sanwley Rai and Ram Lal, sons of Ram Adhin Rai, the mortgagee, in the Court of the Munsif of Ramsanehighat, District Barabanki. In the plaint (Ex. A-1) the plaintiff described himself as the owner of plot No. 1863 measuring two *bighas* and stated that he had mortgaged half the plot to Ram Adhin Rai, the deceased father of the defendants. In para. 2 of the plaint the date of the mortgage-deed was incorrectly stated as *Bhadon* 1285 and the amount of the mortgage money was similarly wrongly stated as Rs. 32. The mortgage property was also misdescribed as half of plot No. 1863 measuring two *bighas*.

In para. 5 the plaintiff claimed a relief for redemption of half the plot No. 1863 measuring two *bighas*.

Ram Lal and Sanwley Rai, the defendants, admitted in para. 1 of their written-statement that the plaintiff was the proprietor of the entire plot No. 1863 and further stated that the plaintiff had mortgaged half of plot No. 1863 measuring two *bighas* to Ram Adhin Rai, the father of the defendants. The defendants, however, in para. 2 gave the correct date of the mortgage as *Miti Aghan Sudi Tij*, 1285 *Fasli* and alleged that the amount of the mortgage money was Rs. 48 and not Rs. 32 and that the plaintiff had agreed to pay Rs. 60 at the time of the redemption. A deed of further charge dated December 30, 1882, was also set up. Along with this written-statement the defendants filed the original mortgage deed.

On July 21, 1911, an application for amendment of the plaint was filed by Ajudhia Rai bearing his thumb impression through *Pandit* Bisheshwar Nath pleader in which it was stated that the Plaintiff admitted that the mortgage deed, which was filed by the defendants along with their written statement, was the correct mortgage deed dated *Miti Aghan Sudi Tij*, 1285 *Fasli*. Accordingly he prayed that para. 1, letter (*jim*) and para 3 and the relief paragraph be so amended as to contain a prayer that the property mortgaged in the deed be redeemed on payment of Rs. 60.

It is quite clear from the application for amendment that it was carelessly drawn up and did not accurately point out what specific additions and delitions the plaintiff desired to make in each paragraph of the plaint. There is no doubt, however, that the real intention of the plaintiff was to obtain redemption of the entire plot No. 1863 mortgaged by him upon payment of the entire mortgage money. No amendment of the plaint was, however, made as desired by the plaintiff.

The learned Munsif decreed the suit of half the share in plot No. 1863 upon payment of Rs. 451-8-0 on July 22, 1911, (*vide* Ex. A-2). The order sheet shows that redemption was granted of the entire plot No. 1863 and not half. The order-sheet is initialled by the Munsif. A decree (Ex. A-3) was prepared in pursuance of the judgment. Exhibit A-4 is the warrant of *dakhal dehani*, which also states that possession was delivered over half the plot.

Ajudhia Rai died and was succeeded by his son Sant Rai. A suit was brought by Sanwley Rai alone—his brother Ram Lal having died—against Sant Rai under s. 127

of the Oudh Rent Act on the ground that Sant Rai had taken unlawful possession in 1924 over half the plot No 1863, which had not been decreed to him. The suit was decreed on February 19, 1927, (Ex. A-5).

In 1936 Sant Rai brought a suit in Civil Court against Sanwley Rai claiming possession over half the plot No. 1863 of which he had been dispossessed on the allegation that his father had redeemed the entire plot and Sanwley Rai had taken wrongful possession of half the plot. The suit was dismissed on September 20, 1936 (Ex. 7) and a decree (Ex. A-6) followed. Sant Rai filed an appeal against the aforesaid dismissal of his suit but withdrew the suit on January 8, 1937, with liberty to bring a fresh suit. The ground of withdrawal was that Sant Rai had discovered a mistake in the description of the mortgaged property, which had crept into the plaint, judgment and decree of the redemption suit and which was repeated in the present suit which was, therefore, liable to dismissal for a formal defect.

Instead of filing a fresh suit Sant Rai filed an application on September 11, 1937, before the Munsif of Ramsanehighat, District Barabanki, under ss. 151 to 153 of the Civil P. C. praying for amendment of the plaint, judgment and decree (Exs. A-1, A-2 and A-3) of the redemption suit No. 223 of 1911. The application was strenuously opposed by Sanwley Rai on the ground that it was barred by time and by the principle of *res judicata*, that it was not entertainable as the Court had become *functus officio* after the satisfaction of the entire decree was recorded and that there was no mistake of any accidental or clerical nature which could be amended.

The learned Munsif framed issues and in an elaborate judgment held against Sanwley Rai on all the points.

Sanwley Rai preferred an appeal to the Additional Civil Judge of Barabanki, who dismissed it by an order dated August 16, 1938 holding that the appeal against an order under s. 152 was not maintainable.

Sanwley Rai filed a second civil appeal on October 7, 1938, in this Court against the order of the Additional Civil Judge. On the same date he filed the present revision application under s. 115 of the Civil P. C. against the order passed by the Munsif of Ramsanehighat, Barabanki. The second appeal and the revision application have, therefore, been connected as they arise out of the same facts.

Learned Counsel on behalf of the applicant Sanwley Rai has conceded that the second appeal is not maintainable and has, therefore, argued only the revision application.

Three points have been argued before me. In the first place it has been contended on behalf of the applicant that there was no clerical or arithmetical error and the learned Munsif had no jurisdiction to order amendment under s. 152 of the Civil P. C. It has also been contended that the decree for redemption of half the plot No. 1863 having been satisfied the Court had become *functus officio* and there was no further jurisdiction to correct the error, if any. Lastly it has been urged that the mistake arose through the negligence of the mortgagor and after a lapse of 26 years the learned Munsif should not have allowed amendment to the prejudice of the applicant.

Having heard parties at considerable length, I am satisfied that the order of the lower Court is perfectly correct and must be maintained.

It is obvious from a narration of facts given above that the equities of the case are admittedly on the side of the opposite party and in favour of the amendment being made. Learned Counsel on behalf of the applicant concedes that his client undoubtedly obtained the entire amount of the mortgage money including the amount due on the further charge. His argument, however, is that the application for amendment does not strictly fall within the purview of s. 152 of the Civil P. C. and consequently the Court had no jurisdiction to order the amendment. I do not agree with this contention. It seems to me clear that the intention of Ajudhia Rai was clearly to obtain redemption of the entire plot No. 1863 in the litigation of 1911 and not half of it. The mortgage deed was written in *Kaithi*, a language, with which both the mortgagee and the mortgagor were unacquainted. Ajudhia Rai admittedly was illeterate and the allegations in the plaint filed by him clearly showed that it was recklessly drawn up without any attempt to ascertain the accurate particulars of the mortgage deed. It is also clear that the mortgagee, while admitting the mortgagor to be the owner of the entire plot No. 1863, either deliberately or unconsciously asserted that only half the plot was mortgaged. The mortgagee filed the original mortgage deed, which had all along been in his possession. He definitely asked not only for the payment of the principal money secured by the mort-

gage but also the money due on the deed of further charge. In these circumstances it was the obvious duty of the mortgagee to have come to Court with clean hands and to point out the error in the description of the property mortgaged. If the mortgagor was careless in the drafting of the plaint which contained incorrect particulars of the mortgage deed, the mortgagee was equally to blame for not disclosing the true facts to the Court. In these circumstances it does not behove the mortgagee or his successor-in-interest now to take refuge behind technical pleas notwithstanding the fact that the mortgagee's claim against the entire mortgaged property had been fully satisfied by the decree for redemption. It appears that soon after the decree of redemption of 1911 the mortgagor mortgaged half of plot No. 1863 with possession with one Sukhpal for a sum of Rs. 200 and one-fourth of it with Lotan for a sum of Rs. 99 and the remaining ¼th with Jagannath for a sum of Rs. 100. These mortgages were subsequently redeemed on payment of the principal money. This shows that possession was with the mortgagees otherwise the redemption on payment of the principal only was not possible. The learned Munsif has held upon documentary and circumstantial evidence that the mortgagor after redemption decree got possession over the entire plot No. 1863, though on paper only half the plot stood apparently redeemed by the said decree, and as possession over the entire plot remained with him, the mistake about incorrect description, on paper, of the property redeemed did not come to his knowledge till he was dispossessed in 1927, and even later till 1926 when his suit for possession failed on the ground of a formal defect. I see no reason to dissent from this conclusion of the learned Munsif. Under these circumstances the learned Munsif was perfectly justified in treating the mistake as one of a clerical nature arising from an accidental slip or omission.

Reference has been made on behalf of both parties to *Mata Din Singh* v. *Sheo Darshan Singh*, (11 O. L. J. 347) (1). This was a case in which the pre-emptor brought a suit for pre-emption against a vendee and in describing the property in the plaint he did not exempt certain plots which had been expressly exempted from the sale deed. A decree was eventually passed in terms of the plaint and was confirmed on appeal by the late Court of the Judicial Commissioner of Oudh. Subsequently an application was made that the plots which were not the subject-matter of the sale were by mistake treated throughout the trial of the suit for pre-emption as if they also were sold under the sale-deed on the basis of which the suit for pre-emption was brought. The error committed in the pleadings was repeated in the decree and the pre-emptor under the colour of the decree tried to dispossess the applicant from those plots. The learned Additional Judicial Commissioner expressed the view that either the mistake arose from an accidental slip or omission or the pre-emptor deliberately but erroneously included such property within his suit for pre-emption as was not the subject-matter of the sale to which the suit related. He held that if the first alternative was correct, s. 152 would apply, and if the second alternative was the right one to adopt, then the pre-emptor was guilty of fraud on the Court and once the fraud was brought to the notice of the Court it could not be allowed to stand. Under s. 151 of the Civil P. C. the Court has the inherent power to act *ex debito justitiae* and to do that real and substantial justice for which it alone exists. The result was that the amendment was granted. It was also observed that the mere fact that the description of the property is erroneous will not attract the application of the provisions of s. 152 of the Civil P. C. and it must be shown that the error is a natural consequence of an accidental slip or omission. In my opinion this case lends full support to the case of the opposite party and does not help the applicant in any way.

In *Shiam Lal* v. *Moona Kuar*, (11 O. W. N. 550) (2), it was held that under ss. 151 and 152 of the Civil P. C. the Court can amend the plaint, judgment and the decree, where by a mistake the *hadbast* number of the village is shown as the *khasra* number of the plot mortgaged, and the mistake is repeated in the judgment of the Court and the preliminary and the final decrees.

A similar view was taken in *Ram Charan Sahu* v. *Jamna Prasad*, (1935 O. W. N. 31) (3), by a Bench of this Court, where it was held that where by a mistake of the plaintiff the property in dispute has been wrongly described in the plaint and the preliminary and final decrees, the Court has power

(1) 11 O L J 347; 81 Ind. Cas. 186; A I R 1924 Oudh 403; 10 O & A L R 46; 25 Cr. L J 698.

(2) 11 O W N 550; 150 Ind. Cas. 791; A I R 1934 Oudh 362; 8 Luck 734; 7 R O 78.

(3) 1935 O W N 31; 153 Ind. Cas. 378; A I R 1935 Oudh 92; 7 R O 338; 1934 O L R 984.

to correct the mistake by amending the plaint and the decrees.

It was held in *Aziz Ullah Khan* v. *Court of Wards, Shahjahanpur*, (A. I. R. 1932 All. 587) (4), that the language of s. 152 was wide enough to cover the correction of mistakes made by the parties themselves. There is no doubt that s. 152 applies in terms to the amendment of the decrees and not to the amendment of the plaint, sale certificate and *dakhalnama*, but the power of the Court to make corrections necessary for the ends of justice is not confined only to powers exercisable under s. 152. Extensive powers may be exercised also under ss. 151 and 153.

The case of *Sheo Narain* v. *Lachhman Prasad*, (1940 O. W. N. 213) (5), relied upon by learned Counsel on behalf of the applicant is a converse case and has no application to the facts and circumstances of the present case. In that case the learned Judge of the lower Court had found in a long and careful judgment that there was no error arising from an accidental slip or omission in the judgment and decree and refused to allow the amendment. A Bench of this Court refused to interfere in revision with the discretion exercised by the lower Court.

As regards the second point, I agree with the lower Court that although after the case has been decided and the decree has been satisfied the Court becomes *functus officio*, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or be design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval as has been laid down by Lord Watson in the well-known case of *Henry William Hatton* v. *Hugh Harris* (1892 A-C. 547 at 560) (6).

Learned Counsel on behalf of the applicant relies upon a dictum of Mr. Justice Daniels in *Pitam Lal* v. *Balwant Singh*, (A. I. R. 1925 All. 556) (7), where he observed that when a decree for money had been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under s. 152 of the Civil P. C. This observation goes beyond the view taken by Mr. Justice Sulaiman, the other member of the Bench, who only observed that under s. 152 of the Civil P. C. the Court has power, under the peculiar circumstances of any case, to refuse the application for amendment of decree if it feels inclined to do so. The Court is not bound to grant the application in every case. This dictum of Mr. Justice Daniels was not approved in *Munuswami* v. *Jagannadha*, (A. I. R. 1929 Mad 830) (8).

I, therefore, hold that this contention has no force

As regards the third point, I have already referred at some length to the conduct of the mortgagee in contributing to the mistake. I am also satisfied that the mortgagor having obtained possession over the entire plot No. 1863 after the redemption decree of 1911 laboured all long under the impression that the decree for redemption obtained by him related to the entire plot and this impression continued till 1927 or even later till 1936, as appears from his conduct. In the circumstances it cannot be said that the mortgagor was guilty of such negligence as to debar him from claiming the relief to which he is equitably entitled. It is well-settled that lapse of time, however, considerable, is no bar to the correction of errors either under s. 151 or under s. 152 of the Civil P. C.

Having regard to all the circumstances of this case I am satisfied that the order of the lower Court directing amendment of the plaint, judgment and decree is eminently just and reasonable, and no interference with the decision of the lower Court in its exercise of discretion under s. 115 is called for.

The application fails and is dismissed with costs. The connected appeal stands dismissed, but without costs.

S. *Application dismissed.*

(4) A I R 1932 All. 587; 139 Ind. Cas. 491; (1932) A L J 784; Ind. Rul (1932) All. 567; 54 A 800.
(5) 1940 O W N 213; 186 Ind. Cas. 667; 1940 O L R 138; A I R 1940 Oudh 298; 12 R O 321.
(6) (1892) A C 547.
(7) A I R 1925 All 556; 88 Ind. Cas. 396; 23 A L J 518; L R 6 A 423 Civ.
(8) A I R 1929 Mad. 830; 123 Ind. Cas. 355; (1929) M W N 729; Ind. Rul. (1930) Mad. 499.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 228 of 1939
October 15, 1940
COLLISTER AND BAJPAI, JJ.

BAHARI LAL BHARGAVA—ASSESSEE—APPLICANT
versus
COMMISSIONER OF INCOME-TAX, C. P. AND U. P.—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 6—Interest awarded under s. 28, Land Acquisition Act (I of 1894), if chargeable with income-tax—Nature of such interest,

stated—Interpretation of Statutes — Fiscal enactment—Doubt arising — Construction in subject's favour.

Under s. 28, Land Acquisition Act the awarding of interest is not mandatory but is discretionary with the Court; and so the claimant is not entitled to it as of right under any rule of law. Interest awarded under s. 28, is in the nature of compensation for the loss of the late owner's right to retain possession of the property acquired. In other words, it is damages assessed in terms of interest for loss of possession of property up to the date of receipt of its consideration. Such interest is not therefore, income within the meaning of s. 6, Income Tax Act, nor can this money be treated as profits when the assessee neither owns nor possesses what was, the only possible source of such profits. Nor can it very well be said that the money in question represents the interest which the assessee might have received by investing the principal sum. Consequently the interest awarded under s. 28, Land Acquisition Act, is not assessable to income-tax. [p. 737, col. 1; p. 736, col. 2.]

[English and Indian case-law discussed.]

Where the interpretation of a fiscal enactment is open to doubt, it should be construed favourably to the subject. [p. 737, col. 1.]

Misc. Case reference submitted by the Commissioner of Income Tax, C. P. and U. P., dated February 22, 1939.

Messrs. *G. S. Pathak* and *Gajadhar Prasad Bhargava*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Party.

Collister, J.—This is a reference under s. 66 (2), Income Tax Act (XI of 1922). The assessee is Behari Lal Bhargava, proprietor of the Central Book Depot at Allahabad. For the assessment year 1937-38 the Income-tax Officer assessed him to tax upon an income of Rs. 11,607. The account of profit and loss was as follows:

		Rs.
(1) Property	...	425.
(2) Interest	...	12,708.
(3) Dividends		24.
(4) Royalty	...	250.
		13,407.
(5) Business loss	...	1,800.
		11,607.

It will be observed that one of the items of profit is a sum of Rs. 12,708 under the head of "interest," and it is with this sum of money that the reference now before us is concerned. It appears that two houses belonging to the assessee's father, Ramji Das Bhargava, were acquired by the improvement trust under the Land Acquisition Act in 1927, and possession was taken on November 11, 1927. The amount awarded by the Land Acquisition Officer was Rs. 13,225; but Ramji Das Bhargava did not accept this as adequate and referred his claim to the tribunal which has seisin of such matters, and the tribunal on April 6, 1931, increased the amount of compensation to the high figure of Rs. 97,640. The tribunal also directed the improvement trust under the provisions of s. 28, Land Acquisition Act, to pay interest at 6 per cent. per annum from the date of taking possession of the property to the date of payment of Rs. 97,640. The improvement trust appealed against this order to the High Court, but the appeal was dismissed; and thereafter the sum of Rs 97,640, plus Rs 49,660 as interest, was paid to the four sons of Ramji Das Bhargava, who had meanwhile died. The assessee's share of the interest money was Rs. 12 415. The Income-tax Officer was of opinion that this money was taxable, and income was accordingly taxed upon it. The assessee appealed to the Assistant Commissioner, but his appeal was dismissed. The view taken by that officer is expressed in the following words:

"..... interest paid is the return on that money which was the appellant's, on the date the improvement trust took possession of the property The return on money being nothing but income is cleary liable to tax."

The Assistant Commissioner not only dismissed the appeal, but he enhanced the amount of income under the head of "business" and accordingly the assessee appealed to the Commissioner under s. 32 of the Act, but that appeal also was dismissed so far as the interest awarded under the Land Acquisition Act was concerned. In his order the Commissioner says:

"If the appellant has been left in the possession of his property till the question between the improvement trust and his father was decided by the tribunal, he would certainly have earned income in the shape of rent and it was to compensate him for this loss of income that the interest was awarded by the tribunal. The appellant's capital stood at the amount awarded by the tribunal and the amount of interest was certainly a thing quite apart from it and clearly represented the appellant's income on that capital for the period during which the appellant was kept out of its possession."

The assessee then applied to the Commissioner to refer certain questions of law to this Court under s. 66 (2) of the Act, and the Commissioner has stated a case and has referred to this Court the following question:

"Whether the sum of Rs. 12,415 received by the petitioner as interest from the improvement trust was part of his income, profits or gains within the meaning of the Act?"

Learned Counsel for the assessee contends thar this sum of Rs. 12,415 was compensation on account of his having been deprived of his property from November 11, 1927 to April 6, 1931, without receiving its monetary value, and the granting of interest under s. 28, Land Aquisition Act, was

merely a convenient way of assessing such compensation. The interest so granted is part of the principal sum awarded as compensation. He pleads that the money in question is either no income at all, or if it is income, it is a "windfall" and is exempt from taxation under s. 4 (3) (*vii*), being of a casual and non-recurring nature. That clause provides that the Act shall not apply to

"any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

The decision on which the taxing authorities have relied is *Commissioner of Income-tax, U. P.* v. *Jagmohan Das Rastogi* (1). In that case one of the parties to a partition suit put his decree into execution. The other party applied for stay pending the hearing of an appeal which he had preferred in the Privy Council, and stay order was passed which was conditional upon his giving security to the extent of Rs. 95,000 and paying interest thereon into Court at 6 per cent. per annum at regular intervals. The interest was so paid and was received by the party who had taken out execution. The question before the Chief Court was whether this interest was income to which the Income Tax Act applied, and the learned Judges answered it in the affirmative. At p. 126*, col. 1. they say :

"Owing to Indar Prasad taking the case to their Lordships of the Judicial Committee the enjoyment of Jagmohan Das over the property was postponed; but in lieu of this enjoyment he obtained interest at 6 per cent. on the amount calculated as security. This was clearly his income."

Further on they say :

"He (Counsel for the assessee) asks us to apply the provisions of s. 4, cl. (3) (*vii*). The receipts in question were certainly not receipts arising from business or the exercise of a profession, vocation or occupation, nor were they by way of addition to the remuneration of an employee. But they were not of a casual and non-recurring nature. In these circumstances the exception does not apply and they are assessable to income-tax."

A few years later, the well-known decision of the Judicial Committee in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (2) was pronounced. This is one of the authorities on which learned Counsel for the assessee mainly relies. In that case the respondent had received a large sum of money as compensation for the termination of certain agencies of the Burma Oil Company, and the Anglo-Persian Oil Company. Their Lordships of the Privy Council held that the amount of compensation so given was not taxable under the Income Tax Act. At p. 590* their Lordships after discarding "the case-law which has been so painfully evolved in the construction of the English Income-tax Statutes—both the cases upon which the High Court relied and the flood of other decisions which has been left loose in this Board," observe :

"The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt into 'income, profits and gains,' but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes monetary return 'coming in' with some sort of regularity, or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus, income has been likened pictorially to the fruit of a tree or the crop of a field."

The taxing officers claimed in that case that the compensation fell under the head of "business" within the meaning of s. 6 (*iv*) of the Act, but their Lordships say at p. 593* :

".... the sums which the appellant seeks to charge can, in their Lordships' opinion, only be taxable if they are the produce, or the result, of carrying on the agencies of the oil companies in the year in which they were received by the respondents. But when once it is admitted that they are sums received, not for carrying on this business, but as some sort of solatium for its compulsory cessation, the answer seems fairly plain."

Further on, we have this observation :

"Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (*vi*) 'other sources' and the corresponding provisions of s. 12."

The next authority to which we are referred is *Commissioner of Income-tax, Madras* v. *B. J. Fletcher* (3). In that case the question before their Lordships was whether a bonus which had been paid to the employee of a company on retirement from a fund which the company had constituted was liable to income-tax. Under the rules governing the constitution of the fund, allotments were made from time to time by the company to the credit of this fund and were invested and accumulated. Allotments so made were neither part of the employee's current salary, nor was it

(1) A I R 1929 Oudh 125; 112 Ind. Cas. 201.

(2) (1932) A L J 588; 136 Ind. Cas. 742; A I R 1932 P C 138; 59 I A 206; 59 C 1313; Ind. Rul. (1932) P C 156; 9 O W N 513; 36 C W N 653; (1932) M W N 618; 55 C L J 386; 34 Bom L R 1033; 36 L W 63; 63 M L J 124 (P C).

*Page of A. I. R. 1929 Oudh.—[*Ed.*]

(3) (1937) A L J 1403; 169 Ind. Cas. 658; 1937 O L R 406; 1937 A L R 638; A I R 1937 P C 261; 10 R P C 43; 3 B R 708; 46 L W 214; 41 C W N 1157; 1937 O W N 892; 39 Bom. L R 1050; (1937) M W N 934, 18 P L T 906; 66 C L J 36; 31 S L R 656; 64 I A 323; I L R (1938) Mad. 1 (P C).

*Pages of (1932) A. L. J.—[*Ed.*]

a part of his original contract of service that he should have benefit of this fund; on the other hand, unless the company chose to put an employee on the list he could have no interest whatever in it, and even when so listed he would have no rights until he had served continuously and satisfactorily for a prescribed period. At p. 1407* their Lordships, after setting out the constitution of the fund and the rules governing it, say:

"The consideration of these factors leads their Lordships to the conclusion that the allotments made to the fund in the name of an officer of the company were not in the nature of salary for current services, but were merely the measure of a sum which the company volunteered to pay to him on the termination of his service, and that this sum when paid was not 'income' and therefore not taxable."

Further on they say that they agree with Cornish, J. (one of the learned Judges from whose decision the appeal was preferred) in thinking that the payment of such a bonus is just as much a capital receipt in the hands of an employee as would be payment of lump sum from a provident fund on the employee's retirement. In this connection they refer to the Board's decision in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (2) already referred to. In *Major A. U. John* v. *Commissioner of Income-tax,* (4) a certain mill at Agra was put to auction by the debenture-holders. A gentleman named Major John held most of the debentures and he was appointed auctioneer by the Court. After the sale he moved the Court to be allowed to retain a percentage of 5 per cent. of the sale proceeds as commission, and this was granted. The income-tax authorities assessed this commission to income-tax but it was held by a Full Bench of this Court that it was not so assessable. At p. 741† the learned Judges say:

"In our opinion, it cannot be maintained that the auctioneer's commission in the present instance was a receipt arising from the business or the exercise of a profession, vocation or occupation or that it was not of a casual and non-recurring nature, or was by way of addition to the remuneration of an employee. Major A. U. John who sold the debentures belonging to himself and his brother is not an auctioneer and the commission which was earned—if it can be said in the circumstances that he earned commission—did not arise out of the business in which he was engaged nor was it in any way connected therewith."

The learned Judges considered the decision of their Lordships in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (2) and they disagreed with the view which was taken by a Bench of this Court in *Messrs. Gaya Prasad Chhotey Lal, In re* (5). to the effect that

"the observations of the Privy Council .... should be taken in connection with the facts of a particular case and that the Board did not intend to lay down any general principle."

The Judges of the Full Bench say:

"In our opinion, the intention of the Board was to enunciate a working definition of income for the guidance of the Courts in India."

Learned Counsel for the assessee has next drawn our attention to some English decisions, and we shall proceed to consider them, while at the same time bearing in mind the warning which was issued by the Judicial Committee in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (2). The first of these cases is *National Bank of Wales, In re* (6). In that case in the winding up of a company it was found that an ex-director of the company had improperly paid out certain dividents. At p. 640* Lord Wright held that the respondent must be held liable to repay the amount of dividends plus interest "as in cases of fraud" at 5 per cent. from the dates on which the dividends were paid. Subsequently, the question arose as to whether from the amount payable by the respondent there should be deducted income-tax on the interest mentioned in the judgment, and Lord Wright at p. 650-651* said that he did not see his way to allowing such deduction. He observed:

"If the company has suffered those damages, I can see no reason why it should not get the whole of the damages back. It is called 'interest,' but it is really damages for withholding its capital from the company."

We are then referred to *Commissioners of Inland Revenue* v. *Ballantine* (7), and *Simpson* v. *Executors of Benner Maurice* (8), in support of the contention that as regards the sum of money with which we are concerned in the present case it is really nothing more than compensation measured in terms of interest. We may also mention the case in *Schulze* v. *S. W. Benstead* (9), which is not before us, but from which certain observations have been cited in the judgment of a Full Bench of the Patna High Court to which we shall

(4) (1938) A L J 736; 176 Ind. Cas. 771; A I R 1938 All 464; 1938 A L R 686; I L R (1938) All. 691; 11 R A 142 (S B).

*Page of (1937) A. L. J.—[*Ed.*]
†Page of (1938) A. L. J.—[*Ed.*]

(5) (1935) A L J 405; 154 Ind. Cas. 963; A I R 1935 All. 495; 57 A 740; 7 R A 838.
(6) (1899) 2 Ch. 629; 68 L J Ch. 634; 81 L T 363; 48 W R 99.
(7) (1920-24) 8 Tax. Cas 595.
(8) (1929) 14 Tax. Cas, 580; 45 T L R 581.
(9) (1917-19) 7 Tax. Cas. 30.

* Pages of (1899) 2 Ch.—[*Ed.*]

presently refer. One paragraph from those observations (made by Lord Johnston) may be usefully quoted here. It is as follows :

"The question is whether a sum paid under decree *eo nomine* as interest on a principal sum recovered by the pursuers in an action was interest in their hands which fell to be assessed to income-tax. Where a puruser recovers damages with interest from the date of decree I do not think that that interest is chargeable. It is part of the damages. But where a sum is due on a definite date with interest from the date of advance and decree goes out, the case is different. The interest ought to have been in the creditor's hand on the stipulated date and is nonetheless interest when it is recovered along with the principal under the decree. Between these two cases there may be many, some partaking more of the characteristics of the one, some more of those of the other."

In *Commissioners of Inland Revenue* v. *Ballantine* (7), "additional costs, loss and damage incurred" by a firm of contractors against a railway company was referred to arbitration on March 1, 1916. On January 14, 1921 the arbitrator awarded the firm a certain sum, mainly as damages, together with interest thereon at 5 per cent. per annum from a certain date in 1918. At p. 611* the Lord President observes :

"Now, it is familiar that an assessment of the kind may contain as one of its constituent elements an allowance in respect that the claimant has lain for a long time out of his remedy. The propriety of such an allowance may depend on the character of the claim, and its amount may depend on many considerations of which time is only one. But an interest calculation is a natural and legitimate guide to be used by an arbitrator in arriving at what he thinks would be a fair amount. In most cases in which such an allowance is a constituent of an award it does not separately appear, but is slumped along with other elements in the gross sum decerned for : but there is nothing to prevent an arbitrator, if he thinks it just and reasonable in a particular case, to make the allowance in the form of an actual interest calculation from a past date until the sum fixed as at that date is paid. In all such cases, however—whether the allowance is wrapped up in a slum award or is separately stated in the decree—the interest calculation is used *in modum æstimationis* only. The interest is such merely in name, for, it truly constitutes that part of the compensation decerend for which is attributable to the fact that the claimant has been kept out of his due for a long period of time. It is not, therefore, 'interest of money' chargeable under Case III of Sch D."

In *Simpson* v. *Executors of Banner Maurice* (8). Mr. Kay, a naturalized British subject domiciled and ordinarily resident in the United Kingdom, had at various dates deposited securities, stocks and shares in banks in Germany with instructions to collect interest thereon. Before the termination of the Great War, the interest and dividends in respect of the securities were collected by the bank, but owing to the legal position created by the war the owner or his representatives could not deal with his accounts in the German bank, but as a result of the Peace Treaty and by virtue of an award by the mixed arbitral tribunal the sums due to Mr. Kay—who had meanwhile died—were paid over to his representatives along with compensation, the compensation being the sum calculated upon the basis of interest in respect of that sum. At p. 593* Rowlatt, J. observes :

"The Treaty did not give Mr. Kay any right to interest nor did it declare the Treuhander a trustee so as to found any consequential claim for interest; it did not empower the tribunal to give interest as such, or to make any declaration as to the character of the purpose for which the Treuhander had held the money. The treaty gave compensation, and the tribunal which assessed the principal sum has assessed it on the basis of interest. I think this sum first came into existence by the award, and no previous history or anterior character can be attributed to it. It is exactly like damages for detention of a chattel and unless it cannot be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention I do not think this compensation can be called interest."

In appeal Lord Hanworth, M. R. said :

"But is it interest ? Is that its quality, or is it compensation estimated and measured in terms of interest ?"

Further on he says :

"For withholding this sum, for preventing Mr. Kay, or his executors, exercising the power of disposition over his property, the Germans have been compelled to pay compensation The way to estimate that compensation or damages—the sensible way no doubt—would be by calculating a sum in terms of what interest it would have earned. That has been done, but the sum that was paid has not been turned into interest so as to attach income-tax to it."

In *Commissioners of Inland Revenue* v. *Barnato* (10), Slesser, L J. observes that :

"Where on the consideration of the realities of the case, it emerges that the money is paid as interest and not paid merely as a means of measuring damages, there it can properly be said that it satisfies the requirement af Case 3, r. 1 of Sch. D that the tax shall extend to any interest of money."

These and other English authorities were considered by a Full Bench of the Patna High Court in *Commissioner of Income-tax, B & O* v. *Prayag Kumari Debi* (11), Manohar Lall, J., who delivered the judgment of the Court, classified the various decisions of the English Courts, the two main groups of his classification being (1) cases where interest is payable either under a contract or under a rule of law, and (2) cases where damages have been awarded. In that case a widow had instituted a suit

(10) (1936) 20 Tax. Cas. 455; 155 L T 211.

(11) A I R 1939 Pat. 662; 186 Ind. Cas. 263; 19 Pat. 186: 20 P L T 938; 6 B R 328; 12 R P 462 (S B).

* Page of (1920-24) 8 Tax. Cas.—[*Ed.*]

* Page of (1929) 14 Tax. Cas.—[*Ed.*]

for possession of moveable and immovable properties left by her husband. She claimed the properties as her husband's heir and pleaded wrongful possession on the part of the defendant. The latter claimed to be the rightful owner, but the suit was decreed in favour of the widow. She was awarded certain movable properties and also certain sums of money as damages for wrongful detention. It was held by the Full Bench of the Patna High Court that the sum received by the widow by way of the damages was not an income assessable to income tax. None of the authorities to which we have been referred is directly in point in the case with which we are now dealing, but some of the observations which have been made, afford material from which we may receive some guidance. The border line between a case where interest is chargeable to tax and a case where it is not so chargeable appears at times to be extremely fine, as has been recognized in Courts in England. In *Renfrew Magistrates* v *Commissioner of Inland Revenue* (12), the Lord President observed that :

".....the question is never more embarrassing than when it is concerned with payments in the nature of compensation or damages. The income-tax rules are of little assistance when it becomes necessary to distinguish between a capital receipt and a revenue one."

Learned Counsel for the assessee contends that there is no difference in principle between the case which is now before us and the case which was decided by the Full Bench at Patna ; and as we have already said, he strongly relies upon the decision of the Judicial Committee in *Commissioner of Income Bengal* v. *Shaw Wallace & Co.* (2). In the last named case we do not know for certain how the compensation was assessed, but presumably it was assessed by capitalising the profits which the respondent might have been expected to receive over a period of years if the agencies had not been terminated ; and in the Patna case damages were awarded for wrongful detention of moveable belonging to the plaintiff. It cannot be said that the facts of either of these cases are on all fours with the facts of the case which is now before us, but from them and from the other authorities to which we have referred and certain authorities to which we shall now refer, as well as from a consideration of the principles applicable to the Income Tax Act, we think that we shall be able to arrive at a decision. In *Revenue Divisional Officer, Trichinopoly* v. *Venkatarama Ayyar* (13), it was held that where Govt. has taken urgent possession of certain lands before the award under the Land Acquisition Act was made, interest on the amount awarded can be given to the person entitled for the period between the date of taking possession by Govt. and the payment of compensation money, even in a case which does not exactly fall under ss. 16 and 17, Land Acquisition Act, on the principle that the right to receive interest takes the place of the right to retain possession. This view was in accordance with the decision in *Inglewood Pulp & Paper Co. Ltd.* v. *New Brunswick Electric Power Commission* (14), where their Lordships of the Privy Council at p. 290*, say :

"It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession."

They go on to say that the law on the point has also been stated under the Land Clauses Consolidation Act, 1845, and they observe :

"It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all this, the owner is deprived of his property in this case as much as in the other and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule."

From these authorities it follows that interest awarded under s. 28, Land Acquisition Act, is in the nature of compensation for the loss of the late owner's right to retain possession of the property acquired. In other words, it is damages assessed in terms of interest for loss of possession of property up to the date of receipt of its consideration. From another point of view it might be said that the interest so calculated represents the profits which the ex-owner might have made if he had retained the property, and on this view of the matter Counsel for the department contends that profits so calculated are chargeable with income-tax. But the assessee had lost both possession

(12) (1934) 19 Tax. Cas. 13; 1934 S C 468; 1934 Sc. L T 426.

(13) 59 M 433; 160 Ind. Cas. 967; A I R 1936 Mad. 199; 71 M L J 69; (1936) M W N 114; 43 L W 190; 8 R M 731.

(14) A I R 1928 P C 287; 111 Ind. Cas. 261; 1928 A C 442; 97 L J P C 118; 139 L T 593; 28 L W 753 (P C).

* Page of A. I. R. 1928 P C [*Ed.*]

and title on November 11, 1927 and so it is difficult to see how this money can be treated as profits when the assessee neither owned nor possessed what was, on this view of the matter, the only possible source of such profits. Nor can it very well be said that the money in question represents the interest which the assessee might have received by investing the principal sum, and this for two reasons. In the first place the principal sum which was ultimately found due as at November 11, 1927 as compensation for the acquisition was not determined and so did not exist until April 6, 1931, the date of the tribunal's order ; and in the second place, as we have already said, the interest awarded is compensation for the loss of the late owner's right to retain the property. If the interest awarded under s. 28, Land Acquisition Act, is income, it must have a source. It seems to us that there are only two possible sources, either the property or its equivalent in money, and as we have already said, we do not think that this interest can be said to have arisen from either of these. It is not the "fruit of a tree"—to borrow the simile used in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (2),—but was compensation or damages for loss of the right to retain possession; and it seems to us that s. 28 was designed as a convenient method of measuring such damages in terms of interest. Under s. 28, the awarding of interest is not mandatory but is discretionary with the Court ; and so the claimant is not entitled to it as of right under any rule of law.

Our conclusion is that this sum of Rs. 12,415 is not income and is not assessable as such to tax. It is not without considerable doubt and hesitation that we have arrived at this decision, for, there is much to be said ; but upon the whole matter we think that this is the correct view to take and we also bear in mind that where the interpretation of a fiscal enactment is open to doubt, it should be construed favourably to the subject. Our answer to the question referred to us is therefore in the negative. The assessee is entitled to the costs of this reference. Counsel for the department is entitled to a fee of Rs. 200. A copy of this order under the seal of the Court and the signature of the Registrar will be sent to the Commissioner of Income-tax, Central and United Provinces.

S. *Answer accordingly.*

193—93 & 94

PATNA HIGH COURT

Appeal from Appellate Decree No. 872 of 1939

January 8, 1941

ROWLAND. J.

THE EQUITABLE COAL Co., LTD.—APPELLANT

versus

Rai Bahadur AMRITA NATH MITTER AND OTHERS—RESPONDENTS

Deed—Construction — Deed of title — Area going against boundaries — Court should see what are operative provisions of document rather than descriptive schedule attached to it.

The proposition that where the area goes against the boundaries, the boundaries should prevail, cannot be accepted as a universal proposition. The question as to what had been demised turns upon the true construction of a lease or grant. What the Court will have to see is what are the operative provisions of the document of title and what was actually granted by those operative provisions. The effect of the document depends, on the operative portion rather than , on the descriptive schedule, attached to the document. 21 Ind. Cas. 750 (3) and 77 Ind. Cas. 403 (3), relied on:

Held, on construction that the operative portion of the lease was that which conveyed 3 *bighas* and that the boundaries given in the schedule did not control the operative portion in the body of the lease. They were merely description. [p. 740, col. 1.]

A. from a decision of the Additional Subordinate Judge of Hazaribagh, dated July 19, 1919.

Messrs. *B. N. Mitter, Ajit Kumar Mitter* and *B. K. Ghose*, for the Appellant.

Messrs *G. N. Mukherji, Subhendu Sunder Sinha* and *A. N. Mitter*, for the Respondents.

Judgment.—The defendant who appeals is the landlord of the plaintiff. The latter, it is not disputed, has a house and compound surrounded by a *pucca* wall in *Mauza* Makatpur in Giridih Municipality as a tenant of the defendant, the Equitable Coal Co. This bungalow and compound bear survey plot No. 45. Outside the wall on the west is an irregular triangle of land plotted in survey Nos. 42, 43 and 44 and beyond these plots is a *nala* or Municipal drain running approximately north to south and bearing plot No. 41. The dispute between the parties put in the briefest terms is whether the lease granted by the defendant company to the predecessor-in-interest of the plaintiff included or excluded these three plots, and whether by the successive transfers of the lease hold property through which the title has devolved on the plaintiff, the latter has acquired a title to these plots in addition to plot No. 45 as claimed by the plaintiff or to plot No. 45 only as is the case of the defendant. The Munsif in a consider-

ed judgment was of opinion that the property to which the plaintiff was entitled did not include the land in suit. There was, he thought, discrepancy between the area and boundaries, but the grant did not extend right up to the western boundary mentioned in the document of lease. The Subordinate Judge who heard an appeal from this decision came to a different view. He considered that the central point in the case was as to the position of the *nala* referred to as the western boundary, and he found that this *nala* was at the time of the grant in the same position as at present. He says: "Where the area goes against the boundaries, the boundaries should prevail", and on this view he has allowed the appeal and decreed the suit.

The observation of the Subordinate Judge just quoted cannot be accepted as a universal proposition although there are observations in *Raghunandan Thakur* v. *Babu Kishundeo Narain Mahta* (1), which lend colour to the view taken by the Subordinate Judge. The legal position is more precisely stated in the decisions I shall now refer. In *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (2), the parties were in dispute as to the construction of a *kabuliyat*, the appellant's contention being that the respondents were entitled to the coal underneath such quantity of land only as was contained within the boundaries given in the schedule, the contention of the respondents, on the other hand, being that they were entitled to the coal underneath the full quantity of 400 *bighas* of land. The lease purported to grant 400 *bighas* within stated boundaries. Their Lordships observed that the question as to what had been demised turned upon the true construction of the *kabuliyat*. The other case to which I propose to refer is *Linton Molesworth & Co. Ltd.* v. *Jaggannath Supakar* (3), a case which turned on the construction of a lease or grant. The property had been described both by area and by boundaries, the area mentioned being 13 *bighas*. Actually it was found that the amount of land situated within the four boundaries mentioned in the schedule was a larger area. The grant was expressed to be of

"the entire land known as East Swardih whose area is 13 *bighas* and whose boundaries are the following"

(1) 7 P L T 134; 98 Ind. Cas. 351; A I R 1926 Pat. 257.

(2) 41 C 493; 21 Ind. Cas. 750; 40 I A 223; 18 C W N 66; (1914) M W N 1; 19 C L J 95; 26 M L J 25; 16 Bom. L R 42; 15 M L T 68 (P C).

(3) 5 P L T 437; 77 Ind. Cas. 403; 1 Pat. L R 377; A I R 1924 Pat. 226.

The question to be decided was whether the lease was of 13 *bighas* of land situate within certain boundaries mentioned in the lease or whether the lease was of the entire block of land within the boundaries given in the foot of the lease. Now in coming to the conclusion that the lease was of the entire block, it was emphasised that the operative part of the lease does not give the area of the demised land, but expressly that the lease is of the entire land. On the basis of these decisions what the Court will have to see is what are the operative provisions of the document of title and what was actually granted by those operative provisions. In the present instance the lease hold property has been the subject of more than one transaction. The earliest document exhibited is the *kabuliyat* dated July 9, 1909, executed by *Rai Bahadur* Jogendra Nath Ghose in favour of the Equitable Coal Co., Ltd. which recites that the lessee has proposed and the lessor has accepted the proposal for taking settlement of 3 *bighas* of land as detailed in schedule and demarcated by posts and as per map prepared. On its face the grant is not a grant of the entire area within the boundaries but of a specified area of land. There is a proviso that if in future at the time of survey the area of the land is found to be in excess of 3 *bighas* by standard measurement, the lessor will settle the said excess land with the lessee on the same terms provided that the lessee agrees to give proportionate excess *salami* and rent for the excess land. If the lessee does not take settlement then the lessor will be competent to take the said excess of land into his *khas* possession or to settle the same with others. A plain reading of this document conveys to my mind the impression that the grant was of an area believed to be 3 *bighas* which area was demarcated by posts and a map prepared. The map unfortunately is not available The plaintiff called for it from the defendant Company and the Company have replied that the map was taken away by the lessee *Rai Bahadur* Jagendra Nath Ghose. There is no evidence to show that this explanation is not true and in the circumstances no inference can be drawn for or against either party from the non-production of the map. We do know that *Rai Bahadur* Jogendra Nath Ghose the lessee put up a surrounding wall completely enclosing a quadrangular block. The disputed land was left outside of this enclosure. The area within the enclosure was found on survey to be three *bighas* 2 *khatas* and

4 *dhoors*. The lessee did not at any time apply to the lessor for settlement of the additional 2 *khatas* and 4 *dhoors*, nor does it appear that the lessor ever made any demand for additional rent or *salami* in respect of this small area. The lessee and his successors, however, have been continuously in undisputed possession of at any rate 3 *bighas* 2 *kathas* and 4 *dhoors*. As regards the area in excess of three *bighas*, the passages I have quoted from the *kabuliyat* Ex. 8 seem to contemplate that any area in excess of the 3 *bighas* was not by this *kabuliyat* settled with the lessee, but that he was given an option of taking settlement of it if it was found that the land in his possession at the time of survey was in excess of 3 *bighas*. If, therefore, the lessee at or after the time of the preparation of the Record of Rights had desired to include the additional 6 *kathas* now in suit being in excess of the area of 3 *bighas* granted to him, it was under the *kabuliyat* open to him to tender proportionate excess *salami* and to take settlement thereof; but no step was taken by *Rai Bahadur* Jogendra Nath Ghose for taking settlement of the excess of 2 *kathas* 4 *dhoors*, not to speak of any additional area beyond what was comprised within the four walls of his compound. On January 25, 1913, *Rai Bahadur* Jogendra Nath Ghose sold the leasehold premises by *kobala* Ex. 14 to Sushil Chandra Bandopadhya. The subject of the document is said to be *darmokarrari jamai* land bounded on all sides by *pucca* walls and the history of the property is recited. It is stated that Dr. V. Roy of Giridih, Munsif, had taken settlement of three standard *bighas* of land in the name of his brother Sarat Chandra Roy on whose death by arrangement the said land was settled with *Rai Bahadur* Jogendra Nath Ghose who took a *darmokarrari* lease of the said 3 *bighas* of land and at his own expense constructed *pucca* wall all round the same. The western boundary in the schedule to this document is *nala* as in the schedule to the *kabuliyat* Ex. 8; but the effect of the document depends, in my opinion, on the operative portion rather than on the descriptive schedule, and it does not operate to convey to Sushil Chandra Bandopadhya more than the compound enclosed by *pucca* wall, firstly, because on my view the original grant did not purport to convey more than this and *Rai Bahadur* Jogendra Nath Ghose could not transfer more than what had been granted to him; and secondly, because the deed of sale itself is expressed to convey land bounded on all sides by *pucca* wall and is not expressed to convey any other land outside the wall. Therefore, even if the original grant had been of more than survey plot No. 45 the conveyance was of survey plot No. 45 only.

This position in fact appears to have been recognised by Sushil Chandra Banerji himself. In 1914 he wished to get settlement of the land adjacent to his bungalow and compound and for this purpose wrote a letter Ex. A-1 dated September 11, 1914, to the Superintendent Equitable Coal Co., stating that he had applied to Mr. Fluker, for a settlement "of the land adjoining mine on the south and west side." In a post script he also referred to the "the narrow strip of land between the public municipal ditch and my boundary walls" and asked he might have this strip of land. He received a reply that the Company were agreeable to let him have that strip of land, but apparently no lease in respect of it was executed. The correspondence is relevant as containing an admission by Sushil Chandra Banerji the predecessor-in-title of the plaintiff as to the extent of the land at the time held by him. In 1920 Sushil Chandra Banerji by a deed of gift Ex. B transferred the leasehold property to his son Achal Kumar Banerji. The property is described

"all the right, title and interest in the house known as 'Santi Nibas' including the land on which it stands as well as the land and appurtenances etc., attached thereto in the town of Giridih., Area of land 3 *bighas* more or less"

and in the schedule of boundaries the western boundary is given as land of Equitable Coal Company. It is clear that at this time no claim of title or possession to the strip of land outside the enclosing wall was being put forward, and in my view, Ex. B did not purport to convey to the donee that strip of land.

The last of the plaintiff's documents of title is the conveyance by which he himself acquired the leasehold property. The property is described as a plot of land measuring 3 *bighas* more or less and more fully described in the schedule. In the schedule the property is described as the piece of parcel of land measuring 3 *bighas* more or less being holding No. 70, Wart No. 1 in the register of Giridih Municipality. Neither party, however, has produced this register showing the entry of holding No 70. The description by boundaries gives as the western boundary, *nala*, next to which is the play-ground of the Boys H. E. School.

It is on this description that the plaintiff relies for his contention that the premises transferred to him extend right up to the *nala*; but in the earlier recitals of the document after mentioning the lease in favour of *Rai Bahadur* Jogendra Nath Ghose, it is stated that the said *Rai Bahadur* being in peaceful possession of the said land by putting *pucca* compound walls around it and by sinking a well thereon transferred his rights to the late Babu Sushil Chandra Banerji. The recitals does not indicate any claim that *Rai Bahadur* Jogendra Nath Ghose had been in possession of more than the land, around which he put *pucca* compound walls.

On these documents of title, I am of opinion that the operative portion of the lease was that which conveyed 3 *bighas* and that the boundaries given in the schedule do not control the operative portion in the body of the lease. They are merely description. There is no doubt that the plaintiff's predecessor was put in possession of the full area of 3 *bighas* which the Company had agreed to let to him. It was within the contemplation of the parties that the area demarcated and made over to the lessee might possibly on scientific measurement prove to be in excess and as above stated an excess of 2 *kathas* 4 *dhoors* was found. That is a difference of about 3 or 3½ per cent. which is not an excessive discrepancy between an area arrived at by rough measurement and the same area measured by scientific measurement; but according to the plaintiff's case the area demised must have been nearly 3 *bighas* 10 *kathas* a discrepancy of about 16 per cent between the area said to have been let and the area actually made over to the lessee. When the documents show that there had been actual demarcation by pegs and a map prepared, it seems in the highest degree improbable that there would be so large a margin of error or difference between the contemporary estimate of the area made over to the lessee and the actual area as found by scientific measurement.

These matters of fact are not to be regarded as controlling the construction of the document for the true view is that the documents of title are to be construed in accordance with their own terms which are sufficient for the decision; but I have referred to these matters as they seem to me to lend some independent corroboration of the view that I have taken on a construction of the documents themselves. It must be held that the plaintiff has no title to the land in suit and, therefore, the appeal must be allowed and the suit dismissed with costs throughout.

Leave to appeal under the Letters Patent is refused.

S. *Appeal allowed.*

BOMBAY HIGH COURT

Letters Patent Appeal No. 52 of 1938

August 13, 1940

BROOMFIELD AND DIVATIA, JJ.

RAYCHAND JIVAJI—APPELLANT

versus

BASAPPA VIRAPPA BELLARY—RESPONDENT

Registration Act (XVI of 1908), s. 17 (1) (e)—Charge, creation of, by decree—Assignment of such decree, if falls under s. 17 (1) (e)—Decrees made prior to or simultaneously with assignment, whether covered by s. 17 (1) (e)—Transfer of Property Act (IV of 1882), s. 100—Principles underlying O. XXXIV, Civil Procedure Code (Act V of 1908), applicability of, to charges created by decree—Charge created by act of parties—Rule applicable to—Held, right to proceed personally against judgment-debtor was not independent of charge and could only arise after exercising right against property charged.

An assignment of a decree creating a charge on immovable property falls within the purview of s. 17 (1) (e), Regis. Act, as a charge is a right to or in immovable property within the meaning of that Act, *Govind Chandra* v. *Dwarka Nath* (12), explained.

[Case-law relied on.]

The principles underlying O. XXXIV, Civil P. C., although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy but in addition to it. In every case it must be essentially a question of construction of the decree, but unless the contrary appears, the ordinary rule should be that when a charge is created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only or at any rate against the property charged in the first instance [p. 745, col. 2; p. 746, col. 1]

Hence, where a decree creating a charge on the immovable property provides expressly that in case the defendant fails to pay the amount at the time fixed he would be entitled to recover the amount out of the property charged. The right to proceed against the judgment-debtor personally cannot be said to be independent of the charge but only arises, if at all, after the right against the charged property has been exercised. 58 Ind. Cas. 377 (7) and 15, Ind. Cas. 292 (15), relied on.

[Case-law discussed.]

Per *N. J. Wadia, J.*—There is nothing in the language of s. 17 (1) (e), Regis Act to indicate that only assignments of decrees which are simultaneous with the making of the decrees are covered by that section, and where the decree had already

created the interest long before the assignment was made, the assignment would not be governed by cl. (e). The language of the clause is wide enough to cover all decrees whether made prior to the assignment or simultaneously with the assignment. [p. 741, col. 2; p. 742, col. 1.]

L. P. A from a decision of N. J. Wadia, J., in F. A. No. 141 of 1937.

First Appeal No. 141 *of* 1937

N. J. Wadia, J.—This is an appeal arising out of a execution proceedings. The appellant is an assignee of a decree obtained by one Kapurji Magniram in Suit No. 55 of 1931. The decree was for a sum of Rs. 22,900 with interest and it provided that the amount was to be paid by annual instalments of Rs. 4 000 each, the first instalment being paid before the end of July 1932. The decree then stated :

"As this amount is large, and as instalments are granted to defendant, for security of the plaintiff's amount a charge of the said amount has been placed on the property mentioned below. In case defendant fails to pay the amount of instalment at the time fixed, plaintiff do recover the amount of the said instalment out of the property over which a charge has been placed."

The decree was transferred to the appellant on March 12, 1935, for Rs. 15,000, and on April 6, 1935, the appellant filed Darkhast No. 43 of 1935, out of which this appeal arises. The judgment-debtor *inter alia* contended that the transfer of the decree is invalid as it was not made by a registered deed, and the learned Judge tried this issue as a preliminary issue and held that as the transfer had been made after the amendment of the Regis. Act by which cl. (e) of s. 17 (1) was enacted, it was compulsorily registrable, and as it has not been so registered the transferee could not enforce the decree in execution.

It is contended on behalf of the appellant that this view is wrong. Section 17 (1) (e), Regis. Act, provides that non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property shall be registered. By the charge the property mentioned in the decree is made a security for the payment of the money to the decree-holder. Although by this charge no right *in rem* is created, nevertheless, the right created is something more than a mere personal obligation. It is a right to payment out of the property specified, and for the purposes of s. 17 (1) (e) there is, in my opinion, very little difference between a charge and a simple mortgage. It was held in *Gopal Narain* v. *Trimbak Sadashiv* (1) that where a mortgagee obtained a decree against his mortgagor for the payment of the mortgage moneys and in default for the sale of the mortgaged property, and his heirs afterwards executed an assignment of the decree, for valuable consideration, to the plaintiff who proceeded to execute the decree by sale of the mortgaged property, the assignment was a document compulsorily registrable under the Regis. Act. This view was followed in *Heptulla* v. *Mahomed* (2). A different view has been taken by the Calcutta and Allahabad High Courts in *Gous Mahomed* v. *Khowas Ali* (3) and *Abdul Majid* v. *Muhammad Faizullah* (4) in which it was held that such an assignment did not require registration on the ground that the assignment is not of any interest in immovable property but of the decree itself, and the decree although it be a decree upon a mortgage bond, can in no sense be regarded as immovable property, and further on the ground that the assignment does not of itself create an interest in immovable property. Neither the Bombay ruling nor the Allahabad and Calcutta rulings are directly in point so far as the present appeal is concerned, since they relate to assignments of mortgage decrees and not to assignment of a decree creating a charge, but the principle of the Bombay decision applies, in my opinion, to the present case. The view taken by the Calcutta High Court in *Gous Mahomed* v. *Khowas Ali* (3), that the deed of assignment does not in itself operate to create any right, title or interest and that all that it assigns is the decree, is clearly in conflict with the view which the Bombay High Court took in *Gopal Narain* v. *Trimbak Sadashiv* (1). The assignment of a decree which creates a charge on the property is, in my opinion, clearly an assignment coming within the purview of s. 17 (1) (e). There is nothing in the language of that section which can support the contention urged on behalf of the appellant, that only assignments of

(1) 1 B 267.
(2) 11 Bom. L R 356; 2 Ind. Cas. 511.
(3) 23 C 450.
(4) 13 A 89; A W N 1890, 186.

decrees which are simultaneous with the making of the decrees are covered by that section, and that where the decree had already created the interest long before the assignment was made, the assignment would not be governed by cl. (*e*). The language of the clause is wide enough to cover all decrees whether made prior to the assignment or simultaneously with the assignment. The view taken by the learned trial Judge is, therefore, in my opinion, correct.

It was next contended that even if the assignment of the decree creating a charge is invalid for want of registration, it is open to the assignee to execute the decree purely as a money decree, and although he had not in the *darkhast* prayed that the decree should be executed as a money decree, he was entitled to all the reliefs which the law allows, and the trial Judge should therefore have allowed him to execute the decree purely as a money decree by arrest and detention of the judgment-debtor or by attachment of his property other than the property on which a charge had been created. In support of this contention, the decision in *Durga Das Nandi* v. *Dewraj Agarwala* (5) and *Hargobind-Kishan Chand* v. *Hakim Singh & Co.* (6), were relied on. In the latter case, the decree was a money decree and it was held that the latter confers upon the decree-holder the right to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by attachment and sale of his property, or by both, and that while the Court has discretion to refuse execution against the person and property simultaneously, it has no authority to refuse execution against the person of the debtor on the ground that the decree-holder must, in the first instance, proceed against the property. In the Calcutta case the decree-holder had applied for demolition of a certain building, and it was held that he had rightly been allowed by the trial Court to execute the decree by attachment although he had not asked for that remedy. The fact in the present case, however, are different. The decree in the present case cannot be said to be purely a money decree. It is a decree which creates a charge on the property and it expressly provides that in case the defendant fails to pay the amount at the time fixed the plaintiff is to recover the amount out of the property over which a charge has been created. The case is analogous to that of a mortgage decree.

In *Janardan* v. *Krishnaji* (7), a decree was passed in a mortgage suit that the defendants should pay a certain amount to the plaintiff by fixed annual instalments; in default of payment of any two instalments the plaintiff was at liberty to recover the whole amount then due by sale of the mortgaged property; the defendants fell into arrears and the plaintiff applied to execute the decree not only by sale of the mortgaged property, but also by attaching other property of the defendants. It was held that the plaintiff was not entitled to proceed simultaneously against the other property of the defendants, since there must be a decree made personally against the defendants before the decree could be executed against property other than the mortgaged property. The grounds on which that case was decided are, in my opinion, applicable to the present case also. Before the decree-holder, the assignee, can proceed against the person of the judgment-debtor or against his property other than the property on which a charge has been created, he must first proceed against the property charged. It is not, therefore, in my opinion, open to him to execute the decree purely as a money decree. It may be noted that this contention has been raised for the first time in this Court and was never raised before the trial Court. The *darkhast* application has been rightly dismissed. The appeal fails and is dismissed with costs.

[Letters Patent appeal having been filed from the above decision, their Lordships delivered the following judgment.]

Messrs. *S. A. Desai* and *B. Moropanth*, for the Appellant.

Mr. *G.P. Murdeshwar*, for the Respondent.

Broomfield, J.—This is a Letters Patent appeal from a decision of N. J. Wadia, J. The appeal arises out of execution proceedings. The appellant is the assignee of a decree obtained by one Kapurji Magniram in July 1931. The terms of the decree which was passed on an award were as follows:

"Defendant do pay to plaintiff Rs. 22,900. Defendant do pay to plaintiff the said amount by annual instalments of Rs. 4,000. And interest on the said amount of Rs. 22,900 at the rate of 6 per cent. per annum should be paid until the amount is paid off. The first instalment should be paid before the end of July 1932. Subsequently, before the same

(5) 33 C 306; 3 C L J 112; 10 C W N 297.
(6) 6 L 548; 93 Ind. Cas. 54; A I R 1926 Lah. 110.
(7) 22 Bom. L R 953; 58 Ind. Cas. 377; A I R 1920 Bom. 95.

fixed time every year the instalments should be continued to be paid. As this amount is large, and as instalments are granted to defendant, for security of the plaintiff's amount a charge of the said amount has been placed on the property mentioned below. In case defendant fails to pay the amount of instalment at the time fixed, plaintiff do recover the amount of the said instalment out of the property over which a charge has been placed."

Then follows a description of the property and there is a further recital : "The charge of the amount has been placed on the property as above." This decree was transferred to the appellant on March 12, 1935, for Rs. 15,000, and on April 6, 1935, he filed the *darkhast* from which the appeal arises to recover Rs. 8,680 as the amount of the second and third instalments. The judgment-debtor contended that the transfer of the decree was invalid because it was not made by a registered deed. That was treated as a preliminary issue and the trial Judge having held that the transfer was compulsorily registrable dismissed the *darkhast*. In appeal before N. J. Wadia, J., two points were argued : (1) that registration of the deed of assignment was not necessary and (2) that the decree could in any case be executed against the judgment-debtor personally. This was a point not taken in the trial Court. On both the issues N. J. Wadia, J., decided against the appellant. As regards the first point ; the necessity for registration, the relevant provision of the Regis. Act is s. 17 (1) (*e*), which is as follows :

"Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

This provision by which transfers and assignments of decrees are made compulsorily registrable was added by an amending Act in 1929. There was formely a conflict of authority as to whether an assignment of a decree creating or declaring rights to or in immovable property exceeding Rs. 100 in value was compulsorily registrable under s. 17 (1) (*b*). The Calcutta and Allahabad High Courts said registration was not necessary because the assignment was not of any immovable property but of the decree itself and the assignment did not of itself create an interest in the property. This High Court took a different view in *Gopal Narain* v. *Trimbak Sadashiv* (1) and *Heptulla* v. *Mohammad* (2). But we are concerned not with s. 17 (1) (*b*) but with the new provision in s. 17 (1) (*e*), which I have just read, and it is now quite clear that all that has to be considered is whether the decree or order or award as the case may be creates or declares, etc., a right to or in immovable property of a value exceeding Rs. 100. If it does, the assignment of it is compulsorily registrable. In *Gopal Narain* v. *Trimbak Sadashiv* (1), the facts were that a mortgagee had obtained a decree against his mortgagors for the payment of the mortgage moneys and in default for the sale of the mortgaged property, and his heir executed an assignment of the decree to the plaintiff who proceeded to execute it by sale of the mortgaged property. It was held that the assignment was a document of which the registration was compulsory. No judgment appears to have been delivered by this Court which merely expressed concurrence in the decision of the lower Courts. But in the report a passage is cited from the judgment of the District Judge, which was the Court of first appeal :

"The deed of sale, under which this decree was transferred from Damodar to Gopal, purported to assign to Gopal certain interest in immovable property; for it gave to him the liberty to sell by auction, by executing the decree against it, the defendant's house; and this liberty to sell was certainly an interest in immovable property and the decision of the Subordinate Judge was, I think, right and must therefore be confirmed."

We must take it, I think, that this Court in dismissing the appeal concurred in this reasoning. It is a very old case, but it does not appear to have been dissented from, and on the contrary it was followed in *Heptulla* v. *Mahomed* (2) as I have said. Apart from these Bombay cases there are several other authorities for the view that a charge is a right to or in immovable property within the meaning of the Regis. Act. One of these cases was cited by the learned Counsel far the appellant himself, *Maina* v. *Bachchi* (8). In his judgment in that case Richards, J., said (p. 659*) :

"It would appear that the provisions as to registration contained in the Regis. and T P. Acts apply to charges (when created by acts of parties) just as much as to mortgages ..."

In *Imperial Bank of India* v. *Bengal National Bank, Ltd.* (9), it was held by Rankin, C. J. that a mere charge on immovable property is within cl. (1) (*b*) of s. 17, Regis. Act, because, as he said, it is a

(8) 28 A 655; A W N 1906, 165; 3 A L J 551.
(9) 58 C 136; 131 Ind. Cas. 689; A I R 1931 Cal. 223; 53 C L J 269; 34 C W N 605; Ind. Rul. (1931) Cal 481.

*Page of 28 A.—[*Ed*].

right in immovable property—a right to have it brought to sale to realize a sum of money to be paid to the chargee. The decision in this case was reversed in *Imperial Bank of India* v. *Bengal National Bank, Ltd.*, (10), but, on another point, unconnected with the question of registration. Then there is a very recent decision of the Calcutta High Court in *Siv Narayan* v. *Basanta Kumar* (11), in which the Court was concerned with a decree for arrears of rent which created a charge on immovable property. It was held that because it created a charge it came within the terms of s. 17, Regis. Act. Mr. Desai referred us to *Govind Chandra* v. *Dwarka Nath* (12), in which the question was whether a decree by which immovable property was hypothecated was void because there was no duly registered instrument as required by s. 17. The Court disallowed the argument but that was done by reason of a provision which was then contained in the Act by which decrees were exempted from the rule as to compulsory registration of documents. We think there can be no doubt that N. J. Wadia, J. was right in holding that this deed of assignment required registration.

The second point really includes two entirely different matters, *viz.*, (1) whether this decree can be executed personally against the defendant and (2) whether, whatever the rights of the decree-holder may have been, the right to proceed against the judgment-debtor personally has been validly assigned. On the first of these questions Mr. Desai's argument is that this is a decree for the payment of money to which has been added a charge on certain property by way of additional security for the benefit of the decree-holder. He relies on O. XXI, r. 30, which provides that every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both. He also cites *Hargobind Kishen Chand* v. *Hakim Singh & Co.* (6), where it was held that the law confers upon the decree-holder the right to decide whether he should execute the decree for payment of money by the arrest of the judgment-debtor or by the attachment, and sale of his property, or by both, and that though the Court has a discretion to refuse execution against the person and property simultaneously, it has no authority to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment debtor. In that case, however, the Court was concerned with an ordinary money decree and no charge was created by it. That being so, it cannot be said that these observations have much applicability in the case before us. We were also referred to *Ambalal Bapubhai* v. *Narayan Tatyaba* (13) and in particular to some observations of Shah, J. at p. 638* of the report:

"The decree contains a distinct direction that the defendant should pay the sum to the plaintiffs. This gives the plaintiffs the right to attach and sell the property of the judgment-debtor under the Civil P. C. and, in the exercise of this right, he can seek to realise the decretal amount or the balance thereof by the sale of the property in question. The declaration in the decree as to the charge on the property in favour of the decree-holder in order to secure re-payment of the amount of the decree has the effect of protecting them against any transfer of the property by the judgment-debtor and not of reducing or modifying the right which the plaintiffs have got in virtue of the direction that the defendant should pay the amount."

It is to be noted, however, that the only question before the Court there was whether the property charged could be sold in execution of the decree or whether a separate suit was necessary. It was held that no separate suit was necessary. The observations relied on by Mr. Desai cannot be said to support the view that the decree so far as it directed payment of money could be executed separately from the provision as to the charge. No such question came before the Court for determination. The case on which the learned Counsel mainly relies is a decision of Barlee, J. sitting alone in First Appeal No. 61 of 1934 decided by Barlee, J. on August 22, 1935, *Automobile Sales Co. Ltd.* v. *Anant Subrao Yatgiri* The decree which had to be construed in that case was a rather complicated one. It is thus summarised in the judgment:

"The decree, which is based on award, provides as follows:—Firstly that the defendant should pay a certain sum to the plaintiff; secondly that the amount so found due should be a charge on the immovable property of the defendant.....;

(10) 58 I A 323; 132 Ind. Cas. 651; A I R. 1931 P C 245; 59 C 377; 35 C W N 1034; 54 C L J 117; (1931) A L J 804; (1931) M W N 910; 33 Bom. L R 1338; 34 L W 569; 61 M L J 589; Ind. Rul. (1931) P C 299 (P C).

(11) 43 C W N 858.

(12) 35 C 837; 7 C L J 492; 12 C W N 849.

(13) 43 B 631; 51 Ind. Cas. 929; A I R 1919 Bom. 56; 21 Bom. L R 698.

*Page of 43 B.—[*Ed.*]

thirdly that some motor-buses then in the possession of the defendant were the properties of the plaintiff. Then there is a clause for instalments, and a default clause which gave the company a right to seize the buses and to sell the immovable properties which have been charged, and there is also a provision about a surety."

What Barlee, J. had to decide was whether this decree could be termed a decree for the payment of money within the terms of s. 73, Civil P. C., which deals with rateable distribution among decree-holders. There are no doubt observations in the jugdment of the learned Judge which may be used in support of the case put forward for the appellant here. But the point which we have to decide did not actually arise in the case decided by Barlee, J., and it is not therefore an authority on the present point. We note also that he has not in his judgment referred to r. 15 of O. XXXIV, Civil P. C., which provides that all the provisions in this order which apply to simple mortgage shall, so far as may be, apply to a charge, within the meaning of s 100, T. P. Act, 1882.

N. J. Wadia J. in the judgment which is now under appeal has relied mainly on *Janardan* v. *Krishanaji* (7) in which the facts were these. A decree passad in a mortgage suit directed that the defendant should pay a certain amount to the plaintiff in fixed annual instalments: in default of the payment of any two instalments, the plaintiff was at liberty to recover the whole amount then due by sale of the mortgaged property. The defendant having fallen into arrears, the plaintiff applied to execute the decree not only by sale of the mortgaged property, but also by attaching other property belonging to the defendants. It was held that he was not entitled to proceed simultaneously against the other property, since there must be a decree made personally against the defendants before it could be executed against property other than the mortgaged property. In the course of his judgment Macleod, C. J. said (p. 958*):

"It seems clear to me that there must be a decree personally made against the mortgagor before it can be executed against property other than the mortgaged property. The decree in this case cannot be said to be a personal decree merely because it directs that the defendant should pay the amount. It directs specifically how the plaintiff shall recover the decretal amount if default is made in payment, and it says nothing about what shall happen supposing the mortgaged property when sold is insufficient to pay the mortgage debt."

It is quite true, as M. Dessai says, that that was a case of a mortgage to which the provisions of O. XXXIV specifically apply. But it has been recently followed and applied by Kania, J. in *Gurupadappa Malappa* v. *Basappa Shiddappa* (14) to the case of a charge created by a decree. It is true that the charge in that case was a statutory charge under s. 55 (4) (*b*), T. P. Act, and the decree was not in the same form as the one which we have to construe. But nevertheless the case is an authority for the view which N. J. Wadia J. adopted *viz.* that the principles laid down in *Janardan* v. *Krishnaji* (7) may reasonably be applied by analogy to decretal charges.

In the argument before us no case directly bearing on the point in issue has been cited, and so far as we are aware there is no decision in the authorized reports. But in *Fatehchand* v. *Indian Cotton Co., Ltd. Bombay* (15) it was held that where a charge is created in the decree over certain specified properties for the payment of the decretal amount the decree holder should first exhaust his remedy against charged property before proceeding against other property. In the event of the charge proving insufficient, there is nothing to prevent the decree-holder from proceeding against other property: "At the same time" it was stated in the judgment,

"by specially indicating this property the parties evidently intended it to be the primary remedy and the judgment-debtor was entitled to act on this belief with regard to the rest of his property. It therefore might be prejudicial to him if the decree-holder were allowed to desert his charge completely and suddenly pounce upon the other property. (p. 131*)."

The judgment seems to have been based therefore on general grounds of equity rather than on the application of the provisions of O. XXXIV, in particular r. 6. It is, however, a direct authority on the point before us, and we agree that the principles underlying O. XXXIV, although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy but in addition to it. In every case it must be essentially a question of construction of the decree, but unless the contrary appears, we think the ordinary rule should be that when a charge

*Page of 22 Bom. L. R.—[*Ed.*]

(14) 42 Bom. L R 592; 190 Ind. Cas. 529; A I R 1940 Bom. 276; I L R (1940) Bom. 640; 13 R B 117.

(15) A I R 1935 Nag. 129; 157 Ind. Cas. 292; 8 R N 39.

*Page of A. I. R. 1935 Nag.—[*Ed.*]

is created by act of parties the specification of the particulary fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only or at any rate against the property charged in the first instance. In my opinion that is the way in which the decree in this case should be construed.

The question whether the right to proceed personally against the judgment-debtor has been validly assigned to the appellant therefore becomes academic because we hold that there was no such right, at any rate until recourse had been had to the sale of the charged property. Whether, if that right had existed, it could be taken to have been assigned, in view of the fact that the assignment deed is invalid so far as the charge is concerned for want of registration, would depend on the question whether the decree is indivisible or whether it can be split up into two parts, *viz.*, the direction for payment of money and the direction as to the charge. In the view we take of the construction of the decree it must be held that the right to proceed against the judgment-debtor personally is not independant of the charge but only arises, if at all, after the right against the charged property has been exercised. In that view of the case *Heptulla* v. *Mahomed* (2) is an authority against the appellant.

For these reasons we hold that Wadia J.'s judgment is correct and dismiss the appeal with costs.

S. *Appeal dismissed.*

CALCUTTA HIGH COURT

Criminal Revision No. 458 of 1940
June 25, 1940
EDGLEY, J.

A. C. MOJUMDAR—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Electricity Act (IX of 1910), s. 44 (d)—Construction—Onus to show improper use of electrical energy—Latter part of s. 44 (d) relating to cl. (d), whether exonerates prosecution from discharging onus.

Section 44 (*d*), Electricity Act, *inter alia* imposes a penalty for improperly using the energy of a licensee The onus would, therefore, lie on the prosecution to show that there had actually been improper use of the energy. The latter part of s. 44 (*d*) in so far as it relates to cl. (*d*) does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself as defined in s. 2 (*c*) of the Act will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control

Messrs. *Probodh Chandra Chatterjee* and *Bireswar Chatterjee*, for the Petitioner.

Mr. *Hamidul Huq*, for the Crown.

Order.—The petitioner in this case has been convicted under s. 44 (*d*), Electricity Act. It is contended on his behalf that the judgment of the learned Magistrate contains no sufficient finding to warrant a conviction under this section. With this contention I must agree. The case for the prosecution appears to have been that the petitioner improperly used three points in his workshop for lighting purposes when he was under a contract with the electric supply company to use the energy supplied through these points for industrial purposes only. The learned Magistrate seems to have been of the opinion that it might be presumed that he had used the electrical energy improperly as alleged by the prosecution because he had made certain connection for the use of electrical energy without the consent of the licensee. In my opinion he has misread s. 44, Electricity Act. This section *inter alsa* imposes a penalty for improperly using the energy of a licensee. The onus would therefore lie on the prosecution to show that there had actually been improper use of the energy. For example, in the case with which we are now dealing, the onus would lie on the prosecution to show that three of the points in the petitioner's workshop had actually been used for lighting purposes and not for industrial purposes. The learned Advocate for the Crown places some reliance upon the latter part of the section in so far as it relates to cl. (*d*), which is to the effect that

"If it is proved that any artificial means exist ..... for facilitating such improper use as is referred to in cl. (*d*).....it shall be presumed, until the contrary is proved that such improper use..., has been knowingly and wilfully caused by a such consumer."

This provision does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself as defined in s. 2 (*c*) of the Act will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. From the findings contained in the judgment it

is clear that the requisite onus was not discharged in this case. In this view the conviction cannot be supported. It is therefore set aside and this rule is made absolute. The fine, if already paid, will be refunded.

D. *Rule made absolute.*

ALLAHABAD HIGH COURT

Stamp Reference in Second Appeal No. 667 of 1939

September 13, 1940

ALLSOP, J.

CHHAKAURI SINGH—PLAINTIFF—APPELLANT

versus

SRI KRISHNA PANDE AND OTHERS—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870 as amended by U. P. Court Fees (Amending) Act (XIX of 1938), s. 7 (IV-B) and Proviso—Under Proviso, court-fee to be calculated upon market value at date of presentation of plaint—Suit for injunction filed before proviso came into force—Valuation of suit at Rs. 5 was proper—Court-fee on Rs. 5 is proper for purposes of appeal.

Under the proviso to s. 7 (IV-B) it is the amount mentioned in the plaint which is the basis of the valuation and, therefore, the Court must look back to the date of the institution of the suit and calculate the court-fee upon the market value at the date of presenting the plaint. Hence, a suit for injunction must be deemed to have been correctly valued at Rs. 5 when at the date of the presentation of the plaint s 7 (IV-B) proviso was not in force and court-fee paid on memorandum of appeal on such valuation is correct.

S. Ref. and S. A. from the decision of the Additional Civil Judge, Ballia, dated February 27, 1939.

Mr. *Baleshwari Prasad*, for Appellant.

Judgment.—The question which is to be decided is what amount of court-fee should be charged on a memorandum of appeal against a decree passed in a suit to obtain an injunction. The law in force when the suit was instituted was that the court-fee charged on the plaint should be *ad valorem* according to the amount at which the relief sought was valued in the plaint, it being left to the plaintiff's discretion to place whatever valuation he wished upon his relief. The plaintiff valued his relief at Rs. 5 and paid the proper court-fee on that amount. At the time when the second appeal was filed in this Court, the law had been amended by a local Act, Act XIX of 1938. After the substitution of the words 'second appeals from decrees in suits' for the word 'suits' in accordance with the provisions of s. 2 (*iv*) and the omission of the portions which are irrelevant, s. 7 is now as follows:

"The amount of fee payable under this Act in the second appeals from decrees in suits next hereinafter mentioned shall be computed as follows:

In second appeals from decrees in suits..... ..to obtain an injunction .. . According to the amount at which the relief sought is valued in the plaint;

Provided that such amount shall be not less than one-tenth of the market-value of the property involved in or affected by the relief sought or Rs. 50, whichever it greater."

According to the Stamp Reporter we should look to the date upon which the memorandum of appeal was filed and assess the court-fee not upon the amount at which the relief was valued in the plaint but upon the amount at which it should have been valued at that date in accordance with the terms of the proviso. According to learned Counsel for the appellant we ought to look to the date of the plaint and assess the court-fee upon the amount at which the relief was in fact valued, and rightly valued, in the plaint. The question is not free from difficulty, but on the whole I think that the contention of learned Counsel must prevail. The Legislature has decided that it is the amount mentioned in the plaint which is the basis of the valuation and, therefore, I think, we must look back to the date of the institution of the suit as we would in suits for movable property other than money under s. 7 (*iii*) of the Act which mentions suits for movable property other than money where the subject-matter has a market value and lays down that the court-fee shall be calculated upon such market-value at the date of presenting the plaint. The proviso to section 7 (IV-B) also mentions market value and in some cases the fee payable would depend upon such market-value. It seems to me that the market value would be such value at the date of presenting the plaint. If we are to go back to the date of the presentation of the plaint, then, as the proviso was not in force on that date, the relief was rightly valued at Rs. 5 and the court-fee paid on the memorandum of appeal was sufficient. I hold accordingly.

S. *Order accordingly.*

PATNA HIGH COURT

Civil Revisions Nos 233 and 372 of 1940

January 21, 1941

HARRIES, C. J. AND FAZL ALI, J.

SHYAMA KANT LAL—JUDGMENT-DEBTOR—PETITIONER

versus

Babu RAM LAL AND ANOTHER—DECREE-HOLDERS—OPPOSITE PARTY

Mortgage—Substituted security — Amendment—Partition after mortgage of share in village—Mortgagor losing share in village mortgaged and obtaining share in another village—Mortgagee not proceeding against such substituted security in mortgage suit—Property originally mortgaged sold and purchased by decree-holder—Sale certificate issued—Subsequent application by decree-holder for amendment of description in mortgage decrees, execution petition, sale proclamation and sale certificate—Amendment held could be allowed upto stage of final decree and no more—Substituted security, ascertainment of—Method—Duty of Court—Amendment—Question involving identity of mortgaged property, if can be dealt with on application to amend relevant documents.

The mortgagors mortgaged their shares in village *S* while partition proceedings were proceeding in respect of the *mahal* which included the village *S* but before the partition was finally concluded and approved of by the Commissioner. By the partition the mortgagors lost all the property of any value in *S* but were given a separate *takhta* in village *B*. In a mortgage suit the mortgagee however did not take any steps to proceed against the substituted security but only prayed for sale of the original security. The preliminary and final decrees were for the sale of that share in *S* and such was the share mentioned in the execution petition, the sale proclamation and the sale certificate. After the whole proceedings were over and difficulties arose as to obtaining possession of the substituted security, the mortgagee decree-holder who had purchased the property himself applied to the Court for amendment of the description of the mortgaged properties in the preliminary and final decrees in the suit and in all the consequential papers of the execution proceedings, that is, in the execution petition, sale proclamation and sale certificate.

Held, that the partition must be deemed to have taken place after the mortgage. On the principle of substituted security the mortgagees could have proceeded against such part of the property allotted to the mortgagors in village *B* as represented their original share in *S* which had been mortgaged by the mortgage and could have brought to sale the substituted security and hence an amendment of the plaint, the preliminary decree and the final decree, could be allowed but no further amendment, could be justifiably made. Because if an amendment was made in the execution petition, sale proclamation and sale certificate, the result would be that property would have been bought and sold which had never been even put up for sale. No amendment could therefore be made in any of the relevant documents and proceedings following the final decree. [p. 749, col 2; p. 750, col. 1.]

In ascertaining what precisely is the substituted security out of a share allotted to the mortgagor in partition subsequent the mortgage the partition papers and the valuation of the properties made in the partition proceedings are no doubt of the utmost importance but it would be advisable that, before a finding is recorded as to what the substituted security is, the parties should be given an opportunity of placing their contentions before the Court and any evidence which they may seek to adduce and which the Court may consider to be properly admissible. After such inquiry the Court should come to the conclusion as to what is the substituted security and such should be inserted in all the relevant documents. [p. 750, col. 1.]

A question involving the identity of the property mortgaged cannot be dealt with on an application to amend the relevant documents after the mortgage decree is passed, sale held and a sale certificate is issued. [p. 750, col. 2.]

C. Rs. from an order of the Subordinate Judge Gaya, dated, April 26, 1940.

Messrs. *Khurshaid Husnain*, and *Ray Paras Nath* for the Petitioner in No. 233 and Messrs. *Khurshaid Husnain*, *Ray Paras Nah*, and *P. Jha*, for the Opposite Party, in No. 372.

Messrs. *Baldeo Sahay* and *C. P. Sinha*, for the Opposite Party in No. 233 and for the Petitioners in No. 372.

Harries, C. J.—These are two civil revisions preferred by the decree-holder and judgment-debtors praying for revision of an order of the learned Subordinate Judge passed in an execution matter. To appreciate the points at issue it will be necessary shortly to set out the facts of the case.

On September 9, 1929, Shyamakanta Lal and his brother Srikanta Lal executed a mortgage in favour of the decree-holder Ram Lal. The properties mortgaged were 5 annas 4 pies share in village Semaria and 6 annas 17 *dams* odd share in village Baralodhwe. It appears that at the date of this mortgage partition proceedings were proceeding in respect of the *mahal* which included the village of Semaria. On September 2, 1929, (that is, a week before this mortgage was executed) the partition was actually approved of by the Collector, but it did not receive the approval of the Commissioner until May 23, 1930 (that is, a considerable time after the mortgage was executed). In this Collectorate partition the mortgagors were given a separate *takhta* in village Basaria and their interest in village Semaria became negligible.

On April 27, 1935, the decree-holder brought a suit to enforce his mortgage by sale of the shares in these two villages. On December 23, 1936, he obtained a preliminary decree which was made final on July 23, 1937. On August 23, 1937, proceedings

were taken to sell the mortgaged properties, and on December 18, 1937, the two properties were sold, the 5 annas 4 pies share in Semaria being sold for Rs. 2,000 and the share in Baralodhwe for Rs. 6,500, the purchaser in each case being the decree-holder. On April 11, 1939, the decree-holder took delivery of possession through Court. He, however, sought to take possession of the mortgagor's property in Basaria and of a share not in village Baralodhwe but in *Mahal* Baralodhwe. He was resisted and eventually the decree-holder applied to the Court for amendment of the description of the mortgaged properties in the preliminary and final decrees in the suit and in all the consequential papers of the execution proceedings, that is in the execution petition, sale proclamation and sale certificate.

The learned Subordinate Judge who heard this application for amendment allowed it in the case of Semaria property and permitted the Basaria property to be substituted in place of the share of Semaria stated in the documents throughout the proceedings. With regard to Baralodhwe, however, the learned Subordinate Judge held that the dispute related not to a misdescription of property but rather to the identity of the property actually mortgaged. In his view amendment was not the proper procedure with regard to Baralodhwe, and he refused that part of the application. The judgment-debtors being dissatisfied with the order relating to amendment and substituting the Basaria property for the share in Semaria have preferred Civil Revision No. 233 of 1940, whereas the decree-holder being dissatisfied with the order refusing to allow an amendment with regard to the Baralodhwe property has preferred Civil Revision No. 372 of 1940.

It will be convenient in the first place to deal with Civil Revision No. 233 of 1940. The Judgment-debtors argued in the Court below that this was not a case where the mortgage preceded the partition but on the contrary it was a case where the partition preceded the mortgage. However it is clear from the facts that the mortgage was entered into before this partition was finally concluded and approved of by the Commissioner, and it has not been argued before us that the Court below was wrong in treating the partition as taking place after the mortgage. By the partition the mortgagors lost all the property of any value in Semaria but were given a separate *takhta* in Basaria. It appears that the mortgagors owned a 5 anna 4 pies share in both Semaria and Basaria and they received a separate *takhta* in Basaria representing their previous shares in both the villages. There can be no doubt that on the principle of substituted security the mortgagees could have proceeded against such part of the property allotted to the mortgagors in Basaria as represented their original share in Semaria which had been mortgaged by the mortgage of September 9, 1929. However, the mortgagees, for reasons best known to themselves, took no steps when they instituted their suit on April 27, 1935, to proceed against the substituted security. The suit prayed for sale not of the substituted security but of the original security, namely 5 annas 4 pies share in village Semaria. The preliminary and final decrees were for the sale of that share in Semaria and such was the share mentioned in the execution petition, the sale proclamation and the sale certificate. After the whole proceedings were over and difficulties arose as to obtaining possession of the substituted security, this application for amendment was preferred.

The learned Subordinate Judge allowed the amendment, feeling that he was bound by a decision of the Privy Council in *Muhammad Afzal* v. *Abdul Rahman* (1). In my view that decision of their Lordships does not warrant the various amendments by the learned Subordinate Judge in this case. Their Lordships lay down that where a partition has followed a mortgage and other properties are allotted to the mortgagor in lieu of the mortgaged property then the mortgagee can proceed against the substituted security. The difficulty in this case is that the mortgagee did not proceed against the substituted security but ignored the fact of partition and proceeded against the property originally mortgaged. There can be no doubt that he could have brought for sale such part of the property in Basaria as represented the property originally mortgaged, and that being so the learned Subordinate Judge was right in my judgment in allowing an amendment of the plaint, the preliminary decree and the final decree, but no further amendment, in my view, could be justifiably made. It must be remembered that if an amendment is made in the execution petition, sale proclamation and sale certificate, the result will be that

(1) A I R 1932 P C 235; 139 Ind. Cas. 85; Ind. Rul (1932) P C 285; 9 O W N 829 36 C W N 1129; 36 L W 456; (1932) M W N 1063; 63 M L J 664; (1932) A L J 909; L R 13 A 350; 16 R D 522; 56 C L J 324; 13 Lah. 702; 35 Bom. L R 1; 34 P L R 63; 59 I A 405. (P C.)

property will have been bought and sold which has never been even put up for sale. If a part of the Basaria property be substituted for the share in Semaria in the sale certificate, it will have the effect of a purchase by the decree-holder of property which has in fact never been offered for sale. That being so, it is clear that no amendment can be made in any of the relevant documents and proceedings following the final decree.

The question now arises what amendment should be made in the plaint, preliminary and final decree. The present *takhta* in Basaria given to the mortgagors by the partition represents not only their previous share in Semaria but also their share in Basaria. That being so, the whole of the *takhta* given in the partition cannot be treated as the substituted security. The learned Judge, after making a calculation based entirely upon the partition papers and valuations, has come to the conclusion that 6 annas 8 pies share of the Basaria *takhta* represents the old Semaria share which was the subject of the mortgage: in other words, the substituted security is now 6 annas 8 pies share in the *takhta* given to the mortgagors in Basaria on partition. Mr. Khurshaid Husnain on behalf of the judgment-debtors has urged that the method adopted by the learned Judge of ascertaining what precisely is the substituted security is not the true one. There is nothing in the judgment to suggest that the parties were given an opportunity of urging their respective points of view as to how the extent of the substituted security should be ascertained. The partition papers and the valuation of the properties made in the partition proceedings are clearly of the utmost importance in the case; but in my view it would be advisable that before a finding is recorded as to what the substituted security is, the parties should be given an opportunity of placing their contentions before the Court and any evidence which they may seek to adduce and which the Court may consider to be properly admissible. After such inquiry the Court should come to the conclusion as to what is the substituted security and such should be inserted in all the relevant documents up to and including the final decree in place of the share in Semaria which was the property originally mortgaged.

After such amendment is made fresh steps will have to be taken in bringing this property in Basaria to sale. It is needless to say that in view of the observations which I have made that the sale which has already taken place is in no sense a sale of the mortgaged property and cannot possibly affect the mortgagor's interest in the *takhta* granted to them in Basaria. Fresh proceedings will have to be taken to bring the substituted security to sale after amendment has been made.

The decree-holder preferred Civil Revision No. 372 of 1940 seeking revision of that part of the order which refused to allow any amendment with regard to Baralodhwe property. In my judgment the learned Subordinate Judge was right in refusing to make any amendment with regard to this property. The mortgaged property was certainly stated to be village Baralodhwe; but it was contended by the decree-holder that there was no such village and that the mortgaged property was in fact the *Mahal* Baralodhwe. Certain documents were adduced by the parties to support their respective cases, and eventually the learned Judge came to the conclusion that this was not a case of misdescription merely but involved a question of the identity of the property mortgaged. That being so, proceedings to amend the relevant documents in the case did not appear to him to be appropriate. In my view a question involving the identity of the property mortgaged cannot be dealt with on an application to amend. There is here a serious dispute as to what was the subject-matter of the mortgage. The mortgagors contend that it was a share in village Baralodhwe, whereas the mortgagees contend that it was a share in a *mahal* known as Baralodhwe. It appears to me that this dispute can never be decided by an application such as that preferred by the decree-holder, and in my view the lower Court was right in rejecting the application to amend.

The result, therefore, is that Civil Revision No. 372 of 1940 preferred by the decree-holder fails in its entirety. Civil Revision No. 233 of 1940 preferred by the judgment-debtors is allowed in part and so much of the order of the lower Court relating to amendment of the execution petition, proclamation of sale and sale certificate is set aside. The judgment-debtors are entitled to their costs in Civil Revision No. 372 of 1940, whereas I would make no order as to costs in Civil Revision No. 233 of 1940. I would assess the hearing fee in Civil Revision No. 372 of 1940 at three gold *mohurs*.

Fazl Ali, J.—I agree.

S. *Order accordingly.*

MADRAS HIGH COURT

Second Appeal No. 55 of 1935
September 29, 1939
VENKATARAMANA RAO, J.

SANAM NARAYANAMURTHI AND ANOTHER—APPELLANTS
versus
MANAPALLI NAGESWARA RAO REPRESENTING FIRM OF MANEPALLI NAGESWARA RAO AND BROTHERS—RESPONDENTS.

Contract — Sale of goods — Vendee paying earnest money but committing default — Earnest money, if can be recovered—Contract falling through vendee's default—If can claim balance of purchase money paid excluding earnest — Vendor's right to set-off claim for damages suffered by him — What vendor must prove.

Even in respect of sale of goods it is customary in India to receive sums of money by way of deposit or earnest and such sums are forfeited when default is committed by the vendee. 7 Ind. Cas. 794 (1), relied on.

Where a contract for sale of goods has failed through default of the vendee, he is entitled to recover the balance of the purchase money paid by him (excluding the earnest money) and the vendors can only resist the claim by seeking to set off against the said sum any damages which they might have incurred by reason of the vendee's non-performance of the contract. But before they substantiate their claim they should prove their readiness and willingness to perform their part of the contract and that they were in a position to perform the contract on the date fixed for its performance.

S. A. against the decree of the Sub-Judge Ellore, in A. S. No. 20 of 1932.

Messrs. *Ch. Raghava Rao* and *Ramamurthi*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

Judgment.—This appeal arises out of a suit for the return of the purchase money paid by the plaintiff in respect of a contract for sale and delivery of 600 bags of paddy by the defendants to the plaintiff. The contract was entered into on October 28, 1929 and is evidenced by Ex. D. The price per bag was fixed at Rs. 8-1-6. An advance of Rs. 200 was paid on the said day and later a sum of Rs. 1,110 was advanced. In all, the plaintiff paid Rs. 1,310 towards the purchase money. The date of performance was November 8 1929. No delivery took place on that day. The case for the plaintiff is that the defendants committed default in the delivery of the bags and therefore he was entitled to sue for the return of the purchase mony. The case for the defendants is that though the contract Ex. D. does not mention what bags they were to deliver it was stipulated between them that those bags were the bags which the defendants had pledged with the Imperial Bank of India, that the plaintiff was to pay in advancee the amount which he had to pay towards the purchase money in order to enable them to redeem the pledge and deliver the bags to the plaintiff but the plaintiff committed default in paying the said money to them. They further stated that this attitude on the part of the plaintiff was due to the fact that there was a falling market. In answer to this the plaintiff stated that he did go with the money to Avatapalli where the bags were under pledge and offered the money but the defendants would not take it. Both the lower Courts have found that the plaintiff did not go to Avatapalli and offer the money as alleged by him and taking advantage of the falling market he was not prepared to abide by the contract. Therefore there is no doubt that the plaintiff committed default in performing his part of the contract, but the question is is, the plaintiff entitled to get a return of the purchase money. Out of this sum of Rs. 1,310 Rs. 200 was the sum paid on the date of the contract as and by way of earnest money.

Mr. Somasundaram on behalf of the plaintiff attempted to argue that that sum was not paid as earnest but as purchase money. do not think it is to him to so contend in the face of the distinct admission made by his client in his deposition wherein he states thus, "Defendant asked for Rs. 200 towards earnest money. I paid the amount." As the plaintiff has committed default, the defendants are entitled to forfeit the said sum of Rs. 200 and it is not open to the plaintiff to seek to recover it. Mr. Somasundaram argued that in mercantile contracts it is not usual to forfeit the said sum and the amount paid as advance or by way of earnest was never treated as security and in support thereof he relied on certain observations of Coutts Trotter, J. Whatever may be the practice with regard to mercantile contracts in England, so far as I am aware even in respect of sale of goods it has been customary in this country to receive sums of money by way of deposit or earnest and such sums were forfeited when default is committed by the vendee and Courts have given effect to such forfeiture. As an instance in point I may mention the case reported in *Roshan Lal* v. *Delhi Cloth and General Mills Co. Ltd Delhi* (1). It was a case relating to a contract for the purchase of 500 bales af cotton. Sir John Stanley C. J., and Banerji, J. non-suited the plaintiff who sued to recover the earnest money paid

(1) 33 A 166; 7 Ind. Cas. 794; 7 A L J 1019.

by him on the ground that he committed default in the performance of his part of the contract. Mr. Somasundaram argued that even assuming that the plaintiff was not entitled to recover the earnest money paid by him when he committed default, at any rate the Court could not non-suit him in a case where the defendants were equally at fault in performing their part of the contract, but he was not able to cite any authority in support of this contention except relying for the purpose of argument on the case reported in 9 Mysore L. J. 35. No doubt there are observations therein in support of his contention but the learned Judges who decided that case did not give any authority in support of the view they have taken. The question is not whether the defendants committed default or not but whether the plaintiff is entitled to recover the purchase money.

The next question is as regards the balance of the money claimed (excluding the said earnest) which is a sum of Rs. 1,110. As the contract fell through the plaintiff is entitled to recover the said sum of money and the defendants can only resist the claim by seeking to set off against the said sum any damages which they might have incurred by reason of the plaintiff's non-performance of the contract. The defendants did make this claim in the written statement but before they could substantiate their claim they should prove their readness and willingness to perform their part of the contract and were in a position to perform the contract on the date fixed for its performance. As the learned Subordinate Judge did not give any finding in regard thereto I called for a finding on the said question. The learned Subordinate Judge has now submitted a finding to the effect that the defendants must be held to have been ready and willing to deliver the paddy on the date fixed for the performance of the contract. This finding was canvassed by Mr. Somasundaram on the ground that the learned Judge made out a new case for the defendants in arriving at his conclusion. It is this. According to Ex. D, there was nothing to indicate that the goods the defendants contracted to deliver were the goods pledged to the Imperial Bank of India and therefore it must be taken that the defendants might have delivered the goods having regard to the falling market. The learned Judge, in my opinion, in arriving at the said conclusion failed to give due weight to the admissions made by the defendants in the written statement and further it was throughout their case that what was contracted to be delivered was the goods pledged to the Imperial Bank of India. So far as these goods are concerned, it is clear that the defendants were not in a position to redeem the pledge and deliver them. At any rate they have not shown that they were in a position to do so. Their case throughout was that with the money to be paid by the plaintiff they should redeem the pledge and deliver the goods. I must therefore set aside this finding and hold that the defendants were not ready and willing to deliver the goods on the date of performance and therefore they are not entitled to claim any damages or set off any damages against the sum claimed by the plaintiff.

In the result the plaintiff will be entitled to a decree for the sum of Rs. 1,110 with interest at 6 per cent. from the date of plaint. The decrees therefore of both the lower Courts will have to be modified accordingly. The appellants and the respondents will receive and pay proportionate costs in this appeal. Leave to appeal refused.

N.S. *Order accordingly*

CALCUTTA HIGH COURT

Election Petition
April 30, 1940
MCNAIR, J.

DR. GIRISH CHANDRA GHOSE AND OTHERS—PETITIONERS
versus
SUDHIR CHANDRA ROY CHOUDHURI —RESPONDENT

Calcutta Municipal Act (III of 1923), Sch. II, Part I, ss. 46 (1), 47—Personation—Candidate must be shown to have knowingly persuaded impostor to obtain voting paper—Charge, contents of—Ballot paper already delivered to elector—Elector's right to vote challenged on ground of being impostor—Candidate not proved to have abetted procuring of ballot paper—No offence under Sch. II, Para. 1—S. 46 (1), construction of—Two candidates to be elected to constituancy—Election of either challenged—Entire election must be held afresh—Both candidates, if necessary parties—Failure to implead one, if fatal.

Schedule II, Part I, Para. 3, Cal. Municipal Act, makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. The offence of personation is complete when the person applies for a ballot paper. It must be established that the candidate knowingly persuaded the impostor to obtain a voting paper, that is the knowledge of the candidate is essential in order that a corrupt practice be proved against him. [p 754, col 2.]

When the candidate charged with offence under Sch II, Para. 1, was absent when the elector applied for the ballot paper, and when the ballot

paper had already been delivered to the elector under Para. 31 of the Govt. order, his right to vote was challenged on the ground of his being an impostor :

Held, that the candidate could not be said to have abetted the procuring of the ballot paper and hence no offence under Sch. II, Para. 1, was committed in the absence of proof that the candidate was aware that the alleged impostor was not the real person.

Section 46 (1) must contemplate the challenge of the validity of an election whether it is an election of one person or of two persons, and where there are two candidates who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh If that is so, it is obvious that both the candidates who may be affected by an election petition should be parties to it. Failure to implead one of them is a fatal omission. [p. 755, col. 2.]

Messrs. *N. N. Bose*, and *A. C. Sircar*, for Petitioner No. 1.

Messrs. *B. S. Ghose*, *S. R. Das* and *P. B. Mukherji*, for the Respondent.

Order.—This is an application by three voters in Ward No. 3 of the Calcutta Municipality for an order that the election of Sudhir Chandra Roy Choudhuri as a councillor for Ward No. 3 be declared null and void and that such election be set aside, and for costs. One of the petitioners, Dr. Ghose, was a candidate at this election. Ward No. 3 is Bartola, a general constituency which elects two councillors and one of the seats is reserved for a member of the scheduled castes. The five candidates polled votes as follows: The respondent Sudhir Chandra Roy Choudhuri 1945, Jogendra Nath Mandal who is a member of a scheduled caste 1039, Radha Nath Das, also a member of a scheduled caste 717 Dr. Girish Chandra Ghose 589 and Mr. Haridat Saha 418.

The election is called in question on the ground of a corrupt practice within the meaning of Sch. II, Part 1, Cal. Municipal Act. It is alleged in the petition that amongst voters on the electoral roll was one Chunilal Bhattacharjee, that on March 28, 1940, the polling day, a fictitious person alleging himself to be Chunilal Bhattacharjee appeared and attempted to vote as Chunilal Bhattacharjee. He was challenged by Banku Behari Ghose polling agent of Dr. G. C. Ghose and then by Dr. Ghose himself. Mr. Sudhir Chandra Roy Choudhuri then entered the polling booth and identified the alleged impostor who was allowed to vote after filling up the requisite form in which Dr. Ghose undertook to prove the offence of personation and Mr. Choudhury signed as the identifier of the alleged impostor of Chunilal Bhattacharjee. Paragraph 6 of the petition alleges that in the premises a corrupt practice under Sch. II, Part. 1, Cal. Municipal Act, was effected by the successful candidate Sudhir Chandra Roy Choudhuri in

'abetting the presonator of the said Chunilal Bhattacharjee to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the said impersonator."

The alleged impostor recorded his vote. The respondent has taken two preliminary objections. He alleges that the petition is incompetent because the proper and necessary parties have not been joined. He also contends that the petition does not disclose any cause of action and that it has failed to set out any corrupt practice which has been committed by the respondent. It is noteworthy that the petition has been signed by Dr. Ghose who has verified all the facts stated in the petition as true to his knowledge. In that petition he states that he also relies on the affidavit of Banku Behary Ghose who is his polling agent. In para. 4 of the petition it is stated that Chunilal Bhattacharjee, the voter, had been residing for the past five months and was actually residing on March 28, 1940 at Kunda in Deoghar in the Santal Pergannas and never attended the polling booth. In para. 6 of Dr. Ghose's affidavit he states, "I learnt on enquiry that Chunilal Bhattacharjee left Calcutta about five months back and was staying at Deoghar." So that apparently what has been stated in the petition as true to Dr. Ghose's knowledge is in fact derived from information, without any statement as to who was the informant. In paras. 9, 10 and 11 of Dr. Ghose's affidavit he sets out at considerable lenght a long conversation which he had with Chunilal Bhattacharjee and with a sircar named Jugal, neither of whom has made an affidavit. These allegations in the absence of any affidavit by the informants cannot be accepted. The offence of personation is defined in Sch. II, Part 1, Cal. Municipal Act as,

"the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person, whether living or dead, or in a fictitious name or by a person who has voted once at an election for a voting paper in his own name at the same election."

Nowhere in the petition or in the relevant portion of the affidavit in support is it stated that the respondent knowingly persuaded the impostor to obtain a voting

paper. It is contended that the knowledge of the respondent is essential in order that a corrupt practice be proved. This view is supported by authority which I see no reason to disregard. It is also contended that knowledge should be alleged in the petition or affidavits in which the charge is made. It is true that the charge is not a criminal charge though it is possible that the facts if established might result in criminal proceedings. But it is in my opinion desirable that the charge should be set out with all possible particularity specifying the elements which the petitioner undertakes to prove. It must be remembered however that the petition must be drafted and presented within 8 days and if the nature of the charge is set out with sufficient clarity to enable the respondent to meet it, the Court would have a discretion considering the circumstances of each case to decide whether or not the plea should be allowed. Neither in the facts contained in this petition nor in those facts which are admissible in the affidavit in support is there any suggestion that the respondent knew that the impersonator was not in fact Chunilal Bhattacharjee. There is a general allegation in para. 6 of the petition charging abetment of corrupt practice. I find the greatest difficulty in construing that paragraph. The corrupt practice in one place is stated to be abetting an impersonator to procure and in procuring and in abetting by such corrupt practice the procurement of a voting paper for the impersonator. So far as I can construe this paragraph the charge is that the respondent abetted the impersonator in procuring a voting paper. Looking then at the facts as set out by the petitioner it is quite clear that he did not allege that the respondent abetted the procurement of a voting paper. Paragraph 31 of the Govt. order for the conduct of elections under the Act sets out the procedure when an elector whose identity is in doubt asks for a voting paper. The presiding officer or the polling officer may, and if so required by the candidate or his election agent or polling agent must put certain questions to the elector so as if possible to establish his identity. If the elector gives the correct answer he is supplied with a ballot paper. Now, in the affidavit, Dr. Ghose states that he entered the polling booth when his agent was challenging the identity of the alleged impersonator. Dr. Ghose also challenged his identity and the respondent entered the polling booth "at or about that time." Mr. Banku Behari Ghose, Dr. Ghose's agent, in his affidavit says that he challenged the alleged impersonator, that Dr. Ghose came in and challenged his right to vote as Chunilal Bhattacharjee. Immediately thereafter, says Mr. Ghose, the candidate, Sudhir Chandra Roy Choudhury, entered and insisted on the presiding officer handing over the ballot paper stating that he was ready to identify the alleged impersonator.

It would appear that the ballot paper had already been delivered to the elector under para. 31 of the Govt. order but that his right to vote was challenged. If that is so it cannot be stated that the respondent abetted procuring the ballot paper and if he did not abet the procuring of the ballot paper, in my opinion, there was no offence under Sch. II, Part 1. Schedule, II, Part 1, para. 3 makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. In Hammond's Indian Candidate and Returning Officer on p. 148, it is pointed out that the offence of personation is complete when the person applies for a ballot paper. At the time when the person applied for the ballot paper the respondent was apparently absent. Learned Counsel for the petitioner has suggested that it is not clear from the affidavits that the ballot paper had been handed over to the voter prior to the entrance of the respondent. But on the facts as set out in the petition and in the affidavit of the petitioner, Dr. Girish Chandra Ghose, that appears to me to be the fact. In any event I am quite satisfied that the manner in which the charge has been set out in para. 6 of the petition is a charge which no respondent could or should be called upon to answer. As I have already stated, there is no statement that the respondent had any knowledge that the alleged personator was not Chunilal Bhattacharjya nor is there any suggestion or statement that the respondent was instrumental in getting the alleged personator to apply for a voting paper in the name of some other person. On these grounds I am satisfied that the petition should be dismissed.

The second ground which has been argued at some length is that the petition is bad for want of parties. The petition has to be filed within eight days of the publication in the *Gazette*. No amendment to the petition could now be allowed and it is argued that the petitioner must in a constituency of this description apply for the entire election to be set aside, that is to say for the election of both the candidates and not merely of one candidate. If he applies for the election

to be set aside the elected candidates should both be parties and one of those elected candidates is not a party to this petition. Reliance is placed in this connexion on the decision of an Appellate Bench of this Court *Rathis Chandra* v. *Amulya Charan* (1). In that case both the candidates had been joined as parties, and the question arose as to whether the election of the successful candidate No. 2 should be set aside although no fault had been found against him. In the course of his judgment Suhrawardy, J. said at p. 744* of the report:

"There is no doubt that defendant No. 2 is not concerned in any irregularity or illegality connected with the election. His nomination paper was submitted in time and he was duly elected. The learned District Judge, however, thinks that it would be in the interest of all parties that the whole election should be set aside and he ordered accordingly. I gave my anxious consideration to this matter, because I find that defendant No 2 is not guilty of any omission or commission and has been penalized for the irregularity committed by defendant No. 1. But it seems to me that an order to be passed in a joint election must be based on some principle. There is no doubt that if the election of defendant No. 1 alone is set aside there will be one vacancy in the constituency But the intention of the Legislature is that two persons out of the total number of candidates should be elected from a particular ward at one election. It did not contemplate that an election may be held piecemeal.

Another difficulty suggests itself to me. If a fresh election is held in place of defendant No. 1 only, the voters who had voted for him will vote for one candidate only though under the law they are entitled to vote for two. In cases in which one candidate has to be elected and the rival candidate who has secured the next largest number of votes got the election set aside, it has been held that the latter is not entitled to be declared elected and a fresh election has always been ordered."

Costello, J., who delivered a separate judgment on another point which is not relevant to this enquiry agreed with Suhrawardy, J., on this point, and in the result the entire election was set aside. Learned Counsel for the respondent has pointed out that in this case Ward No. 3 is a constituency for which two persons must be elected and one of them must be from the scheduled caste, and he argues, in my opinion with considerable justification, that if one of the elected candidates were to be unseated that there should be fresh election so that the electors might have an opportunity of deciding who were the two councillors whom they wished to represent them and the way in which they would give their votes.

An argument was also based on ss. 46 and 47, Cal. Municipal Act, which have been the subject of much perplexity and some comment in the cases which have come before this Court in the past. Many Judges have found the same difficulty, which I find, in trying to place a construction upon these two sections which is consistent with the clauses of both. Section 45 (1) provides the occasions on which an application may be made to the High Court for hearing an election petition. One of those occasions is 'if the validity of any election is questioned." Another is "for any other cause." The section provides that an application may be made to the High Court within eight days, and there follows a proviso which gives certain grounds on which no election may be called in question. Section 47 provides that if in any proceeding duly instituted under s. 46 the High Court is of a certain opinion, then "the election of returned candidate shall be void." Various grounds are given in sub-cls. (*a*), (*b*) and (*c*) of s. 47 (1). Returning then to s. 46 (2). This sub-section provides "if the Court sets aside an election or declares an election to be null and void, a fresh election shall be held." There is a curious lacuna, here, because s. 47 (1) merely provides that if the High Court is of a certain opinion the election of the returned candidate shall be void. It does not provide that the Court shall set aside the election, but s. 46 (2) assumes that the Court may set aside an election or declare an election to be null and void and provides that in that event a fresh election shall be held.

It is argued that s. 46 (1) contemplates the challenge of the validity of an election as an entire election to a constituency, that is to say in Ward No. 3, with which we are concerned, the election of two persons. It is then argued that if under s. 47 (1) the Court is of an opinion adverse to the elected candidate, the election of that candidate must be void, and as a consequence set aside. Reliance is then placed on the decision in *Rathis Chandra* v. *Amulya Charan* (1), for saying that if the election of one candidate is void then there must be a fresh election in the constituency. In my opinion s. 46 (1) must contemplate the challenge of the validity of an election whether it is an election of one person or of two persons, and where as in the present instance there are two candidates who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh. If that is so, it is obvious that both

(1) 34 C W N 741; 129 Ind. Cas. 422; A I R 1931 Cal. 35; 58 C 87; Ind. Rul. (1931) Cal. 193.

*Page of 34 C. W. N.—[*Ed.*]

the candidates who may be affected by an election petition should be parties to it. That has not been done in this case, and that is, in my opinion, a fatal omission. The petition is, therefore, dismissed with costs. Costs as of a hearing. Certified for two Counsels.

D. *Petition dismissed.*

PATNA HIGH COURT

Appeal No. 252 of 1939
May 1, 1940

HARRIES, C. J. AND CHATTERJI, J.

TARA PRASAD BALIASEY AND OTHERS—APPELLANTS

versus

BAIJNATH PRASAD BALIASEY AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), Sch. II, paras. 5, 17—Agreement for reference to arbitration—Persons to be arbitrators specified—Some of them refusing to act—Court, if can substitute other persons.

There is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case, the Court obviously cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot under para. 5, Sch II, Civil P. C., substitute in the place of the named arbitrators certain other persons. 64 Ind. Cas 459 (1) and 67 Ind. Cas 739 (2), dissented from, 89 Ind. Cas. 404 (3), explained. 129 Ind. Cas. 638 (4), 147 Ind. Cas. 1073 (5) and 172 Ind. Cas. 243 (6), relied on. [p. 757, col. 1.]

A. from the original order of the Sub-Judge, Deoghar, dated August 9, 1939.

Dr. *D. N. Mitter* and Mr. *Girendra C. Banerji*, for the Appellants.

Messrs. *B. C. De* and *D. N. Varma*, for the Respondents.

Chatterji, J.—This is an appeal from an order refusing to make a reference to arbitration on the appellants' application under para. 17, Sch. II, Civil P. C. Appellant No. 1, who is the father of the other appellants, is the elder brother of respondent No. 1 of whom the other respondents are the sons. The parties are members of a joint Mitakshara family. The application under para. 17 was to the effect that there was an agreement, dated May 11, 1937, between appellant No. 1 and respondent No. 1 to refer their disputes regarding the division of their joint family properties to the arbitration of four gentlemen named in the agreement. There was some attempt by the arbitrators to carry on the arbitration, but owing to the laches of the parties they could not proceed in the matter. Afterwards the respondents filed a partition suit (No. 1 of 1938) against the appellants. Thereupon the appellants presented their application under para. 17 praying that the agreement, dated May 11, 1937, be filed in Court. The application was opposed on various grounds, the most important of which is that the arbitrators refused to act and give their award. At the hearing three of the arbitrators gave evidence in support of the respondents' version. The learned Subordinate Judge, accepting their version, dismissed the application. Dr. D. N. Mitter on behalf of the appellants contends that the grounds on which the Court below has refused to make the order of reference was not sufficient within the meaning of para. 17 of Sch. II, Civil P. C. The relevant portion of that paragraph is cl. (4), which is as follows:

"Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator."

Dr. Mitter's contention is that "sufficient cause" under this clause does not contemplate the position that has arisen in the present case. According to him, the Court, when it found that there was a valid agreement, was bound to make a reference and he suggests that, although some of the arbitrators are not willing to proceed with the arbitration, the Court may, in exercise of its powers under para. 5 of the same schedule of the Civil P. C. appoint new arbitrators in their place. It will be necessary here to refer to para. 5 which provides, among other things, that where an arbitrator refuses or neglects to act or becomes incapable of acting any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator and then if, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator is appointed, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator.

It is however, to be observed that paras. 1 to 16 of Sch. II relate to "arbitration in suits," whereas paras. 17 to 19 relate to "order of reference on agreements to refer." It cannot be seriously disputed

that there is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case, the Court obviously cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators certain other persons. Clause (4) of para. 17, which I have already quoted, makes it clear that the reference should be made "to the arbitrator appointed in accordance with the provisions of the agreement." In the present case, four persons were specifically named as arbitrators in the agreement. That being so, I do not see how in the face of the clear provision of cl. (4) of para. 17, a Court can substitute anybody else in their place. Dr. Mitter invites our attention to para. 19 of the same schedule of the Civil P. C. which runs as follows :

"The foregoing provisions, so far as they are consistent with any agreement filed under para. 17 shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon"

It is contended that by the operation of this paragraph the provisions of para. 5 will apply to the present case. This contention, to my mind, is quite untenable. What is actually meant by para. 19 is that where there is an order of reference made by the Court under para. 17 "the foregoing provisions" shall be applicable to all proceedings under the order of reference. It by no means follows that the Court, before it is competent to make an order of reference, can exercise the powers conferred under para. 5. Otherwise, it would be stultifying the very provisions of para. 19. Dr. Mitter in support of his contention relies upon *Bhagwan Das* v. *Gurdayal* (1), *Fazal Ilahi* v. *Prag Narain* (2) and *Zahur Ahmad* v. *Taslim-un nissa* (3). In *Bhagwan Das* v. *Gurdayal* (1), the facts were that it was not known whether the arbitrators named in the agreement were actually willing to proceed with the arbitration. The trial Court dismissed the application on the ground that the plaintiff had no cause of action. On appeal, it was held that before the application could be dismissed it should be ascertained whether in fact the arbitrators were unwilling to act. The case was therefore remanded to ascertain the real facts. In the course of the judgment, however, Walsh, J. observed that if any of the arbitrators was unwilling to act, the Court in exercise of its powers under para. 5 can appoint somebody else in his place and then refer the matter to arbitration. With all respect to the learned Judge, I am unable to agree with his view. As I have already pointed out, para. 5 can come into play only after there has been an order of reference made by the Court. The same view was followed in *Fazal Ilahi* v. *Prag Narain* (2) where Walsh, J. was one of the Judges who decided it. In this case the learned Judges go further and state :

"If it were necessary, we should be prepared to hold that the words in para. 17, sub-cl. (4) (which enables a Court to make an order of reference to a particular arbitrator at the time of filing the reference) if there is no such provision and the parties cannot agree, cover a case where there has been a provision for a particular arbitrator who is either dead or retired. If he has died or refused to act, it is as though there was no provision."

With all respect I must say this is an extreme view which is not justified by the clear provisions of cl. (4) of para. 17. The decision in *Zahur Ahmad* v. *Taslimannissa* (3), does not really support the contention of Dr. Mitter. There the question was whether an order revoking a reference under para. 17 was appealable. In the course of the judgment Sulaiman, C. J. referred to the decision in *Bhagwan Das* v. *Gurdayal* (1) and *Fazal Ilahi* v. *Prag Narain* (2), but it does not appear that he approved of those cases. On the other hand, Mr. B. C. De for the respondents has referred to the cases in *Narayanappa* v. *Ramachandrappa* (4), *Abdul Hamid* v. *Abdul Aziz* (5) and *Rajani Kanta* v. *Panchanan Karati* (6). These cases support the view which I have already expressed. In *Narayanappa* v. *Ramachandrappa* (4) the parties privately agreed to refer their disputes to certain named arbitrators, but the agreement did not contain any provision as to what should be done in case any of the arbitra-

(1) 19 A L J 823; 64 Ind. Cas. 459; A I R 1921 All. 188.

(2) 44 A 523; 67 Ind. Cas. 739; A I R 1922 All. 133; 20 A L J 327.

(3) 48 A 27; 89 Ind. Cas. 404; A I R 1926 All. 55; 23 A L J 891

(4) 54 M 469; 129 Ind Cas. 638; A I R 1931 Mad. 28; 60 M L J 676; Ind. Rul. (1931) Mad. 302; 32 L W 905; (1930) M W N 1028.

(5) 9 Luck. 321; 147 Ind. Cas. 1073; A I R 1934 Oudh 67; 11 O W N 12; 6 R O 356.

(6) I L R (1937) 2 Cal. 434; 172 Ind. Cas. 243; A I R 1937 Cal. 388; 41 C W N 981; 10 R C 354.

tors died in the course of the arbitration proceedings, and one of them died in the course of such proceedings. It was held that the agreement became inoperative and came to an end on the death of the arbitrators and that it could not therefore, be filed in Court under para. 17 of Sch. II, Civil P. C.

In *Abdul Hamid* v. *Abdul Aziz* (5) it was held that an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators dies or refuses to act and thus makes the agreement incapable of performance, and in such a case the Court has no jurisdiction under cl. (4) of para. 17 of Sch. II, Civil P. C. to make a reference to the arbitrators who are willing to act. In this case it was pointed out that para. 5 can come into operation only when an order of reference has already been made under para 17. This, to my mind, is the correct view of the law. In *Rajani Kanta* v. *Panchanan Karati* (6), it was held that:

"an agreement to have a dispute settled by one or more individuals is one thing, and an agreement to go to arbitration rather than to litigation in the Court is another. Where by an agreement, parties decide to settle disputes by the arbitration of ascertained persons without the intervention of the Court, in a proceeding following the filing of the award under para. 20, of Sch. II Civil P. C. the Court has no power under para. 5 to direct the appointment of a new arbitrator in the place of one declining to act."

No doubt it was held in this case that para. 5 will have no application even after the order of reference is made under para. 17. It is unnecessary for the purposes of this case, to decide whether that view is correct or not. The case however, is an authority for the proposition that the Court cannot substitute any arbitrator in the place of the arbitrator named by the parties themselves in their agreement. Dr. Mitter also referred to the case in *Pestonji Nussurwanjee* v. *Manockjee & Co.* (7), but that case merely decided that where certain persons agreed to submit their differences to the arbitration of one or more specified persons, no party to such an agreement could revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority could not be permitted. This case is therefore of no assistance to the appellants. There is another serious objection to the filing of the agreement. The agreement was between the two brothers, and the parties to the partition suit include their minor sons also. In fact, the minor sons also are parties to the present proceeding under para. 17 of Sch. II, Civil P. C. From the agreement it appears that the elder brother is to get more than ten annas in the joint family properties. A serious question may arise as to whether this agreement would be binding on the minor sons of the younger brother who agreed to take a little over five annas in the place of eight annas which would be his normal share. For the reasons which I have given above, I am of opinion that the Court below was quite right in refusing to make an order of reference. I would accordingly dismiss the appeal with costs.

Harries, C. J.—I agree.

S. *Appeal dismissed.*

(7) 12 M I A 112; 10 W R 51; 2 Suther 164; 2 Sar. 390 (P C).

MADRAS HIGH COURT

Second Appeal No. 801 of 1938
December 15, 1939
HORWILL, J.

VENKATARAMASASTRI—APPELLANT
versus
VENKATASUBRAMANIA DIKSHITAR AND ANOTHER—RESPONDENTS

Court Fees Act (VII of 1870), s. 12 (2)—Applies to all parties to appeal where deficient court-fee is paid whether by appellant or by any other party—Interpretation of Statutes—Section primarily intended to apply to suits—Principle of construction in applying it to appeals.

Section 12 (2), Court Fees Act, applies to all the parties to the appeal Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. It cannot be intended to apply only to a case where the deficiency was by the appellant.

Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the section good sense.

S. A. against the decree of the Sub-Judge, Vellore, in A. S. No. 94 of 1937.

Messrs. *V. Govindarajachari* and *V. V. Raghavan*, for the Appellant.

Mr. *A. Viswanath Aiyer*, for the Respondents.

Judgment.—The plaintiff, who is the appellant in this Court brought a suit on insufficient court-fee and he was granted a decree. The defect was not noticed during the course of the trial. In appeal to the Court of the Subordinate Judge of Vellore, he was called upon to pay the deficient court-fee under s. 12, Court Fees Act, and as he did not do so within the time

allowed, s. 10 (2) was applied and his suit dismissed. This second appeal has therefore been preferred, the plaintiff contending that s. 12, Court Fees Act, does not apply to his case. The argument of the learned Advocate for the plaintiff in this Court is that s. 12 (2) only applies to cases where the plaintiff is the appellant. This sub-section runs :

"But whenever any such suit comes before a Court of Appeal .....if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided."

If this sub-section had ended with the word "decided" I am quite sure there would never have been any doubt at all that it applies to all the parties to the appeal. Its provisions are very wide and it definitly refers to the party by whom the fee has been paid. If this sub-section had been intended to apply only to a caste where the deficiency was by the appellant, it would not have been necessary to say "the party by whom such fee had been paid." The simple word "appellant" would have been sufficient. A doubt has however arisen because of the last few words of the sub-section "and the provisions of s. 10, para. 2 shall apply." S. 10, para 2 applies only to suits. It is argued that if the word "appeal" replaces the word "suit" in s. 10 (2), then the appeal would have to be dismissed, which would work a grave injustice on the appellant when the respondent is the defaulter. That was the reasoning that impressed the learned Judge who decided *Narain Singh* v. *Chaturbhuj Singh* (1). The matter came before a Full Bench of the Allahabad High Court in *Mohan Lal* v. *Nand Kishore* (2), where the argument of *Narain Singh* v. *Chaturbhuj Singh* (1), was adopted. It was therefore held that s. 12 (2) could not apply to cases where the plaintiff was not the appellant and that there was therefore no provision in the Court Fees Act for the recovery of deficient court-fee from a plaintiff-respondent. What a Court could do, the learned Judges, said, was to suspend the execution of the decree until the deficit court-fee was paid. The difficulty of that course is that it would be in the interests of a plaintiff who has made default in the payment of proper court-fee to await the result of the appeal. If he was unsuccessful in the appeal, then obviously he would certainly not pay court-fee. This difficulty was seen in *Baijnath* v. *Dhani Ram* (3), and the learned Judges there held that the course suggested in the earlier Allahabad cases was not the only one. If the plaintiff did not pay the deficit court fee when called upon to do so by the Appellate Court, a contempt of Court was committed and the Appellate Court could therefore refuse to hear the respondent or his Advocate and dispose of the appeal in his absence.

There is no authority in any of the Codes (or previously reported decisions as far as I know) for the adoption of the procedure suggested in these cases. Section 12 (2), except for the last few words, provides no difficulty at all; and the sub-section clearly enough applies to all cases where a deficient court-fee has been paid in the first Court, whether by the appellant or by any other party. Is it possible that because of some little difficulty in applying the wording of s. 10 (2) to appeals by a defendant, the rest of the section is nullified and can have no application at all to cases where the plaintiff is not the appellant? Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the section good sense. If that is done, I do not think there is any difficulty in understanding s. 10 (2). Several decisions of other High Courts have been quoted in which the Allahabad decisions have been dissented from: *Brij Krishna Das* v. *Murli Rai* 56 Ind. Cas. 316 (4), was a Bench decision of the Patna High Court. *Dayal Singh* v. *Ram Rakha*, 15 Ind. Cas. 463 (5) is a Full Bench decision of the Punjab Chief Court. *Shama Soondery* v. *Hurro Soondary* (6), is a Bench decision of the Calcutta High Court. *Ram Nidh* v. *Balkaran Singh*, 60 Ind. Cas. 654 (7), is a decision of a Single Judge of the Oudh Chief Court. In all these cases the Allahabad decisions have been dissented from; and it was held that in applying s. 10

(1) 20 A 362; A W N 1898, 72.
(2) 23 A 270; 2 A L J 839; A W N 1905, 200 (F B).
(3) 51 A 886; 117 Ind. Cas. 107; A I R 1929 All. 577; (1929) A L J 1024; Ind. Rul. (1929) All. 683.
(4) 56 Ind. Cas. 316; A I R 1920 Pat. 656; 4 P L J 703.
(5) 15 Ind. Cas. 463; 109 P R 1912; 136 P W R 1912 (F B).
(6) 3 C 348; 8 C L R 528.
(7) 60 Ind. Cas. 654; A I R 1920 Oudh 167; 23 O C 388.

(2) to appeals and reading it with s. 12 (2) the word "suit" should be deemed to include "appeals." If this is done, there is no difficulty in interpreting the section. It has been pointed out that in *Subbaiya Pandaram* v. *Mahomed Mustapha Maracayar*, 40 Ind. Cas. 50 (8), a Single Judge of the Patna High Court followed the Allahabad decisions. He did so, however, without discussing the matter in question here and that decision cannot be good law in Patna in view of the Bench decision *Brij Krishna Dass* v. *Murli Rai*, 56 Ind. Cas. 316 (4). It has been moreover pointed out by Mr. Viswanatha Ayyar for the respondents that the actual wording of s. 12 (2) shows that the appeal is considered as an extension of the suit for the subsection begins, "But whenever any such suit comes before the Court on appeal." If we remember this, there is really no necessity for altering the word "suit" to "appeal" in s. 10 (2) when we apply it to cases where the court fee has not been paid by a plaintiff-respondent. The appeal is accordingly dismissed with costs.

N. D. *Appeal dismissed.*

(8) 40 Ind. Cas. 50; A I R 1918 Mad. 974; 32 M L J 85; 21 M L T 62; 5 L W 690.

PATNA HIGH COURT

Letters Patent Appeal No. 17 of 1939
August 16, 1940
HARRIES, C. J. AND FAZL ALI, J.
KUSUM KAMINI DEBYA—DEFENDANT No. 2—APPELLANT
versus
Raja JAGDISH CHANDRA DEO DHABAL DEB—PLAINTIFF AND ANOTHER—DEFENDANT No. 1—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 108 (o)—Property leased for cultivation and settling tenants thereon—Right of lessee to collect and sell surface stones.

Where property is leased for the purpose of cultivation and settling tenants thereon, the lessee is only entitled to a reasonable right to user in the soil but he has no right to dig or quarry stone or to collect and sell surface stones. Right to collect and sell surface stones can be established only by custom. *Gandoo Mahata* v. *Nilmones Singh* (3), explained 111 Ind. Cas. 345 (1), relied on, 160 Ind. Cas. 114 (4) not approved.

L. P. A. from the decision of Wort, J. dated February 14, 1939.

Sir *Manmatha Nath Mukerji* and Mr. *S. M. Gupta*, for the Appellant.

Messrs. *S. M. Mullick*, *B. C. De* and *Ravneshwar*, for the Respondents.

Harries, C. J.—This is a Letters Patent appeal from a judgment of Wort, J., reversing concurrent decrees of the Courts below dismissing the plaintiff's claim. The plaintiff was a *zamindar* and proprietor of the Dhalbhum estate of which *Mauza* Gopalpur forms a part. By a *patta* dated *Ashar* 3, 1290, *B. S.*, the plaintiff's predecessor-in-interest leased *Mauza* Gopalpur to the father of defendant No. 2. The lease provided for the payment of rent and appears to have been a permanent one. According to the plaintiff, defendant No. 2 had permitted defendant No. 1 to dig quartz stone from the land in Gopalpur, and after breaking up the stone to sell the same as ballast. The plaintiff contended that neither defendant No. 2 nor defendant No. 1 had any right to this stone, which was the property of the plaintiff. Accordingly he brought the suit out of which this appeal arises, claiming a declaration that the defendants were not entitled to the stone in question, an injunction restraining them from digging, collecting or disposing of the stone and damages in respect of the stone already disposed of. The defendants by their written statement claimed the right to dig, collect and dispose of this stone and contended that their acts were not in contravention of the terms of lease but were in accordance with the rights created thereby.

The learned Munsif came to the conclusion that no quartz had actually been quarried and that all that had been done was the collection of quartz lying on the surface of the land and disposal of the same. The learned Munsif also came to the conclusion that this quartz was not a mineral and that defendant No. 2 as the lessee had a right to collect all quartz lying on the surface and dispose of the same. He therefore dismissed the plaintiff's suit in its entirety. On appeal the learned Subordinate Judge did not think it necessary to decide whether quartz was or was not a mineral. In his view the defendants were entitled to collect the surface quartz and dispose of the same. In second appeal to this Court, Wort, J., held that the defendants were only entitled to the user of the surface of this land and that the lease gave the lessee no property whatsoever in the soil or in stones lying on the surface. He though it unnecessary to find whether the quartz were minerals. He held that the defendants had no right whatsoever to dispose of these quartz stones even if they were not minerals and he accordingly

reversed the decisions of the Courts below and decreed the plaintiff's claim.

It has been strongly urged before this Court in this Letters Patent appeal that the decision of Wort, J., is erroneous and contrary to authorities of this and other Courts. All the Courts below have held that the lease in question was not an agricultural lease but was a lease governed by the T. P. Act. This was conceded by the plaintiff in the Court of the learned Munsif but in the Court of the Subordinate Judge an attempt was made to show that the lease was a purely agricultural one. The learned Subordinate Judge appears to have thought that the terms of the lease were somewhat ambiguous and therefore that he was entitled to look to the conduct of the parties to assist him in construing the lease. He came to the same conclusion as the learned Munsif that the lease was not a purely agricultural one but one governed by the T. P. Act The same view was taken by Wort, J., and having regard to the course of these proceedings in the Courts below I do not think that the decision of the three Courts can now be questioned in this appeal. The decisions on this point were never seriously challenged and therefore this case must be decided upon the assumption that the lease in question is one governed by the T P. Act.

At one time the Courts in India were inclined to hold that lessees under certain leases not governed by the T. P. Act were entitled to minerals. In short, the view appears to have been that these lessees had some proprietary interest in the land actually leased to them. However, the matter has now been set at rest by two decisions of their Lordships of the Privy Council. In *Bejoy Singh* v. *Surendra Narain* (1), a *zamindari* granted a *patni* lease of his *zamindar* lands including all interest therein, and *jalkar*, *bankar*, *falkar*, *beels* and *jhils* at an annual *jama*. The document was described therein as a *mofussil patni taluk* lease according to Reg. 8 of 1819," and contained stipulations that the grantee should not cut trees or excavate a tank. Their Lordships held, reversing the decision of the Calcutta High Court, that the terms of the grant showed that there was no transfer of the property in the soil, the intention being that that *patnidar* should be a leaseholder only; consequently that he and those claiming under him were not entitled to excavate the soil for the purpose of making bricks. A similar decision is the case in *Bhupendranarayan Sinha* v. *Rajeswar Prasad* (2). In that case a *zamindar* sued for a declaration of his subsoil rights in land held from him under *patni* grants and for damages; the *patni* grants did not convey the subsoil rights. Beneath a stratum of stones and gravel used for road making the land contained a fairly well defined stratum of valuable ochre. For over twelve years before suit, the defendant *darpatnidars* had been removing the stones and gravel by pits sunk all over the land; some ochreous earth was removed with the stones and gravel but merely as a waste product. The ochre had first been worked within twelve years under leases granted by the *darpatnidars*, the right to the stones and gravel being thereby reserved. It was held that *patni* tenures, generally, were on the same footing as regards subsoil rights as other permanent, heritable and transferable tenures created by a *zamindar*, that is to say, the subsoil rights pass to the *patnidar* only when granted in express terms; general vernacular words signifying "with all rights" were insufficient for that purpose.

From these two cases it is clear that apart from statute a lease which does not in terms give to the lessee rights in the subsoil gives the latter no proprietary right in the soil. The present lease however is governed by the T. P. Act, but in my view that Act does not give the tenant any proprietary right in the subsoil. The rights of the tenant under a lease governed by the T. P. Act are laid down in s. 108 (*o*) of that Act, which is in these terms:

> "The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto."

This sub-section makes it clear that the lessee can use the property and its produts as a person of ordinary prudence would use them if they were his own; but

(1) 56 C 1; 111 Ind. Cas. 345; A I R 1928 P C 234; 55 I A 320; 48 C L J 268; 55 M L J 456; (1928) M W N 841; 33 C W N 66; 26 A L J 1233; 13 R D 30 (P C).

(2) 59 C 80; 132 Ind Cas. 610; A I R 1931 P C 162; 58 I A 228; 35 C W N 870; (1931) A L J 566; 34 L W 1; Ind. Rul. (1931) P C 194; 54 C L J 137; 33 Bom. L R 1273; 61 M L J 632 (P C).

he cannot use or permit any other person to use the property for a purpose other than that for which it was leased. The sub-section then goes on to provide that he cannot cut down or sell timber, work mines or quarries not open when the lease was granted, pull down buildings or do any act which would be destructive or permanently injurious to the property. He has no rights in minerals underlying the soil and his rights are confined to a reasonable user of the soil for the purposes for which the property was leased. It has been held in the present case that the property was leased for the purposes of cultivation and settling tenants thereon. Is the digging of quartz or the collection of surface stones, whether minerals or not, and disposal thereof a purpose other than that for which the property was leased? In my view it is unnecessary to decide whether surface quartz is a mineral.

In my view there is nothing in the present lease to suggest that the lessee was to have any proprietary right in the soil. He could use the soil for the purposes of cultivation or for settling tenants thereon. If the lease gave him no proprietary interest in the soil, then in my view he could not dispose of the soil or anything which could be legitimately considered as part of the soil. Clearly he could not dig or quarry these quartz stones, because no quarries or mines were opened on this land when it was originally leased. The defendants have claimed such a right in their written statements, and in my view they can have no such right.

The two Courts of fact, however, have held that no quartz were quarried or dug on the soil but only quartz lying on the surface was collected and sold. Does the lease give the tenant such rights? The surface stones really form part of the surface soil. Stones lying loose on the surface have either been turned up by ploughing or other agricultural activities or have been left exposed as the result of the elements. When they are left loose and exposed on the surface they must still, in my view, be regarded as part of the subsoil. They form part of the property leased and unless the lease gives the tenant proprietary rights in the subject-matter of the lease the property in the surface stones cannot possibly pass to him. All that s. 108 (*o*), T. P. Act, gives to the lessee is a right to use the soil and its products as a person of ordinary prudence would use them if they were his own. The lessee could use these stones or the soil on the surface as a person of ordinary prudence would use them; but collecting them and selling them to others is something more than user. It is an act which can only be done by a person who has rights greater than mere rights of user. Collecting and selling these stones is an act of a person entitled to the property in the stones. In my judgment the present lessees had no such property in these stones and therefore had no right to sell them. They could, however, use the stones and use the property for the purpose for which the property was left. If the presence of these stones interfered with good husbandry, the tenant could, in my view, collect the stones and remove them to some place on the land where they did not so interfere with agricultural operations. He could use the stones for purposes for which the land was leased; but he could not use them for any purpose other than that for which the land was leased. At most his only right in these stones was a right of user. He had no right to sell them as an owner. This was the view of Wort, J., and in my judgment it is the correct view.

A different view was taken by the Calcutta High Court in *Gandoo Mahata* v. *Nilmonee Singh* (3). It is to be observed, however, that this was a decision given previous to the Privy Council cases to which I have referred. Further, the point now under consideration was not the main point in the case. It was only incidentally that the question of the right to the ghooting or inferior lime stone found on the surface came to be considered. In that case it appears to have been admitted that this ghooting or inferior lime stone could not be regarded as a mineral within the reservation of mines etc., and that the reservation did not prevent the tenant from removing this material from the surface of the land. In fact the point which now falls for decision was practically conceded in that case. There is also a Single Judge decision of this Court in *Ras Behari* v. *Jagadish Chandra Deb* (4), to the same effect. In that case it was held that a lessee is entitled to use the surface and to take what he finds on the surface. It was a case of an agricultural lease, and, Rowland, J., held that the lessee was entitled to collect and remove ghooting stone found on the surface although he was not entitled to dig and quarry for it. Rowland, J., appears to have thought that this ghooting and lime stone lying on the

(3) 1 C L J 526.
(4) A I R 1936 Pat. 111; 160 Ind. Cas. 114; 2 B R 163; 8 R P 331.

surface could not properly be regarded as a mineral and therefore the property in it passed to the tenant under the lease. He, however, did not consider the general question whether a proprietary interest of any kind in the property leased passed to the tenant unless the terms of the lease so provided In my view the decision of Rowland, J., cannot be reconciled with the principles laid down by their Lordships of the Privy Council in the earlier cases to which I have referred. Those cases were not referred to or considered by the learned Judge.

The rights of a tenant in England under a lease in which mines and minerals have been excepted admit of no doubt. The tenant has the right to use the subsoil, but he has no right to dig and dispose of it. This has been the law from early times, and in Co. Lit. 53 (*b*) it is laid down :

"Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravel or clay of the reparation of the house, as well as he may take convenient timber trees."

In *In re Purmanandas Jeewandas* (5), Latham, J. held that the rule as enunciated in Co. Lit. 53 (*b*) was also the law in India. In that case a lease did not expressly give the tenant the right to remove the soil, and the learned Judge held that the tenant had no right to remove soil and stones from the land.

In *Tucker* v. *Linger* (6), a point very similar to the one now under consideration fell to be decided by the English Courts. In that case a tenant by an agreement for a lease agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brick-earth and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases. It was held by Kay, J., that such a custom was reasonable and good and that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of the right of collecting and selling these flints. The decision of Kay, J., was upheld by the Court of Appeal and by the House of Lords in *Tucker* v. *Linger* (7). The decision of that case turned upon whether a custom entitling the tenants to collect and sell these flints was a reasonable one and whether it conflicted with the express terms of the agreement to lease. All the Courts were of opinion that the custom was a reasonable one, and that it was not in any way in conflict with the term "reserved to the landlord all mines and minerals, sand quarries of stone, etc." It is to be observed that in this case the tenant's right was based entirely on custom and nowhere in the judgments of the trial Court, Court of Appeal or the House of Lords is it even faintly suggested that quite apart from custom a tenant had a proprietary right in surface stones and could dispose of the same. The decisions of all the Courts proceed upon the basis that proof of a custom was necessary to entitle the tenant to sell these stones. From this case it is clear that in England at least, apart from custom, a tenant who is not entitled to mines, minerals, quarries, etc., has no proprietary right in surface stones and is not entitled to sell them.

Another English case was referred to in argument, *Elwes* v. *Brigg Gas Co* (8) and it was suggested that certain observations of Chitty, J. in that case suggested that a lessee did have a proprietary interest in the soil. In that case a small plot of land was demised to a Gas Company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authourized, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gas-holder and other buildings. In the course of excavation a pre-historic boat was discovered embedded in the soil six feet below the surface, and the lessors claimed this boat. It was held that whether the boat was regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, it did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease. In that case Chitty, J. was of opinion that the lessees had certain rights to remove and dispose

(5) 7 B 109.

(6) (1882) 21 Ch. D 18; 51 L J Ch. 713; 46 L T 198; 30 W R 425.

(7) (1883) 8 A C 508 52 L J Ch. 541; 49 L T 373; 32 W R 40; 48 J P 4.

(8) (1886) 33 Ch. D 562; 55 L J Ch. 734; 55 L T 831; 35 W R 192.

of the soil, though he does not hold that the lessees had any right to sell the soil. He so held because to give effect to the terms of the lease some such permission had to be implied. At p. 569* he observed:

"The defendants discovered the boat in making these excavations, pursuant to the plans. The lease did not give any license to make the excavations, but the approval of the plains was equivalent in law to a license to make the excavations. The plans however are silent as to what is to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the lessors the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly deemed to have contemplated would be found in making the excavations; but beyond this point it ought not to be carried."

It has been urged that this case is authority for the proposition that a tenant has an interest in the soil; but it appears to me that Chitty, J.'s observations are authority to the contrary. On the particular facts of that case the learned Judge held that some permission to remove and dispose of the soil should be implied. If a tenant had a common law right to dispose of soil, it would have been wholly unnecessary for the learned Judge to consider the terms of the lease in order to ascertain whether some permission to remove and dispose of soil could be inferred. The rights and obligations of the lessor and lessee created by s. 108, T. P. Act, are in many ways similar to those of a lessor and lessee under the usual form of English lease, and it is for that reason and that reason only that I have referred to these English cases. They can in no way be regarded as authorities, but they are of some assistance in arriving at a conclusion as to the rights of a tenant in India in the soil of land leased to him.

In my judgment having regard to the decisions of their Lordships of the Privy Council and the provisions of s. 108, T. P. Act, I am bound to hold that the lessee under a lease such as the one existing in this case, has only a reasonable right of user in the soil and has no proprietary interest therein or in anything which forms part of the soil. These surface stones did, in my view, form part of the soil, and that being so, they could not be sold to third parties. It may be that a right of collection and disposal of surface stones can be established by custom. Custom however was not pleaded in this case, and therefore the point does not arise. If tenants could show that for a long period of time they had been accustomed to collect and sell surface stones for ballast, it might well be that they could establish a right so to do. For the reasons which I have given I am satisfied that the decision of Wort, J., was right and must be upheld. As the defendants in their written statement had asserted that they had a right not only to collect and sell surface stones but also to dig and dispose of quartz embedded in the ground the plaintiff was in my view entitled to the declaration, injunction and damages as claimed. His suit was decreed by Wort, J. in its entirety and, in my view, rightly. This appeal therefore fails and I would dismiss it with costs.

Fazl Ali, J.—I agree.

D. *Appeal dismissed.*

*Page of (1886) 33 Ch. D.—[*Ed.*]

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 70 of 1939
March 6, 1940
ROBERTS, C. J. AND BLAGDEN, J.
M. DO CARMO LOBO—APPELLANT
versus
OFFICIAL ASSIGNEE

Presidency Towns (Rangoon) Insolvency Act (III of 1909), s. 39 (2), cls. (a), (d) *and* (e)*—Case falling under—Court's order should be one suspending discharge for specific time.*

The object of the order of the discharge is to enable a person to recommence with a clean slate, and it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Insolvency Act, should as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. Consequently, in a case falling under s. 39 (2), cls. (a), (d) and (e), Presidency Towns Insolvency Act, Court's order should be an order, suspending the discharge for a specific time.

C. Misc. A. against the order of the High Court, in Insolvency Case No. 66 of 1935, dated November 8, 1939.

Dr. *M. A. Rauf*, for the Appellant.

Mr. *Paget*, for the Official Assignee.

Roberts, C. J.—This is an appeal against the order of the learned Judge in Insolvency in reference to Mr. Lobo, who became insol-

vent on March 26, 1935. He had been employed as the chief agent of the Vulcan Insurance Co., of Bombay for over eight years subsequent to 1925; and it appears that his method of doing business with them was to canvass for policies and, when he had obtained a promise to pay the premium, to issue them and debit the company with the commission to which he would become entitled. This was a somewhat hazardous method of doing business, since it meant that he was in effect guaranteeing to the Vulcan Insurance Co., whose agent he was, that the policy-holders would ultimately pay the premiums which were due on their policies. And, once having issued the policy and debited the company with the commission, he became from time to time responsible under each policy, for the amount of the premiums to the company. And over a period beginning about 1927 it appears that Mr. Lobo, in addition to his insurance business, had been spending a good deal of time in connection with racing matters he says, in order to advertise his insurance connections. Those racing matters were on the whole fortunate and, according to him, he made a profit altogether in a few years of some Rs. 30,000 upon the turf, not by gambling, but having prizes and award as result of his successful racing. Some of the money he spent on stabling and accommodation in connection with that, but it appears that all his landed properties were mortgaged and on their sale the sums realized were insufficient to pay the unsecured creditors. But it does appear from all the information at our disposal that the ventures of Mr. Lobo on the turf did not in any way contribute to his insolvency. On the contrary, he prospered on the turf and owed less to the company at the time of giving up racing than at the time he started it.

It must be remembered that the nature of his business was fire, marine and accident insurance, and not life insurance, and the view taken by the learned Judge in insolvency may have been due to some misconception on his part. What the learned Judge found was that the insolvent used the premiums paid by the policy holders in some other venture, and it is evident from his order that he was under the impression that Mr. Lobo speculated with money which was not his own. It is not now contended on behalf of the Official Assignee, and it does not appear anywhere, that there is the slightest ground for any imputation of criminality against Mr. Lobo; what he did may have been hazardous, but there is no kind of evidence that it was in the least degree criminal. The learned Judge has found that the insolvent brought on, or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs. This brings the case under s. 39 (2) (*f*) Rangoon Insolvency Act, and accordingly, acting under its provisions the learned Judge suspended the discharge of the insolvent until he paid at the rate of four annas in the rupee. We are obliged to reach the conclusion, after very carefully examining the evidence, that it was owing to a misconception that the learned Judge brought this case at all within the ambit of s. 39 (2) (*f*). The Official Assignee's report does not in any part suggest that the insolvency was brought about by gambling or hazardous speculation and merely states in its concluding words that the debts were contracted recklessly and without any reasonable prospect of repayment. The fifth creditor's objection to the insolvent's discharge did make an allegation under s. 39 (2) (*f*), and in the grounds of opposition by the Vulcan Insurance Company to the application of the insolvent for his discharge it is alleged that he has failed to account satisfactorily for the deficiency in his assets, which would bring the matter within s. 39 (2) (*e*).

Now, it seems clear that the insolvent made his application for discharge very soon after his public examination, and at his public examination he was asked a number of questions from which the learned Judge came to the conclusion that he had been speculatively engaged on the turf but which we think, really go to show that he failed to account satisfactorily for the loss of his assets, and certainly there were grounds upon which it could also be said under cl. (*d*), that at the time of contracting his debts he had not shown that he had any reasonable or probable expectation that he would be able to repay them. These debts were not all contracted in one fell swoop; from time to time as policy-holders failed to meet their obligations the insolvent must have known that he was going into deeper and deeper water and at no time does he appear to have made any substantial effort to cut his loss, and he has not shown in his public examination what income he was in receipt of and how he spent it. We have been referred to a number of questions and answers, as the result of which it is impossible to say whether he paid income tax on an income of Rs. 14,000

or whether that sum represents the income tax he paid, or whether his later suggestion that Rs. 5,0 0 a year was his income is correct; and it is also very difficult to say what he did with such money as he possessed or how he got into the chaotic condition in which he finds himself.

Accordingly, in our opinion this appeal must be allowed and the order of the learned Judge must be varied upon the basis that it should have been made under s. 39 (2) cls. (*a*), (*d*) and (*e*). The principle which we have to bear in mind is a straightforward one. Dr. Rauf referred to the dicta of the learned Judges in Bankruptcy Courts in England (which have always been followed in this Court) which are to the effect that the object of the order of the discharge is to enable a person to recommence with a clean slate, and that it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Act should as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. And, we think, in all the circumstances, that our order ought only to be an order suspending the discharge for a specific time and we suspend the discharge of the insolvent for a period of six months.

Blagden, J.—I agree.

D. *Order varied.*

LAHORE HIGH COURT

Criminal Appeal No. 994 of 1939.
January 11, 1940
YOUNG, C J. AND ABDUL RASHID, J.
EMPEROR—PROSECUTOR
versus
ABDUL QAYYUM—ACCUSED
—RESPONDENT

Penal Code (Act XLV of 1860), s. 304-A.—Heavy traffic—Road invisible due to dust raised—Duty of motor car driver pointed out—Rash and negligent driving

When there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, it is the duty of all motorists under these conditions to stop the car. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood, particularly when the driver continues driving the car and manages to get on the wrong side of the road blocking the right of way of a car in the act of proceeding in the opposite direction and the act of driving amounts to undoubtedly a rash and negligent act.

Mr. *Mohammad Monir*, Assistant to the Advocate-General, for the Crown.

Mr. *Ghulam Mohy-ud-Din Khan*, for the Respondent.

Young, C. J.—Abdul Qayyum was found guilty by a First Class Magistrate at Montgomery for the rash and negligent driving of a motor lorry and for an offence under s. 304 A, as a result whereof one man was killed and several persons received grievous hurts. He was given one year's rigorous imprisonment under s. 338 and one year under s. 304-A and four months under s. 337, I. P. C. the sentences to run concurrently. His license was suspended also for one year. On appeal the convictions and sentences were set aside by the learned Sessions Judge. The Local Govt. appeals against this acquittal. Abdul Qayyum was driving a lorry from Montgomery in the direction of Lahore. He was proceeding about 20 miles an hour when he was passed on his right side by another lorry going fast which went on to the *kacha* part of the road and raised a great cloud of dust which completely blinded the driver and hid the road from him. Abdul Qayyum, however, instead of stopping proceeded. The result was that as he could not see the road he drove his lory on the right side of the road instead of the left and either bumped into a stationary lorry which was on its correct side going in the opposite direction, or while driving on the right side of the road collided with the other lorry which might have been travelling—the evidence is conflicting on this point—with the result that several persons were injured and received grievous hurt, and one died.

The whole point is whether under the circumstances we have related, the respondent can be said to be guilty of a rash and negligent act. In the first place, we think that when there is heavy vehicular traffic on the road and the road is invi ible in a cloud of dust, as so frequently happens in this province in dry weather, when a car passes which goes in the *kacha* part of the road, it ought to be clearly recognized that it is the duty of all motorists under these conditions to stop the car. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood. In this case the position is even aggravated: the respondent continued driving the lorry and managed to get on the wrong side of the road. It is suggested by some witnesses that the fact that Abdul Qayyum was driving on the wrong side of the road was due to the fact that while the

dust was obscuring his vision he passed some carts If he did so he was clea ly guilty also of another rash and negligent act. When it is impossible to see, for a car whether going too fast or not to pass another so that it would be blocking the right of way of a car in the act of proceeding in the opposite direction is undoubtedly a rash and negligent act. It is clear even according to the defence version that the respondent drove at least 50 yards after the dust obscured his vision. It is probable, however, according to the prosecution evidence, that the respondent drove a good deal further, but even putting it at 50 yards he should and ought to have completely stopped his lorry within that distance.

We therefore must find that the respondent was guilty of a rash and negligent act. We therefore set aside his acquittal and convict him of the offences with which he was charged. We would have given the respondent under all the circumstances of this case three months' rigorous imprisonment. He had however served six weeks and came out of jail last April. We think that instead of sending him back to jail he should pay a fine of Rs 100 or in default undergo one month's rigorous imprisonment. His license will also be suspended for one year commencing from March 13, 1939.

D. *Appeal allowed.*

PATNA HIGH COURT

Miscellaneous Judicial Case No. 8 of 1939
April 2, 1940.

HARRIES, C. J. AND MANOHAR LALL, J.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA—PETITIONER

versus

DHANESHWARDHAR MISRA—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 2 (1)—Agricultural income — Determination of — Income held not agricultural.

In order to determine whether the income is agricultural income or not regard must be had to the source of such income.

An ancestor of the assessee had in the past rendered some service to the Bettiah Raj. In consideration of these services the Raj had for many years given a *thikadari* lease of certain villages at a comparatively favourable rent to this ancestor and afterwards to his descendants. On the expiry of the term of the lease the Raj declined to grant a new lease and the sum of Rs 4,500 per annum was granted to the then lessee in lieu of the profits which he would have made if he had continued as lessee. The question was whether this allowance was agricultural income within the meaning of s. 2 (1), Income Tax Act:

Held, that this annual payment made to the assessee could not be regarded as agricultural income as it was not derived from any lands. It was in fact an annual *ex gratia* payment made by the Raj to the assessee in consideration of some services rendered by an ancestor of his in the remote past.

Mr. *S. M. Gupta*, for the Petitioner.

Mr. *S. K. Majumdar*, for the Opposite Party.

Harries, C. J.—This is a reference under s. 66 (2), Income Tax Act, made by the Commissioner of Income-tax. The question propounded by the Commissioner is as follows:

"Whether the allowance made to the assessee in accordance with the order Ex. B and transfer to him in accordance with the letter Ex. C, is agricultural income within the terms of s. 2 (1), Income Tax Act."

The assessee is the adopted son of the late *Mst.* Moharmani Kaur. It appears that an ancestor of the assessee had in the past rendered some service to the Bettiah Raj. In consideration of these services the Raj had for many years given a *thikadari* lease of certain villages at a comparatively favourable rent to this ancestor and afterwards to his descendants. It appears that from time to time the lands had been temporarily resumed by the Raj and the rent had on occasions been slightly increased; but throughout a long period of years the Raj had recognized the claims of the descendants of the original lessee to favourable consideration. *Mst.* Moharmani Kuar as a widow succeeded to the *thikadari* lease then in existence in the year 1906 and that lease expired in the year 1919. In that latter year the Bettiah Estate was under the management of the Court of Wards, and the Court of Wards conceded that the widow as a member of this family had some indeterminate claim to consideration from the Raj. The Court of Wards however were firmly of opinion that the widow was an undesirable lessee and at that time the present assessee was minor. In those circumstances the Court of Wards decided that they would resume the lands and declined to give the widow a new lease; but in recognition of her claim to "consideration" the Court of Wards gave to the widow an annual allowance of Rs. 4,500 which the Court thought to be the probable amount of profit which she would have derived had she been given a renewal of the lease at the past rental levels. The order included an expression of opinion that when the widow's adopted son came of age he would be offered a renewal of the lease on similar favourable

terms to those enjoyed hitherto. No application was ever made by the assessee for a new lease and in the year 1936 the widow died. Application was made by the assessee for payment of this allowance to him, and this was sanctioned. The income-tax authorities now claim to tax this annual sum of Rs. 4,500, but the assessee claims that such sum is not liable to income-tax as it is in fact and in law agricultural income within the meaning of s. 2 (1), Income Tax Act.

In my judgment this annual payment of Rs. 4,500 made to the assessee cannot possibly be regarded as agricultural income. It is not derived from any lands. It is in fact an annual *ex gratia* payment made by the Bettiah Raj to the assessee in consideration of some services rendered by an ancestor of his in the remote past. In order to determine whether the income is agricultural income or not regard must be had to the source of such income. Mr. Majumdar, who has said all that can be said on behalf of the assessee, has urged that the source of this income is the land which had previously been the subject of *thikadari* leases. He has contended that though the last lease came to an end in 1919 the Court of Wards never resumed possession but only resumed management. It is clear from Ex. B which is the order granting this allowance that the Court of Wards declined to grant a new lease and entered into possession of the property and the sum of Rs. 4,500 per annum is granted to the widow in lieu of the profits which she would have made if she had continued as lessee. In the order of the Board of Revenue it is true that it is stated that the Court would resume *khas* management but what is meant is that the Court was resuming possession on the expiry of the lease. Mr. Majumdar has referred the Court to a letter from the Manager of the Bettiah Estate to the Collector of Champaran, dated July 30 1919, and that letter makes it clear that the intention of the Court of Wards was to resume possession and to give the lady a personal allowance as she was no longer a lessee. The source of the income in this order of the Board of Revenue, and in my view this annual sum is in the nature of an *ex gratia* payment and is not derived from land. In my view the annual sum is not agricultural income and I would answer the question referred to this Court by the Commissioner of Income-tax in the negative. The assessee must pay the costs of this reference which we assess at Rs. 200. The sum of Rs. 100 already deposited in Court will go towards the sum of Rs. 200 awarded as costs.

Manohar Lall, J.—I agree.

S. *Answer accordingly.*

BOMBAY HIGH COURT

First Appeal No. 233 of 1939
August 15, 1940

BEAUMONT, C. J. AND WASSOODEW, J.

RUKMANSA RAJANSA HOSMANI—APPELLANT

versus

SHANKARGOUDA BASANGOUDA LAKHYAL AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3, O XV, r. 2, O. IX — Discretion conferred by O. XVII, r. 2 to be exercised judicially — Court, when can pass order on merits under O. XVII, r. 2 or r. 3 —Case adjourned for production of evidence under O. XV, r. 3—Plaintiff not appearing on adjourned date—Order on merits cannot be passed—Case falls under O. XVII, r. 2 and not r. 3—Court must proceed under O. IX, r. 8 or grant adjournment.

The last words of r. 2 of O. XVII, Civil P. C., confer a discretion, but it is a discretion which must be exercised judicially. A Judge, in exercising such discretion, may grant a further adjournment, or, if the circumstances justify such a course, he can pass an order on merits, but he must have material before him to justify that course. If there is no evidence before him, he cannot in the exercise of judicial discretion proceed to deal with the case on merits. Hence where a case is adjourned under O XV, r. 3 for the production of evidence and the plaintiff fails to appear on the adjourned date, the Court is under O. XVII, r. 2 bound to dispose of the matter under O. IX, r. 8, or else to grant an adjournment. The Court cannot dispose of the case on merits as in such a case there is no evidence before the Court to do so. Order XVII, r. 3, does not apply to such a case :

Held, that the case was dealt with on merits and appeal therefore lay.

Held, further that the case fell under r. 2 and not under r. 3 of O. XVII and as the Court had no material before it to justify a disposal on merits the order passed by it should be modified so as to fall under O. IX.

F. A. from the decision of the First Class Sub-Judge, Bijapur, in C. S. No. 205 of 1938.

Mr. *N. M. Hungund*, for the Appellant.
Mr. *S. B. Jathar*, for the Respondents.

Beaumont, C. J.—This is an appeal against a decree passed by the First Class Subordinate Judge of Bijapur. The plaintiff sued for a sum of approximately Rs. 11,000. The defendants admitted that a sum of Rs. 5,976 and certain interest was due. At the first hearing the Court framed issues under O. XV, r. 3, sub-r. (1), Civil

P. C., and then adjourned the further hearing, under sub-r. (2), to February 15, 1939. On that date the plaintiff alleged through his Pleader that he was ill, and asked for an adjournment. The adjournment was refused, and the Pleader thereupon withdrew, saying that he had no instructions to proceed. The learned Judge then dealt with the case on merits and answered the issues. He came to the conclusion that the defendants proved that only the amount admitted by them was due; in effect therefore he rejected the balance of the plaintiff's claim, and passed a decree against the defendants for the amount admitted to be due, and directed payment by certain instalments. The plaintiff contends on this appeal that the order ought to have been made under O. IX, r. 8, decreeing the amount of the claim admitted by the defendants, but dismissing the balance of the claim for want of appearance. An order in that form would entile the plaintiff to apply to get the dismissal set aside under O. IX, r. 9. Mr. Jathar for the respondents contends that in effect the order is one decreeing part of the claim and dismissing the rest for want of appearance; and that there is no substance in the appeal; but I do not think that that contention can be supported. In my opinion the case was dealt with on merits, and the balance of the plaintiff's claim was dismissed on merits. If that is so, plaintiff can only appeal on merits, and he has no evidence.

It is then argued that the course was justified under O. XVII, r. 2, or r. 3. Order XVII, deals with adjournments, and r. 2 provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX, or make such other order as it thinks fit. This was an adjourned hearing, and therefore that rule applied, and the learned Judge could either have disposed of the matter by making an order under O. IX, r. 8 or by making such other order as he thought fit. Now, it is clear that those last words of the rule confer a discretion, but it is discretion which must be exercised judicially. A Judge, in exercising such discretion, may grant a further adjournment, or, if the circumstances justify such a course, I think that he can pass an order on merits, but he must have material before him to justify that course. If there is no evidence before him, he cannot in the exercise of judicial discretion proceed to deal with the case on merits. In this case he had no material enabling him to do so, since there was no evidence as to the balance of the plaintiff's claim. Therefore the learned Judge was bound, either to dispose of the matter under O. IX, or else to grant an adjournment. It was not, in my opinion, open to him on the material before him to dispose of the case on merits.

Then O. XVII, r. 3 is relied on. The difference in phraseology between r. 2 and r. 3 has been discussed on a good many occasions by this Court and other High Courts. Rule 3 is not in terms confined to default of appearance as is r. 2, though r. 3 may be brought into operation by default of appearance. Rule 3 provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith. That rule is directed to the failure by one of the parties to do an act for which he has been allowed time, and on that failure the Court may proceed to decide the suit forthwith. But even under r. 3 the Court must have material to enable it to exercise its proper discretion by deciding the case on merits. In this particular case I do not think that r. 3 applied. The hearing of the suit had been adjourned under O. XV, r. 3, for the production of evidence by the parties, and I do not think a general adjournment of that kind can be said to be an order bringing into operation O. XVII, r. 3. Even if the rule did apply, there was no material for deciding the case on merits. In my view this case fell within r. 2 only, and the learned Judge had no material before him to justify him in disposing of the plaintiff's case on merits by dismissing that part of the claim which was not admitted. I think therefore that the appeal must be allowed, and the order of the lower Court must be varied by adding thereto the words: "And the balance of the plaintiff's claim is dismissed for want of appearance." No order as to costs.

Wassoodew, J.—I agree.

S. *Appeal allowed.*

OUDH CHIEF COURT

Criminal Appeals Nos. 484, 485 and 486 of 1939

January 11, 1940

RADHA KRISHNA, J.

WARIS KHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 162, 509 (1)—Statement of witness to which his thumb-mark was taken by Police during investigation is inadmissible—S. 509 (1), applicability of, to evidence relating to facts tendered by person who also happened to be medical man—Criminal trial—Evidence—First information report—Value—Evidence—Trial Court's opinion as to credibility of witnesses—Value of.

A statement of a witness to which his thumb-mark was taken by the Police Sub-Inspector during investigation of the case, is inadmissible. 132 Ind. Cas 234 (1), relied on.

Section 509 (1), Criminal P. C., confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. It is therefore necessary to prove a dying declaration by producing the doctor who had recorded it if in recording the statement of the deceased the doctor was not acting as a medical man. The first information report, is really not a substantive piece of evidence but can be used only for corroborative purposes.

The trial Court has the opportunity of watching the demeanour of the witnesses when they are in the witness box and its opinion as to their credibility is of great value.

Cr. A. against the order of the Sessions Judge, Fyzabad, dated September 18, 1939.

Messrs. *H. G. Walford* and *R. N. Shanglu*, for the Appellant.

The Assistant Govt. Advocate, for the Crown.

Judgment—The appellants in these appeals, Waris Khan, Janab Khan and Inamullah Khan, were charged before the learned Sessions Judge of Fyzabad for an offence under s. 302, I. P. C., for the murder of one Nagai *dhobi* at midnight between May 4 and 5, 1939, at his house in Din Bhayun. All of them were found guilty of an offence under s. 304, I. P. C., and sentenced to ten years' rigorous imprisonment each. The prosecution case was that there was a criminal case pending between Aulad Ali on one side and the three accused on the other, in which Nagai was a witness for Aulad Ali. Nagai attended the Court wherein the case was pending but the case was put off. Since then the appellants had been threatening to put him to death if he gave evidence against them. On the date of the occurrence the appellants went to the house of the deceased Nagai, who was out, and told his wife to stop him from giving evidence for Aulad Ali otherwise he would be murdered. The same day, it was alleged, the appellants came at midnight armed with spears and *lathis* and assaulted Nagai. Nagai died at 3-30 A. M. on May 7, 1939, in the hospital at Jamalpur as an effect of injuries received by him. Nagai made a report at the *thana* at 8 A. M. on May 5, 1939. It is Ex. 2, and the Police Station is situated at a distance of six miles from the place of the occurrence. In this information report the names of P. W.s Nos. 1 to 4 were mentioned and the accused were implicated.

The accused persons set up a counter story in defence to the effect that Nagai's daughter Sugri's marriage had been settled with the son of one Sheo Darshan of village Tanda, that Nagai broke off this engagement and settled the marriage with the son of another *dhobi* of Azamgarh, which was to come off on the day following the occurrence. In order to have his revenge and to frustrate the completion of alliance with the Azamgarh *dhobi*, Sheo Darshan assaulted Nagai either singly or with the help of others. On hearing this assault the accused went to the house of Nagai in the early morning where Nagai was freely mentioning the name of Sheo Darshan as his assailant. Soon after this, Aulad Ali, who has great influence in the village, reached the spot and took Nagai away to the Police Station and there to nurse his own grudge with the appellants induced Nagai to implicate them. Aulad Ali used to attend the deceased while he was at the hospital at Jamalpur. It may be mentioned that out of the three appellants the first two are own brothers and the third is their nephew. They are cousins of Aulad Ali, who is their *pattidar*. It is admitted that great enmity existed between the appellants on one side and Aulad Ali on the other side.

In support of the prosecution the evidence on the record is (1) the evidence of eye-witnesses, P. W. No. 1, Oudhu, the son of Nagai, and P. W. No. 2 Ram Lal, (2) the evidence of Jhanghai (P. W. No. 3), Lokai (P. W. No. 4) and Balai (P. W. No. 7) and the statement of one Kalpu (Ex. 7) in the Court of the committing Magistrate. Kalpu had died when the case came up before the Sessions Court. (3) The first information report (Ex. 2) and the dying declaration (Ex. 10). The motive for assault is as stated by the prosecution and is borne out by the evidence of P. Ws. Nos. 1 and 8.

The learned Sessions Judge disbelieved the statement of P. W. No. 2 Ram Lal, one of the eye-witnesses, on the ground that he

was easily amenable to external influences and could be made to perjure himself. On the first hearing before the committing Magistrate he stated that he could not identify any of the assailants, but when he came into the witness box a few days later he readily identified all of them. This witness also admitted that the Sub-Inspector took his thumb-mark to the statement taken during the Police investigation and so his statement was not admissible as held in *Bhuneshwari Pershad* v. *Emperor* (1) at p. 509. The learned Judge also disbelieved the evidence of Jhanghai (P. W. No. 3), Lokai (P. W. No. 4), Balai (P. W. No. 7) and that of Kalpu made in the committing Magistrate's Court. These witnesses had stated that they had seen the accused running away immediately after the occurrence. It is not necessary for me to give any detail of their statements and the reason given by the learned Sessions Judge for discarding their testimony. The learned Assistant Govt Advocate has strenuously maintained before me that the evidence of P. Ws. Nos. 3, 4 and 7 as well as the statement of Kalpu should not have been discarded by the learned Sessions Judge. The evidence of P. W. No. 3 was discarded on the ground that he was not in a position to identify the assailants. Lokai (P. W. No. 3) was treated by the prosecution as a hostile witness. P. W. No. 7 Balai and Kalpu were not mentioned in the first information report. The signatures of P. W. No. 7 were taken by the Sub-Inspector on his statement made during investigation I am not prepared to disagree with the view of the learned Sessions Judge in treating the evidence of these witnesses as unreliable. That Court had the opportunity of watching the demeanour of these witnesses when they were in the witness box and its opinion as to their credibility is of great value.

Thus, the only evidence upon which the conviction is based is that of P. W. No. 1 Oudhu, a boy of 14 years of age and the son of the deceased Nagai, Ex. 2, the first information report, which is really not a substantive piece of evidence but can be used only for corroborative purposes, and Ex. 10, the alleged dying declaration of the deceased. The alleged dying declaration was recorded by the medical officer of Jamalpur hospital. It was produced in the Court of the committing Magistrate and proved by the doctor. This dying declaration and the statement of the doctor in proof of it made in the committing Magistrate's Court were produced before the learned Sessions Judge as Exs. 10 and 9. The learned Counsel for the appellants has contended that Ex. 10 is not admissible in evidence as it was not proved in the Sessions Court by producing the doctor, who is alleged to have recorded it, the learned Assistant Govt. Advocate argued that it was not necessary to examine the doctor for proving Ex. 10 in the Sessions Court in view of the provisions contained in s. 509 (1), Criminal P. C. In my opinion the section confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. In my opinion it was necessary to prove Ex. 10 by producing the doctor who had recorded it. In recording the statement of the deceased the doctor was not acting as a medical man and he was not produced in the committing Magistrate's Court as a medical witness. Exhibit 10, therefore, goes out of consideration for want of proof.

There remains the only substantive piece of evidence consisting of the evidence of P. W. No. 1 Oudhu. About this witness it was contended on behalf of the appellants that he is a most unreliable witness because he made conflicting statements on certain matters in the two Courts below and further that he admitted that he had covered himself on account of the fear when his father was assaulted and, therefore, he was not in a position to identify the assailants. The learned Sessions Judge has discarded this criticism made by the appellants on the ground that this witness was lying close to his father and could have no difficulty in identifying the accused before he covered himself. In view of the circumstances of the case I am not prepared to put great reliance upon the evidence of this witness. He admitted in the committing Magistrate's Court that Aulad Ali came to his house early morning next after the night of the occurrence. He changed his statement on this point in the Court of Session. The change is in respect of a very material matter. As stated above, the accused had stated in their defence that Aulad Ali was the person responsible for the implication of the accused persons. Aulad Ali was examined in the trial Court to prove motive for the assault but when the

(1) 8 O W N 503 (509); 132 Ind. Cas. 234; A I R 1931 Oudh 172; (1931) Cr Cas 444; 32 Cr L J 860; 6 Luck 38; Ind. Rul. (1931) Oudh 250.

accused persons disclosed their defence Aulad Ali was kept back and not produced in the Court of Session. Then with regard to the story that Nagai had broken off the engagement for the marriage of his daughter with Sheo Darshan's son, this witness made a contradictory statement in the Court of Session. In the committing Magistrate's Court he had admitted that his sister's marriage had first been settled with Sheo Darshan's son and was broken off by his father. This question was also a material fact in support of the defence. I have read the statement of P. W. No. 1 carefully. He is a boy of 14 years. His statement before the learned Sessions Judge does not appear to me to be reliable. In the Sessions Court he made certain statements contrary to his statements in the committing Magistrate's Court in his anxiety to support the prosecution and to eliminate the proof of facts which must have been considered by the prosecution to be favourable to the accused.

In respect of the counter story it has been made probable by the witnesses for the prosecution themselves. Sheo Dharshan must have been greatly annoyed with the deceased for having broken off the engagement for the marriage of his son with Sugri and that he was interested in frustrating the completion of marriage of Sugri with the *dhobi* of Azamgarh. The marriage party from Azamgarh was to come to the house of the deceased on May 5, *i. e.*, next after the night of the assault. The marriage did really take place in a couple of days after the date of the assault which shows that the deceased was so utterly opposed to the marriage of his daughter with the son of Sheo Darshan that he had it completed in spite of the fact that he was on the brink of death himself with the Azamgarh boy. Further, there is evidence on the record which I believe that Aulad Ali accompanied Nagai to the Police Station where a report was made by Nagai. He further accompanied Nagai to the hospital at Jamalpur. He was a deadly enemy of the three appellants There is nothing improbable in the suggestion made by the appellants that the first information report made by Nagai was made at the instance of this Aulad Ali. The statement of Nagai in the first information report implicating the appellants as the persons who assaulted him is open to great suspicion.

In my opinion the guilt of the appellants is not established by evidence, which can be said to be free from all reasonable doubt. After hearing the learned Counsel for the appellants and the Assistant Govt. Advocate I hold that the case is not free from suspicion. I give the appellants the benefit of the doubt and acquit them of the offence of which they have been convicted. I, therefore, set aside the conviction and sentence passed upon the appellants, acquit them of the offence charged and direct that they be released at once. All the three appeals are allowed.

S. *Appeals allowed.*

ALLAHABAD HIGH COURT

Civil Revision No. 152 of 1939
December 22, 1939
GANGA NATH J.

NATHI LAL—PLAINTIFF—APPLICANT
versus
SRI MAL AND ANOTHER - DEFENDANTS
—OPPOSITE PARTY

Partnership Act (IX of 1932), s. 4—Single transaction or venture—Whether business.

A single transaction or venture does not amount to business and consequently it does not come under "business" as mentioned in s. 4, Partnership Act. 126 Ind. Cas 429 (1), relied on.

C. R. against the order of Small Cause Court Judge, Agra, dated November 15, 1938.

Mr. *J. Swarup*, for the Applicant.

Mr. *S. B. L. Gour*, for the Opposite Party.

Order.—This is an application in revision by the plaintiff against the decree of the learned Judge, Samall Cause Court, Agra, dismissing a suit. The applicant brought a suit against the defendants for contribution of the loss sustained by the parties in a single transaction of purchase of 25 tons of linseed. The learned Judge, Small Cause Court, has dismissed the suit as barred by s. 69, Partnership Act, on the ground that there was no registered partnership. It is contended for the applicant that a single transaction does not amount to "business". The "partnership" is defined in the Partnership Act as :

"Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

A single transaction or venture does not amount to "business". In *Firm of Senaji Kapurchand* v. *Firm of Pannaji Dev Chana* (1) their Lordships observed :

(1) A I R 1930 P C 300; 126 Ind. Cas. 429; Ind. Rul. (1930) P C 333; 59 M L J 435; 34 C W N 1107; 32 L W 646; 32 Bom. L R 1607; 52 C L J 5. (P C).

"No doubt a single venture, where a single article or a number of articles on the single contract are purchased and sold, may not amount to a business. But where a number of bales are purchased at one time, sales are to go on profits are to be realized and those profits are to be divided among the partners, it is not a single venture and amounts to partnership within s. 4."

In this case there was a single venture and consequently it does not come under "business" as mentioned in s. 4, Patnership Act. The suit was, therefore, maintainable. It is therefore ordered that the application be allowed, the order of the learned Judge, Small Cause Court, be set aside and the case be sent back to the lower Court to be re-admitted under its original number and to be disposed of in accordance with law. No order is made as to costs, as the chief defendant (defendant No. 1) is absent.

S. *Case remanded*

CALCUTTA HIGH COURT

Election Petition

May 15, 1940

McNAIR, J.

S. SHARAFUDDIN AHMED—

APPLICANT

versus

SHAMSUL HUQ—RESPONDENT

Calcutta Municipal Act (III of 1923), ss. 46, 47—High Court's special jurisdiction as Election Court—Right of parties must be found within statute—Right to recount is inseparately linked to claim to seat—Recount, when can be granted.

High Court, sitting as an Election Court, exercises a special jurisdiction which is the creature of statute, and the rights of the parties must be found within the four corners of the statute and no right which is not so found can be imported. [p. 774, col. 2.]

There is no doubt that the Calcutta Municipal Act does not contain any provision which enables an unsuccessful candidate to claim the seat. The procedure of scrutiny and recount is inseparably linked to the claim to the seat. It enables a Court to review the decision of the revising officer as to the admissibility of the ballot papers with the object of further enabling the Court, (as for instance under the provisions of s. 39, Ben. Municipal Act) to declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. Hence when the Legislature excluded from Cal. Municipal Act the right to claim the seat, it also excluded the right to a recount. *Halifax case* (3), relied on, *Madura case* (1924) *Hammond's "Election cases"* 501 (1) and *Tanjore case*, (1921) *Hammond's "Election cases"* 673 (2), distinguished. [p. 774, col. 1; p. 775, col. 1.]

A recount, however, can only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence and must be disallowed where it is claimed merely as a method of obtaining evidence in support of a number of serious charges of which no particulars have been given. *Tanjore case* (1921), *Hammond's "Election cases"* 673 (2), relied on, 124 Ind. Cas. 216 (5), explained.

Messrs. *Sarat C. Bose, N. Barwell* and *J. P. Mitter* for the Applicant.

Messrs. *B. C. Ghose* and *P. B. Mukherji*, for the Respondent.

Order—This is a petition by the defeated candidate in Muhammadan constituency Taltolla, Ward No. 14, who polled 304 votes. The respondent who was elected, polled 312 votes, and his election was published in the *Calcutta Gazettee* on April 4.

A preliminary question has been argued by way of demurrer, namely whether the petitioner is entitled to a recount and by a recount is meant not merely the counting of votes to check the arithmetic of the returning officer, but a scrutiny as well to review his finding as to the validity of the ballot papers. In the earlier paragraphs of the petition it is alleged that the appointment of the returning officer was open to objection and that he was guilty of malpractices. The first three grounds have been abandoned, but Mr. Bose for the petitioner states that he abandoned ground 3 so far as it related to the appointment of the returning officer, but did not intend to abandon his contention that the returning officer had been a party to divers malpractices and breaches of the relative rules. In ground 11 further charges have been made against the returning officer that he improperly refused certain votes. Ground 11, sub-para. 2 has been abandoned. Sub-paras. 3 and 4 purport to be particulars of improper refusal of votes. They are in fact vague allegations that the returning officer did not allow the inspection contemplated by the rules and that the returning officer did not observe what the petitioner alleges to be the established practice of placing the ballot papers face upwards on the table. The petition is supported by an affidavit of Syed Mohammad Yusuf who states that six ballot papers, (presumably those referred to in ground 11, sub-para. 1 of the petition) which were valid and in favour of the petitioner, were improperly rejected and that the returning officer refused to give the petitioner or his representative reasonable opportunity to inspect the ballot papers and refused to recount them when requested to do so. These apparently constitute the alleged malpractices and the breaches of the rules on which the petitioner still seeks to rely.

Two questions have been argued: (1) whether relief by way of a recount is contem-

plated by the Cal. Municipal Act and (2) if such relief is permissible, do the facts alleged justify a recount? There is no doubt that the Cal. Municipal Act does not contain any provision which enables an unsuccessful candidate to claim the seat and so far as I have been able to discover from the decided cases both in England and in India, a recount is always coupled with scrutiny and the right to recrimination, on the result of which the unsuccessful candidate may be declared duly elected. It is equally clear that the English Acts and Rules dealing with elections, and the various Indian Acts of a similar nature to which my attention has been directed other than the Cal. Municipal Act give the unsuccessful candidate the right to claim the seat if the circumstances justify it.

Mr. S. C. Bose relies on s. 47 (1) (c) Cal. Municipal Act, which provides so far as is material, for the avoidance of the election if there has been improper reception or refusal of a vote, and the question arises whether that provision contains the same principle and by implication empowers the Court to embark on the procedure of a recount. The provisions of the Cal. Municipal Act relating to elections have been drafted somewhat differently to the provisions of other Acts dealing with the same subject, and the difficulty of construing ss. 46 and 47 has been referred to in previous decisions of this Court. Section 46 provides that if the validity of an election is questioned by reason of a corrupt practice, or the improper rejection of a nomination or the improper reception or refusal of a vote or for any other cause, an application may be made to the High Court. Section 47 provides that if the High Court is satisfied on certain specified points the election is null and void. Some difficulty has been experienced in ascertaining what are those points owing to exceptions imported by reference to s. 46. Provisions of a somewhat similar nature are contained in the English and Indian Acts and Rules but in every case they contain a further provision entitling the defeated candidate to claim the seat. This additional provision is of importance for all the decided cases and the extracts from the text books to which I have been referred are dealing with Acts and rules which enable the seat to be claimed, and the claim to the seat can be confined to a recount.

The question then resolves itself into the following: Is the right to a recount a right which is so closely linked to the claim to the seat, that when the Legislature excluded from the Cal. Municipal Act the right to claim the seat, it also excluded the right to a recount? Admittedly, this Court sitting as an Election Court exercises a special jurisdiction which is the creature of statute, and the rights of the parties must be found within the four corners of the statute and no right which is not so found can be imported. By s 47 (1) (c) Cal. Municipal Act, the election is void if it has been materially affected by improper reception or a refusal of a vote, and it is argued that the Court cannot for an opinion as contemplated by the section unless it investigates the charges under this head and one of the most expeditious ways of investigating the charge is by a recount. True, that method is a convenient form of procedure which might be adopted, if permitted, but it is not the only form of procedure by which the result can be obtained and the question for determination is whether the Calcutta Act empowers the Court to adopt it. Mr. Bose for the petitioner argues that the right to a recount is a right entirely separable from the claim to the seat and a form of procedure to which every petitioner in an election dispute is entitled. In support of this argument he refers to "The Indian Candidate and Returning Officer" by Sir Laurie Hammond which was published in 1923. On p. 174 the learned author says:

"From the above and a perusal of the rules quoted it will be seen that there are five kinds of election petitions. The third kind, under heading "C" which the learned author mentions is "A" petition for recount of votes where it is believed that the recounting has been carelessly done."

Rule 34 of the Electoral Rules referred to in Hammond's "The Indian Candidate and Returning Officer" gives the specific right to the candidate to claim the seat, and the extract from Sir Laurie Hammond's book on which Mr. Bose relies is dealing entirely with election petitions in which the petitioner has the right to claim the seat. Reliance is placed on the *Madura case*, (1924) *Hammond's "Election cases"* 501 (1) where a recount was allowed. Reliance is also placed on the *Tanjore case* (1921), *Hammond's "Election cases"* 673 (2) where a recount was refused. It is argued that in neither of these cases is it apparent that the seat was claimed. The reports are only fragmentary and in neither case do they state fully the relief sought. In the circumstance that question remains at large, and to that extent the reports cannot be said to support

(1) (1924) Hammond's "Election cases" 501.
(2) (1921) Hammond's "Election cases" 673.

Mr. Bose's argument. And again, it must be remembered that in each of these cases the petitioner had a right under the relevant act to claim the seat.

Mr. B. C. Ghose, for the respondent, in support of the argument that the Legislature has withheld in the Calcutta Act the right to a recount, has contrasted the provisions of the Ben. Municipal Act of 1932 with the similar provisions of the Cal. Municipal Act as amended up to 1939. Sections 46 and 47, Calcutta Act, he argues, correspond to ss. 36 and 38, Bengal Act, but the Bengal Act by s. 38 entitles the Court, in addition, to hold a scrutiny and computation of votes and to declare as a result of such scrutiny, the candidate who has been duly elected.

Although Mr. Bose has nominally confined his argument to a recount, he admits that by a recount he does not mean to confine the procedure to a mere arithmetical check of the returning officer's figures. It implies, in addition, the careful checking of ballot papers and all the complicated procedure of a scrutiny and recrimination. In my view no such procedure can be allowed unless it is clear from the Act itself that such was the intention of the Legislature, and I can find no such provision in the Cal. Municipal Act which even suggests that such was the intention. If a recount were to be ordered each party would be entitled to check the ballot papers and to have deducted from his opponent the votes which were held to be improperly admitted or rejected. Pandit Nanak Chand, in his recent text book on the Law and Practice of Elections and Election Petitions, at p. 553, observes on the authority of the *Halifax case* (3)" A petition which claims a seat for a defeated candidate may be presented solely on the ground of scrutiny and recount," and he continues:

"It is obvious that unless the petitioner claims to be duly elected, there can be no petition for scrutiny or recount. A right to ask for this relief only arises when the seat is claimed. Therefore, where the petitioner claims to have received a majority of lawful votes, a scrutiny of votes must take place in order to ascertain the truth of the allegation made."

The procedure of scrutiny and recount appears to me to be inseparably linked to the claim to the seat. It enables a Court to review the decision of the revising officer as to the admissibility of the ballot papers with the object of further enabling the Court, (as for instance under the provisions of s. 39, Ben. Municipal Act) to declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. That power is not granted by the Cal. Municipal Act, and in my opinion the right to a recount is also withheld. This by no means deprives the Court of the power under s. 47 to investigate the proper reception or refusal of a vote. That is part of the investigation in every case of personation or plural voting.

The second question is whether, assuming that a recount could be ordered, there were circumstances present which would justify such an order in the present case. In my opinion there are not. I have already referred to the manner in which the alleged malpractices of the returning officer have been set out in the petition. According to the English practice as outlined in Fraser's "Law of Parliamentary Elections & Election Petitions," the petitioner in order to obtain a scrutiny must claim the seat and must also give particulars. The rule in regard to particulars was set out in the *Taujore case* (2) and has been followed in a number of subsequent election cases. In the *Tanjore case* (2) although the election was declared void, the prayer for a recount was refused. The Commissioners in dismissing the application for a recount said:

"It rested on the nebulous allegation of the agents about the counting of batches of votes twice over and we therefore refused to grant an application of that nature on such slender materials. It is well established law that a recount will only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence."

Now what are the particulars given here? If ever there were nebulous allegations, they appear in this petition. In ground 3 there is a general charge of malpractices introduced in what was apparently particulars of a charge of illegal appointment of the returning officer. Ground 11 refers to the improper rejection or refusal of a vote and Mr. Bose for the petitioner now seeks to link it with the vague charge of malpractice alleged in the abandoned ground 2. Particulars in sub-paras. 3 and 4 of ground 11 have not been given and I am not prepared to allow this matter to be agitated in the absence of specific grounds and, as stated in the *Tanjore casse* (2), reliable *prima facie* evidence. The majority is admittedly a narrow one, namely eight votes, but that is only one of the fences which the petitioner would have to negotiate. Sub-paras. 3 and 4 of ground 11 are far too vague to justify a serious inquiry and they are deleted. Sub-para. 1 alleges the

(3) (1893) 4 O'M & H 203.

illegal rejection of six votes. Again, no particulars are given other than those contained in the affidavit of Mohammed Yusuf.

Mr Bose has argued on the authority of the *Punjab North case* (*Hammond Election cases* 567) (4) that in India the practice differs from that prevailing in England, and that the petitioner cannot be expected to furnish any definite particulars until he has scrutinized the ballot papers. The Commissioners in the case of *Punjab North* (4) sought to distinguish the *Tanjore case* (5) on the ground that there the recount was only asked for in the course of the inquiry whereas in the case they were considering the petition itself was chiefly for a scrutiny and recount. The recount claimed here is merely a method of obtaining evidence in support of a number of serious charges of which the petitioner has not given particulars. Reference has also been made to a decision by a Judge of the Madras High Court on a revision petition from the decision of a Subordinate Judge. The learned Judge points out that in revision his sole duty was to see that the lower Court had not acted without jurisdiction and that there was no material irregularity. In the course of his judgment he does however consider the principles and the evidence on which the lower Court came to its decision, and he states, as reported in *Lakshumanayya* v. *Rajam Ayyar* (5) at p. 196:

"An overstrict insistence that an application should be supported by evidence of miscounting is therefore unwarrantable."

That remark is undoubtely *obiter*, but it comes to no more than this, that in each case the Court must consider the facts alleged and decide whether in the circumstances there are grounds for thinking that a miscount took place.

It is obviously undesirable that what have been termed "nebulous allegations" should be made for the sole purpose of obtaining a general scrutiny of the ballot papers. It is true that the petitioner is not entitled in India to inspect the ballot papers without an order of Court, but he has some power of inspection while the votes are being counted. While it is not expected that the precise particulars required by the English procedure should be given before a scrutiny, it is expected that there should be some specific instances and the Court in each case must decide whether the instances given would justify further consideration of the matter by way of scrutiny or recounting. In the present instance, the petitioner had sufficient inspection to know that the votes alleged to have been improperly rejected were valid and were in favour of the petitioner, but he does not state whether the ballot papers to which he refers were marked "rejected" as provided in para. 42 (c) of the Govt. order; nor does he state whether the correctness of the rejection was questioned at the time or whether the grounds for rejection were recorded. Were I of opinion that a recount was permissible under the Act, I should still hold that no recount should be ordered in this case for, in my opinion, the vagueness of the allegation would not in any event justify such an order. The preliminary question is answered accordingly and a recount is refused.

D. *Order accordingly.*

(4) Hammond's Election cases 567.

(5) A I R 1930 Mad. 195 (196); 124 Ind. Cas. 216; 58 M L J 118; 30 L W 949; Ind. Rul. (1930) Mad. 648.

OUDH CHIEF COURT

Provincial Insolvency Application No. 1 of 1938

March 10, 1941

BENNETT AND GHULAM HASAN, JJ.

S. HASAN ABBAS ALI KHAN *alias* PEARE SAHEB—APPLICANT

versus

MR ABDUL RAHMAN, THE OFFICIAL RECEIVER, S. C. CT.—OPPOSITE PARTY

Provincial Insolvency Act (V of 1920), ss. 43, 27—Insolvency Court specifying period of one year within which to apply for discharge—Order challenged by way of appeal and revision to High Court—High Court's order and that of Insolvency Court, is final—Limitation for application of discharge runs from such final order—Time originally fixed under s. 27 for application for discharge—If can be extended after its expiry but before order of annulment.

The order of the Insolvency Court specifying the period of one year within which an application for discharge was to be made is not a final order when the same was challenged originally by way of an appeal to the District Judge and later by a revision petition to the High Court. In such a case the order passed by the High Court in revision must be deemed in law to be the final order, furnishing the starting point of the limitation for an application of discharge. In this respect no distinction can be drawn between orders and decrees passed under the Civil P. C., and an order passed under the provisions of the Prov. Insol. Act specifying the time within which an insolvent must apply for discharge.

[Case-law referred to.]

A Court has jurisdiction to extend the time originally fixed under s. 27 of the Prov. Insol Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under s. 43 of the Act. 174

Ind. Cas. 607 (6), followed. 105 Ind. Cas. 912 (1), held Overruled.

Prov. Insol. App. of the order of the District Judge of Lucknow, dated April 9, 1938.

Mr. *Habib Ali Khan*, for the Applicant.

Order.—This is an application made under the first proviso to s. 75 of the Prov. Insol. Act and arises out of an appellate order passed by the District Judge of Lucknow upholding the order of the Small Cause Court Judge sitting on the Insolvency side. The order in question was one of annulment of an order of adjudication on account of the insolvent's failure to file an application for discharge within the time fixed by the Court.

The facts are that the applicant applied for insolvency on April 18, 1933, and was adjudged an insolvent on February 7, 1935. The debts in the application were shown to be Rs. 12,069. The learned Judge on the Insolvency side ordered that the applicant should pay Rs. 100 per mensem towards his debt. None of the creditors came forward to prove his debt except one, who tendered proof of a debt of Rs. 136 due to him from the insolvent on March 7, 1935. The applicant appealed against the order directing him to pay Rs. 100 per mensem to the District Judge but his appeal was dismissed. The matter was carried further in revision to this Court and a Bench of this Court set aside the order about the payment of Rs. 100 per mensem by the insolvent on February 19, 1937. The time for filing an application for discharge expired on February 7, 1936, when the insolvent's revision application was pending in this Court. The applicant applied for discharge on February 27, 1937, in which he stated that the unpaid debts amounted to Rs. 2,465 only out of the original debts of Rs. 12,069 shown in the application. On the same date the applicant also applied under s. 27 of the Prov. Insol. Act for an extension of time on the ground that the applicant had been busy in conducting his appeal to the District Judge and the revision in this Court against the order directing him to pay Rs. 100 per mensem. The applicant further stated that he was under a *bona fide* impression that the application for discharge would be premature till the Appellate Courts had passed order upon his appeal and the revision application. The learned Judge on the Insolvency side disposed of both the applications by a single order, refused the application for extension of time and passed an order annulling the adjudication under s. 43 of the Prov. Insol Act. Reliance was placed in support of its decision on *Amjad Ali* v. *Muhammad Ali* (4 O. W. N. 993) (1), where it was held that the provisions of s. 43 are mandatory and a Court is not free to enlarge the time fixed after the expiry of the period.

The learned District Judge in appeal held that the time of one year limited for discharge must be reckoned from the date of the original order of adjudication and cannot be reckoned from February 19, 1937, the date of the order passed by a Bench of this Court in revision. As regards the power to extend time under s. 27 of the Prov. Insol. Act the learned District Judge held that although a Court had the power to extend the time even after the expiry of the period fixed in the order of discharge, yet upon the merits of the matter he did not wish to interfere with the order of the Insolvency Judge refusing to extend the time and passed an order of annulment of adjudication as the insolvent, although possessed of sufficient means, had not paid anything to the creditors since he was declared insolvent.

The insolvent has now come up to this Court and it has been argued on behalf of the applicant that the order passed by the lower Courts is not according to law The Official Receiver has not appeared in this Court to support the order of the lower Appellate Court.

The first point that arises for determination is whether the period of one year specified in the order of discharge should be reckoned from February 7 1935, the date of the order, or from February 19, 1937, the final order, of the Bench in revision. We are of opinion that the order of the Insolvency Court specifying the period of one year within which an application for discharge was to be made was not a final order as the same was challenged originally by way of an appeal to the District Judge and later by a revision petition to this Court. In the circumstances it is the final order passed by the Bench on February 19, 1937, which should be deemed in law to furnish the starting point of the limitation for an application of discharge. In *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (I. L. R. 11 All., 267) (2) it was held by a Full Bench of the Allahabad High

(1) 4 O W N 993; 105 Ind. Cas 912 2 Luck. 757; A I R 1927 Oudh 506.

(2) 11 A 267; A W N 1889, 55; 13 Ind. Jur. 427 (F B).

Court that the effect of s. 579—O. XLI, r. 35 of the present Civil P. C., is to cause the decree of the Appellate Court to supersede the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it. Order XLII, r. 1 of the Civil P. C. makes the provisions of O. XLI applicable to appeals from appellate decrees. In *Raja Sashikanta Acharyya* v. *Raja Sarat Chandra Rai Chaudhuri* (34 Cal. L. J. 415) (3) the learned Judges observed:—

"If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the Appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes, both the decrees cannot exist simultaneously. The balance of judicial opinion is in favour of the view that when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree."

Their Lordships of the Judicial Committee in *Jowad Husain* v. *Gendan Singh* (L. R. 53 I. A., 197) (4) in a case of mortgage held that where there has been an appeal from a preliminary mortgage-decree under O. XXXIV, r. 4, sub-r. 1, and the Appellate Court has not extended the time for payment, the period of three years within which, under the Indian Lim. Act, 1908, Sch I, Art. 181, an application for a final decree under O. XXXIV, r. 5, sub-r. 2, must be made runs from the date of the decree of the Appellate Court, and not from the expiry of the time for payment fixed by the preliminary decree.

This view was confirmed by their Lordships of the Privy Council in another case, *Fitzholmes* v. *Bank of Upper India, Ltd.* (L. R. 54 I. A. 52) (5). It was held in the latter case that the jurisdiction of the Appellate Court in the appeal is not affected by the Lim. Act.

The learned District Judge has sought to draw a distinction between orders and decrees passed under the Civil P. C. and an order passed under the provisions of the Provi. Insol. Act specifying the time within which an insolvent must apply for discharge. We are of opinion that the principle enunciated in the above decisions is one of universal application and cannot be held to exclude from its purview orders passed under the Provi. Insol. Act. In this view of the matter the application for discharge was perfectly within time and the order passed by the Court below must therefore be set aside.

As regards the second point whether the Insolvency Court had the jurisdiction to extend time under s. 27 of the Provi. Insol. Act even after the expiry of the period originally fixed in the order of discharge the matter is now concluded by a Full Bench decision of this Court in *Sheikh Fazal Azim* v. *Rana Umanath Bakhsh Singh*, (1938 O. A. 263, F. B.) (6) where it was held, overruling the decision in 4 O. W. N., 993 (1) relied upon by the Insolvency Court, that a Court has jurisdiction to extend the time originally under s. 27 of the Provi. Insol. Act for an application by the debtor for discharge, after expiry of that time but before an order of annulment is passed under s. 43 of the Provi. Insol. Act. This point appears to have been conceded by the learned District Judge. In the view which we have taken no question of extension of time to the applicant for applying for discharge really arises, though we have no doubt whatever that we should be perfectly prepared to extend the time to the applicant upon the facts of this case. The applicant has filed an affidavit, which has not been rebutted by the Official Receiver, that a substantial portion of his debts has been paid off by the sale of certain property and that only a debt of Rs. 2,465 remains unpaid. We further find that only one creditor came forward to prove a debt of Rs. 136 only and this debt we understand has not yet been paid.

We allow the application, reverse the order of the learned District Judge and grant an order of discharge to the applicant subject to the condition that he shall pay up the debt of Rs. 136 due to the creditor concerned within two months from to-day. No order as to costs.

S. *Application allowed.*

(3) 34 C L J 415; 70 Ind. Cas. 6; A I R 1921 Cal. 699.

(4) 53 I A 197; 98 Ind. Cas. 499 (2); A I R 1926 P C 93; 24 A L J 765; 7 P L T 575; (1926) M W N 591; 44 C L J 63; 3 O W N 690; 24 L W 394; 6 Pat. 4; 28 Bom. L R 1395; 31 C W N 58; 51 M L J 781 (P C).

(5) 54 I A 52; 100 Ind. Cas. 22; A I R 1927 P C 25; 25 A L J 78; (1927) M W N 87, 38 M L T 46; 4 O W N 181; 52 M L J 366; 28 P L R 117; 31 C W N 444; 45 C L J 297; 25 L W 722; 29 Bom. L R 782; 8 P L T 577; 8 L 253 (P C).

(6) 1938 O A 263; 174 Ind. Cas. 607; 1938 O W N 377; 10 R O 260; 1938 O L R 196; A I R 1938 Oudh 122; 14 Luck. 40 (F B).

BOMBAY HIGH COURT

Notice of Motion in Suit No. 1126 of 1940

August 27, 1940

KANIA, J.

SUKHANANDAN RAMDHIN AND OTHERS—PLAINTIFFS

versus

MANIKLAL KANHIALAL FIRM—DEFENDANTS

Contract—Pakka adatya—*Forward contract—Held, that suit by constituent against* pakka adatya *was for unpaid claim and fell within bye-law* 38 *of the East India Cotton Association*

There was an initial sale of 200 bales of cotton by the defendant who was *pakka adatya*, for the plaintiff and a contract note dated November 6, 1939, was sent by the defendant to the plaintiff and signed by the plaintiff. Thereafter, owing to fluctuations in the market, the defendant demanded margin money but the plaintiff failed to pay the same. Thereupon the defendant closed the transaction on February 3, 1940 On receipt of intimation thereof the plaintiff repudiated this closing transaction. The defendant thereupon offered to resell, if the margin, as demanded, was paid. To that there was no reply. The defendant thereupon sent a contract note with his letter of February 6, 1940, to the plaintiff. The plaintiff retained the same. On March 19, 1940, the plaintiff sent a telegram to the defendant as follows: "Kindly settle 200 bales cotton; *vide* your contract note C. 694 purchasing market price to-day wire settlement." The defendants sent a reply intimating that the purchase had already been effected on February 3, under contract No. 1553 which was already sent and there was no outstanding business. Contract note No. C. 694 was the contract dated November 6, 1939. The plaintiff then filed a suit to recover the amount due to them on the footing of the difference between the price noted in the contract, dated November 6, 1939, and the current price in the market on March 19, 1940:

Held, that the suit was in respect of an unpaid claim in relation to the contract dated November 6, 1939, and clearly fell within the words of bye-law 38 as of the East India Cotton Association, Ltd, subject to which the contract note dated November 6, 1939, was accepted by the plaintiff.

Mr. *M. C. Setalvad*, Advocate-General, for the Plaintiffs.

Sir *Jamshedji Kanga*, for the Defendants.

Order.—This is a motion for the stay of this suit on the ground that the matter should be referred to arbitration. The dispute between the parties arises out of a transaction in cotton. It is admitted that there was an initial sale of 200 bales of cotton and a contract note dated November 6, 1939, was sent by the defendants to the plaintiffs and signed by the plaintiffs. Thereafter, owing to fluctuations in the market, the defendants demanded margin money but the plaintiffs failed to pay the same. Thereupon the defendants closed the transaction on February 3, 1940. On receipt of intimation thereof the plaintiffs repudiated this closing transaction. The defendants thereupon offered to resell, if the margin, as demanded, was paid. To that there was no reply. The defendants thereupon sent a contract note with their letter of February 6, 1940, to the plaintiffs. The plaintiffs retained the same with them. On February 20, 1940, the defendants sent a statement of account showing the balance due by them to the plaintiffs, and requested the plaintiffs to draw up a *hundi* for that balance. No reply was sent by the plaintiffs to that letter and no dispute was raised at that stage. On March 19, 1940, the plaintiffs sent a telegram to the defendants as follows: "Kindly settle 200 bales cotton; *vide* your contract note C. 694 purchasing market price to-day wire settlement."

The defendants sent a reply intimating that the purchase had already been effected on February 3, under contract No. 1553 which was already sent and there was no outstanding business. It is common ground that contract note No. C. 694 is the contract dated November 6, 1939. The plaintiffs then filed this suit to recover the amount due to them on the footing of the difference between the price noted in the contract, dated November 6, 1939, and the current price in the market on March 19, 1940. The defendants have appeared under protest and now apply for a stay of the suit. In the affidavit in reply the plaintiffs took a point about the defendants submitting to the jurisdiction of the Court. That is given up. The only point which is argued is that the dispute between the parties is in respect of the closing contract which is not signed and therefore there is no written submission to arbitration. In my opinion that is a misstatement of the true facts. The plaintiffs' contention is that by the contract dated November 6, 1939, they had sold through the defendants 200 bales. When they instructed the defendants to purchase those bales they wrongfully refused to do so. They therefore claim damages between the contract price mentioned in the contract note dated November 6, 1939, and the prevailing market rate on March 19, 1940. This claim in my opinion clearly falls within the words of bye law 38 of the East India Cotton Association Ltd., subject to which the contract note dated November 6, 1939, was accepted by the plaintiffs. The words "all unpaid claims whether admitted or not .... arising out of or in relation to contracts made subject to these bye-laws", etc. of Bye-law 38 are wide enough to cover

the dispute in suit. It is nobody's case that instructions were given for the closing of this transaction which were carried out and the dispute is in respect of such closing. The defendants purported to close the transaction on the footing of the plaintiffs' failure to pay the margin money as they were bound to do. The plaintiff's case is that the defendants wrongfully refused to purchase and close the outstanding transaction. In either view of the matter therefore the case is in respect of an unpaid claim in relation to the contract dated November 6, 1939. The notice of motion is therefore made absolute with costs and the suit is stayed as prayed.

S. *Order accordingly.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 420 of 1940

February 11, 1941

MANOHAR LALL, J.

RAMGOBIND SAHU—APPELLANT

versus

MOSO DHOBI AND OTHERS—RESPONDENTS

Second appeal—Rent suit—Finding of lower Courts that plaintiff was unable to prove rate of rent—No interference in second appeal—Landlord and tenant—Rent—Suit for, on ground that rent was settled—No declaration that land was liable to assessment sought—Failure to prove settlement—Suit cannot be tried as for declaration.

The High Court cannot interfere in second appeal with the conclusion which has been arrived at by the Courts of fact, that the plaintiff in the rent suit has been unable to prove the rate of rent which is payable by the defendants, although the reasoning of such Courts in rejecting the documents filed by the plaintiff are not quite satisfactory

Where in a suit for rent the plaintiff has not sought for a declaration that the land was liable to fair and equitable assessment, but on the other hand it is asserted that the land has been settled at certain amount per annum, with the defendants, on the story of that settlement having failed the suit cannot be allowed to be tried as a suit for declaration that the land was liable to be assessed for rent.

A. from a decision of the District Judge of Darbhanga, dated March 19, 1940.

Mr. *K. N. Lall*, for the Appellant.

Mr. *S. C. Mazumdar*, for the Respondents.

Manohar Lall, J.—The plaintiff instituted Rent Suit No. 3230 of 1935 to recover rent due for the years 1339 to 1342 in respect of certain piece of *gairmazrua* land in the occupation of the defendants claiming rent at the rate of Rs. 7-2-0 per annum. The defence was that the land was rent-free, that they never paid any rent to the *maliks* nor did the *maliks* ever realise any such rent. The defence set up has been negatived. The Courts below have given good reasons for holding that it is impossible to believe that the land which is in Dalsinghsarai Bazar should be treated to be rent-free upon the materials put forward by the respondents.

But the Courts below dismissed the suit on the finding that there was no sufficient evidence as to when the land was assessed with rent and how much was the rent payable. It may be remarked that it was not necessary to find out the origin of the tenancy if evidence was sufficient to show the amount of rent payable for this land. The Courts below have, however, refused to place reliance upon the documentary evidence produced by the plaintiff and have held that the evidence of the plaintiff is insufficient to show that the defendants agreed to pay Rs. 7-2-0 as rent to the plaintiff. The trial Court has pointed out among other things that no village papers of the other co-sharer landlord has been produced and this was a remarkable fact considering that the case came up for hearing after setting aside the *ex parte* decree which had been fraudulently obtained by the plaintiff. It is true that the reasonings of the Courts of fact are not quite satisfactory when they have rejected the documents filed by the plaintiffs as manufactured, but be that as it may this Court cannot interfere in second appeal with the conclusion which has been arrived at by the Courts of fact. That conclusion is that the plaintiff has been unable to prove the rate of rent which is payable by the defendants.

It was then argued strenuously by the learned Advocate for the appellant that the suit should be remanded in order to decide what would be the damages properly payable to the appellant for the use and occupation of the land by the defendant for the the years in suit and he relied upon two cases of this Court, namely, *Jai Narayan Mandar* v. *Kuleswar Singh* (1) and *Maharajadhiraj Sir Kameshwar Singh Bahadur* v. *Sheikh Sakhawat Ali* (2), in support of his contention. But in both these cases the suits were instituted for assessment of fair and equitable rent after a declaration that the land was liable to assessment

(1) 10 P L T 226; 117 Ind. Cas. 45; A I R 1929 Pat. 233; Ind. Rul. (1929) Pat 365.

(2) 17 P L T 819; 167 Ind. Cas. 238; A I R 1937 Pat. 96; 3 B R 283; 9 R P 396.

as such. The present case is wholly different. No declaration is sought for here, but on the other hand it was asserted that the land has been settled at Rs. 7-2 0 per annum with the defendants. The story of that settlement having failed it is impossible to allow this suit to be tried as a suit for declaration that the land was liable to be assessed for rent. This land has never been treated as *kabil lagan*, on the other hand the plaintiff treated it as always bearing a rental.

For these reasons the appeal fails and is dismissed. But as the case of the defendants was that the land was rent free and that case has been found to be false, I order that each party should bear his own costs throughout.

S. *Appeal dismissed.*

LAHORE HIGH COURT

Second Appeal No. 380 of 1940
October 3, 1940
BHIDE, J.
ATA MOHAMMAD—DEFENDANT—APPELLANT
versus
LACHHMAN DAS AND ANOTHER—PLAINTIFF—RESPONDENTS

Estoppel—Bond payable in certain instalments—Suit by plaintiff on default of two instalments—Suit compromised and decree for two instalments passed—In a subsequent suit by plaintiff, defendant claiming that full consideration for bond had not been paid—Defendant's plea held not barred by compromise decree in previous suit.

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise, must depend upon the answer to the question: 'Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree.' 9 Ind. Cas. 875 (3), relied on.

The original bond was payable in ten annual instalments. The plaintiff instituted a suit for recovery of certain sum when two instalments remained unpaid This suit was compromised and the plaintiff was granted a decree for the full amount and costs. The parties had come to an agreement that a decree for the two instalments should be passed, but that no further claim should be made by the plaintiff without going into the accounts relating to the balance. In a subsequent suit by plaintiff it was pleaded by the defendant *inter alia* that the full consideration for the bond had not been paid:

Held, that the compromise decree was merely confined to the two instalments which were in dispute in the previous suit. The decree could not, therefore, be considered to be tantamount to an admission that full consideration had been paid for the bond. Therefore, the consent decree in the previous suit was not a bar to the pleas raised by the defendant in the subsequent suit. 24 Ind. Cas. 931 (1), 157 Ind. Cas. 749 (2), distinguished.

S, A. from the decree of the District Judge, Multan dated December 8, 1939.

Malik *Barkat Ali*, for the Appellant.

Mr. *Mela Ram Agarwal*, for the Respondents.

Judgment.—This is a second appeal arising out of a suit for recovery Rs. 1,359-9-0 on the basis of a bond. The original bond was for Rs. 9,762 and it was payable in ten annual instalments. The plaintiff instituted a suit for recovery of Rs. 2,385-10-0 when two instalments remained unpaid. This suit was compromised on August 22 1935 and the plaintiff was granted a decree for the full amount and costs. Subsequently the present suit was instituted on August 28, 1936. It was pleaded by the defendant *inter alia* that full consideration for the bond had not been paid. The plaintiff contended in reply that it was not open to the defendant to take up this plea in view of the compromise decree passed in the previous suit. The trial Court granted a decree for Rs. 1,359 9 0. On appeal the learned District Judge remanded the case for trial of additional issues with respect to the question whether the consent decree in the previous case was a bar to pleas raised by the defendant in the present cese. These additional issues were as follows:

"(1). Did the consent decree in the previous case debar the defendant from raising the question of consideration and interest in the present case?

(2) If the former issue is found in favour of the defendant, was the bond for consideration?"

The trial Court gave findings against the plaintiff on both these issues. The learned District Judge, however, confined himself to the first of these issues and held that the consent decree was a bar to the pleas raised by the defendant and therefore it was unnecessary to go into the question whether consideration for the bond had been fully paid. He further held that the plaintiff was not entitled to any costs or interest inasmuch as he had failed to comply with the provisions of the Punjab Regulation of Accounts Act. Accordingly he granted the plaintiff a decree for the principal sum only, *viz.* Rs. 1,000. From this decision the present appeal has been preferred. The main point which has been agitated before me is whether the learned District Judge was right in holding that the consent decree in the previous suit was a bar to the pleas raised by the defendant. The defendant's conten-

tion was that in the previous suit the parties had come to an agreement that a decree for the two instalments should be passed, but that no further claim should be made by the plaintiff without going into the accounts relating to the balance. The learned District Judge has remarked that no such plea was raised by the defendant at first; but this does not appear to me to be correct, because in the written statement filed in this suit, it was stated that the parties had agreed at the time of the compromise in the previous suit that accounts would be gone into. It may also be mentioned here that in the written statement filed in the previous suit it was pleaded by the defendant that the consideration had not been fully paid. It cannot therefore be said that this plea is a mere afterthought.

The sole point therefore is whether according to the law it was open to the defendant to raise the plea of want of consideration in spite of the compromise in the previous suit. The learned Counsel for the plaintiff-respondent relied on *Gobind Lal* v. *Rao Baldeo Singh* (1) and *Shamsul Nisa* v. *Mohammad Jafar* (2) in support of the view taken by the learned District Judge, but these rulings appear to me to be clearly distinguishable. In the first case the defendant appeared at first and took an adjournment for effecting a compromise but subsequently he failed to appear with the result that an *ex parte* decree was passed against him. In these circumstances it was held that s. 11. Expln. 4 Civil P. C., applied, and the pleas which could have been set up by the defendant in the previous suit could not be reagitated in the subsequent suit. In the second case also, the question of custom which the defendant raised was such that the claim could not have been admitted by the defendant in the previous suit if he had relied on the custom. As pointed out in *Kumara Venkata Perumal* v. *Ramaswamy* 9 *Ind. Cas.* 875 (3).

"the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend upon the answer to the question: Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree?"

(1) 12 P R 1915; 24 Ind. Cas. 931; A I R 1914 Lah. 390; 226 P L R 1914.
(2) A I R 1935 Lah. 487; 157 Ind. Cas. 749; 37 P L R 65.
(3) 9 Ind. Cas 875; 35 M 75; (1911) 1 M W N 290; 21 M L J 709; 9 M L T 487.

In the present case, the compromise decree was merely confined to the two instalments which were in dispute in the previous suit. The decree could not therefore be considered to be tantamount to an admission that full consideration had been paid for the bond. Nor can the terms of the compromise decree be said to be inconsistent with the allegation of the defendant that it was agreed at the time that the accounts would be gone into before any portion of the balance was claimed. I am therefore of opinion that the consent decree in the previous suit was not a bar to the pleas raised by the defendant in the present suit. The learned District Judge has however not gone into the merits of the pleas raised by the defendant in this connection. It is therefore necessary to remand the case to him for a decision of those pleas on merits. I accept the appeal, and setting aside the decree of the learned District Judge, remand the case to him for re-decision in the light of the above remarks. The parties are directed to appear before the learned District Judge on October 28, 1940. Costs will follow final decision.

D. *Case remanded.*

PATNA HIGH COURT

Civil Revision Application No. 286 of 1940
November 6, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

UDAI CHAND LAL—PLAINTIFF—PETITIONER

versus

FIRM PANNALAL CHAMPALAL AND OTHERS—DEFENDANTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit under r. 63 for declaration of title and injunction restraining defendant from taking possession of suit property and preventing him from taking illegal action to plaintiff's detriment falls under Sch. II, Art. 17 (1), Court Fees Act (VII of 1870).

A suit brought under O. XXI, r. 63, Civil P. C., by a claimant whose claim was rejected in proceedings under O. XXI, r. 58, for a declaration of his title and a permanent injunction restraining the defendant from taking delivery of possession of the suit property and preventing him from taking any illegal action to the detriment of the plaintiff, falls within the purview of Sch. II, Art. 17 (1); Court Fees Act and no *ad valorem* court-fee is necessary. *Bibi Phul Kumari* v. *Gansyam Misra* (1), relied on.

C. R App. from an order of the Sub-Judge, First Court, Arrah, dated May 18, 1940.

Messrs. *S. K. Mitra* and *Girindra Nath Mukherji*, for the Petitioner.

Mr. *Harians Kumar*, for the Opposite Party.

Manohar Lall, J.—This is an application on behalf of the plaintiff who instituted title suit No. 17 of 1940 for certain declarations after he was defeated in a proceeding under O. XXI, r. 58, Civil P. C. The order complained against was passed by the learned Subordinate Judge on May 18, 1940, requiring the plaintiff to pay an *ad valorem* court-fee of Rs. 1,132-8-0. The learned Subordinate Judge was of opinion that as the plaintiff sued for a declaration with injunction, both temporary and permanent, and also because it appeared to the learned Subordinate Judge on a perusal of the record of the execution case that delivery of possession had also been effected of the property mentioned in the plaint, the plaintiff must sue for recovery of possession. Hence the learned Subordinate Judge thought that court-fee *ad valorem* was payable by the plaintiff. In so doing he has completely overlooked the well-known decision of their Lordships of the Judicial Committee in *Bibi Phul Kumari* v. *Gansyam Misra* (1). The plaintiff in that case also asked for relief (*c*) as stated at p. 203*.

"that a permanent injunction may issue on the defendant first party not to execute his said decree against the said properties of the plaintiff."

Lord Robertson, in delivering the judgment of the Privy Council, expressly approved of the decision of the Bombay High Court in *Dondo Sakharam* v. *Govind Babaji* (2), in which the learned Chief Justice had held that the ruling in *Parvati* v. *Kisansingh* (3), which had always been followed in the Bombay High Court,

"shows that although the plaintiff may pray in such a suit to be awarded possession, the plaint is still to be treated as falling under Art. 17, cl. 1 of Sch. II of Act VII of 1870, and chargable with only a 10-rupee stamp."

Act VII of 1870 was the Court Fees Act in force at that time. The present Court Fees Act has a similar provision, but the duty chargable has now been raised to Rs 15. In these circumstances I think the learned Subordinate Judge was in error in construing the reliefs asked for in the present plaint and in requiring the plaintiff to pay *ad valorem* court-fees. The second relief only says that

"an order for permanent injunction be passed on he defendant first party so that no delivery of possession of he property in suit may take place and prevent them from taking any illegal action whatsoever to the detriment of the plaintiff."

It is therefore argued that the plaint in the present suit is not confined to the reliefs which can be properly granted in a suit instituted under O. XXI, r. 63, Civil P. C. But the cause of action in the plaint is stated to be the order in the claim case, passed on July 17, 1939, within the jurisdiction of the Court at Arrah. That being so, the question of the amount of court-fee is governed by the decision in *Bibi Phul Kumari* v. *Gansyam Misra* (1). The order of the learned Subordinate Judge is set aside, and he is directed to proceed with the suit from the stage at which he passed the order dated May 18, 1940. The plaintiff is entitled to the costs of this Court,—hearing-fee one gold *mohar*.

Harries, J.—I agree.

S. *Order set aside.*

(1) 35 C 202; 35 I A 22; 7 C L J 36; 12 C W N 169 (P C).
(2) 9 B 20.
(3) 6 B 567.

*Page of 35 C.—[*Ed.*]

SIND CHIEF COURT

First Appeal No. 27 of 1938
July 24, 1940
DAVIS, C. J AND LOBO, J.

SOBHOMAL THAOOMAL—
APPELLANT
versus
DULAHDINOMAL TILUSING—
RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 19, s. 50—Suit against father and son — Plaintiff getting money decree against father—Son awarded decree for costs against plaintiff — Son's execution application against plaintiff dismissed on ground that sum due against him as legal representative of his deceased father was larger — No enquiry under s. 50 as to extent of assets in hands of son—Dismissal held illegal —O. XXI, r. 19 held applicable.

Order XXI, r. 19, Civil P. C., applies even to a case of a claim by a defendant against a plaintiff personally and a claim by a plaintiff against the defendant as legal representative of another deceased defendant. The mere fact that there has to be some inquiry under the provisions of s. 50, Civil P. C., as to the extent of the property of the deceased in the hands of his legal representative, or that the sum may be limited by the provisions of s. 50, Civil P. C., does not remove a case out of the scope of r. 19 of O. XXI, Civil P. C.

The plaintiff in a suit against father and son obtained a money decree against the father. The son was awarded a decree for his costs. Applications for execution by the son were dismissed on the ground that the amount due to the plaintiff from the son as legal representative of his deceased father was longer. No enquiry, however, under s. 50 was made as to the extent of the deceased father's assets in the hands of the son:

Held, that the order of dismissal was illegal. The Court should have ordered an enquiry under s. 50.

Then the sum recoverable by the plaintiff from the son would be set off against the sum recoverable by the son from the plaintiff within the meaning of O. XXI, r. 19 which applied to the case. 173 Ind. Cas 574 (1) and 175 Ind. Cas 427 (2), relied on.

Held, also that the plaintiff could demand a set off and need not have filed his own execution application against the son as a legal representative of his deceased father of his money decree which the plaintiff held against the father inasmuch as the object of O. XXI, r. 19 was to avoid multiplicity of proceedings.

F. A. against the judgment and decree of the First Class Sub-Judge, Hyderabad, dated February 21, 1938.

Mr. *Dingomal Narainsing*, for the Appellant.

Mr. *Manghanmal Bhojraj*, for the Respondent.

Davis, C. J.—This is an appeal against an order passed in execution by the First Class Subordinate Judge of Hyderabad dated February 21, 1938, in which he dismissed two applications made by defendant No. 2 in the suit in which defendant No. 1 was the father of defendant No. 2 and which resulted in defendant No. 2 obtaining an order for his costs in the trial Court and an order for his costs in the Appellant Court against the plaintiff. The plaintiff on the other hand, got a money decree against defendant No. 1, whose legal representative defendant No. 2 now is, and, indeed, defendant No. 2 is on the record as the legal representative of defendant No. 1. The decree which the plaintiff obtained against defendant No. 1 was for a sum of money, that is to say, his decree was a money decree and within the terms of s. 50, Civil P. C., he is entitled to execute that decree against defendant No. 2 as the legal representative of defendant No. 1 to the extent of the property of defendant No. 1 which has come to his hands and has not been duly disposed of. But the learned Judge seemed to assume that because the sum of money to be recovered by the plaintiff under the decree was greater than the sum of money to be recovered by defendant No. 2 on account of the costs, the application of defendant No. 2 on account of his costs should be dismissed. But we do not think that this would be the case until there had been an inquiry as to the extent of the property of the deceased defendant No. 1 in the hands of defendant No. 2 within the meaning of s. 50, Civil P. C., and if the value of that property did exceed the sum which defendant No. 2 was entitled to recover by way of costs from the plaintiffs, then rightly, the applications of defendant No. 2 would be dismissed. But no inquiry was held and we do not think it is a matter of presumption that merely because a plaintiff seeks to execute a decree against the legal representatives of a defendant, that legal representative has sufficient property of the deceased in his hands to satisfy the decree. Therefore, it would appear that the Judge, instead of dismissing the applications of defendant No. 2 for costs, should have ordered an inquiry as to the extent of the property of the deceased defendant No. 1, in the hands of defendant No. 2 within the meaning of s. 50, Civil P. C., against which the plaintiff could execute his decree. Then the sum recoverable by the plaintiff from defendant No. 2 would be set off against the sum recoverable by defendant No. 2 from the plaintiff within the meaning of O. XXI, r. 19, Civil P. C.

It was argued that O. XXI, r. 19 could not apply to a case such as this, to a claim by a defendant against a plaintiff personally and a claim by a plaintiff against the defendant as legal representative of another deceased defendant, but there is nothing, we think, in r. 19 of O. XXI to exclude its application in a case of this nature. Cases cited to us, for instance, that in *Nonibai* v. *Jethanand* (1), and in *Gurushantappa Shankerappa Umbarje* v. *Nangappa Bandappa Kadadi* (2), relating to rr. 18 and 19, show that this rule is not to be interpreted in a narrow and restricted manner; that it is not exhaustive and must be applied on equitable principles, and we do not think that it would not apply, for instance, in a case such as this merely because there has to be some inquiry under the provisions of s. 50, Civil P. C., as to the extent of the property of the deceased in the hands of his legal representative. Rule 19 of O. XXI, Civil P. C., refers to sums of money and it is said, therefore, that there is no room for inquiry under s. 50, Civil P. C., for the sum of money must be a certain sum ascertainable at once from the decree. But in this case the plaintiff is entitled to recover a sum of money under the decree from the legal representative of defendant No. 1, that is to say, from defendant No. 2, and *prima facie* he is entitled to recover from de-

(1) 32 S L R 162; 173 Ind. Cas. 574; A I R 1938 Sind 31; 10 R S 218.

(2) I L R (1938) Bom. 263; 175 Ind. Cas. 427; A I R 1938 Bom. 253; 40 Bom. L R 188; 10 R B 560.

fendant No. 2 the sum decreed to be recovered by the plaintiff from defendant No. 1. The fact that the sum may be limited by the provisions of s. 50, Civil P. C., does not appear to us to remove a case such as this out of the scope of r. 19 of O. XXI, Civil P. C.

It has been suggested to us that the plaintiff, instead of demanding a set-off should have filed his own execution application against defendant No. 2 as a legal representative of defendant No. 1 of the money decree which the plaintiff held against defendant No. 1, but to accept this suggestion would be to encurage multiplicity of proceedings which we think, r. 19 of O. XXI is, among other things, intended to avoid. We think the Judge is wrong when he dismissed the execution applications of defendant No. 2 on the assumption that he had in his hands sufficient property of the deceased to meet a claim of the plaintiff. He should, we think, have held an inquiry as to the extent of the property of the deceased in the hands of defendant No. 2 within the meaning of s. 50, Civil P. C., and if he had then found that the extent of that property and its value was greater than the sum claimed by defendant No. 2 in execution, he would have dismissed the execution applications of defendant No. 2, because the plaintiff was entitled to recover a larger sum from defendant No. 2 as legal representative than defendant No. 2 was entitled to recover from the plaintiff. But if on enquiry it was found that the extent of the property of defendant No. 1 in the hands of defendant No. 2 was less than the sum which defendant No. 2 was entitled to recover under the decree, then clearly there would be a balance in favour of defendant No. 2 which he would be entitled to recover from the plaintiff.

We think, therefore, that the order of the learned Judge must be set aside and that before he can pass an order dismissing the defendant's execution applications, he must hold an inquiry as to the extent of the property of the deceased in the hands of defendant No. 2 within the meaning of s. 50, Civil P. C., and dispose of these execution applications including any other objections already raised by the decree-holder in these execution applications according to law. We think in the circumstances of the case there should be no order as to costs. Order accordingly.

D. *Order accordingly.*

ALLAHABAD HIGH COURT

Second Appeal No. 1722 of 1937
January 11, 1940
THOM, C. J.

BADRI LONIA AND OTHERS—DEFENDANTS—APPELLANTS
versus
Pandit DWARKA PRASAD RAM SHUKLA—PLAINTIFF—RESPONDENT

Landlord and tenant—Ryot, *if can build house on parti land in front of his house.*

A *ryot* is not entitled to build a residential house upon the *parti* land in front of the existing house. 146 Ind. Cas. 736 (1), relied on.

S. A. from the decision of the Additional Civil Judge, Gorakhpur, dated March 15, 1937.

Mr. *K. L. Misra*, for the Appellants.

Mr. *A. P. Pandey*, for the Respondent.

Judgment. — This is a defendant's appeal arising out of a suit in which the plaintiff who is a *zamindar* seeks an order for the demolition of a house which has been erected upon *parti* land in front of the defendant's house. The main defence to the suit was that the house had been erected by the defendant with the implied permission of the *zamindar* who had acquiesced in the construction. This defence has not been sustained in the lower Appellate Court. Upon a consideration of the evidence the learned Civil Judge has reached the conclusion that far from acquiescing in the construction of the house the plaintiff took active steps to prevent the construction being completed.

It was contended in appeal however that under the provisions of the Tenancy Act of 1939 a defendant who is a *ryot* in the village in which his house is situated was entitled to build a residential house upon the *parti* land in front of the existing house. In support of this contention learned Counsel for the appellant referred to the definition of "improvement" in that Act. "Improvement" in reference to a tenant's holding is defined in the Act as

"a dwelling house erected on the holding by the tenant for his own occupation or a cattle shed or a store house or any other construction for agricultural purposes erected or set up by him on his holding."

Holding is defined as

"a parcel or parcels of land held under one lease

engagement or grant, or in the absence of such lease, engagement or grant under one tenure and in the case of a *thekadar* includes the *theka* are."

"Land" is defined as

"land which is let or held for growing of crops, or as groveland or for pasturage. It includes land covered by water used for the purpose of growing *singhara* or other produce, but does not include land for the time being occupied by buildings or appurtenant thereto other than buildings which are improvements."

Now the house which has been erected by the defendant is built in land which is within the *abadi* of the village. It has not been built upon the defendant's holding. The law therefore with regard to the tenant's right to construct buildings in the *abadi* is not altered by the provisions of the 1939 Tenancy Act. It is well settled that a *ryot* may not build a dwelling house on the *sahan* in front of his house: *see Ratan Barhai* v. *Kishen Dei* (1). The finding that the house built by the defendant is a new structure and that the plaintiff did not acquiesce in its construction is sufficient for the disposal of this appeal. In the result the appeal is dismissed with costs.

S. *Appeal dismissed.*

(1) (1933) A L J 56; 146 Ind. Cas. 736; A I R 1933 All. 288; 55 A 204; 17 R D 141; L R 14 A 104 Rev.; 6 R A 334.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 181/69 of 1939

November 4, 1940

ALMOMD, J. C. AND MIR AHMED, J.

ISLAMUDDIN JUMMA DIN—PLAINTIFF—APPELLANT

versus

FIRM JIWA SHAH RAM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS

Registration Act (XVI of 1908), s. 17 (1), Proviso and s. 17 (1) (d)—Punjab Government Notification No. 29 of July 4, 1888—The word "reserve"—Meaning explained.

The word "reserve" in s. 17 (1) (*d*), Regis. Act, and also in the Punjab Govt Notification No 29 of July 4, 1888, is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee and in common parlance it is equivalent to the word "fix".

C. A. from an order of the Additional District Judge, Peshawar, dated October 26, 1939.

Mr. *Ganesha Khan*, for the Appellant.

Lala *Lal Chand*, for Respondent No. 1.

Mir Ahmed, J.—Firm Jiwan Shah Ram Chand obtained a decree for Rs. 647-8-0 with costs against Roidar and Abdul Manaf on June 28, 1938 and in execution of that decree proceeded to attach standing crops of the land belonging to the judgment-debtors. Islamuddin objected that the land of the judgment debtors had been leased to him by two lease deeds dated April 14, 1938, and May 6, 1938. The objection was dismissed. Islamuddin therefore brought the present suit for a declaration that the land belonging to the judgment-debtors was under lease to him and that therefore he was the owner of the crops standing thereon. The decree-holder pleaded that the documents on the basis of which the plaintiff claimed his rights were inadmissible in evidence, because they were not registered. The trial Judge did not frame any issue on the point of registration. He granted a decree to the plaintiff as prayed for. An appeal was preferred by the decree-holder to the District Court at Peshawar. The Additional Judge who heard the appeal was of the view that the two documents required registration. He also incidentally remarked that the lease deeds were not acted upon. He accepted the appeal and dismissed the suit.

Islamuddin has come up on further appeal to this Court. We would first give a description of the two lease deeds. By the first lease deed dated April 14, 1938. Roidar leased 40 *kanals* of land for two years to Islamuddin. The yearly rent was fixed at Rs. 75. It was mentioned in the document that the lessor had received one year's rent in advance which was to be taken as the rent for the second year, and that he would receive the rent for the first year after the expiry of that year. By the document dated May 6, 1938, Abdul Manaf leased 32 *kanals* of land at a rent of Rs. 96 a year for three years. He admitted in the document that he had received the sum of Rs. 288, the rent for three years, in advance.

Counsel for the appellant has admitted that the two documents on which he bases his title would require registration under s. 17 (1) (*d*), Regis. Act. He however, takes refuge under a notification of the Punjab Govt. issued as No. 29 of July 4, 1888. It was issued under the proviso to s. 17 of Act VIII of 1871 and exempted from registration agricultural leases the terms granted by which did not exceed five years and the annual rents reserved by which did not exceed Rs. 50. We may reproduce the proviso for facility of reference below:

"Provided that the Local Govt. may by order

published in the *Official Gazette* exempt from the operation of the former part of this section any leases executed in any district or part of a district the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed Rs. 50."

The proviso to s. 17 (1) of Act XVI of 1908 which is now in force is practically to the same effect. It may be noted that by operation of s. 25, General Clauses Act, the notification will hold good under the new Act also and although this Province has been separated from the Punjab the notification has the force of law in the N. W. F. P. by virtue of s. 6 of the N. W. F. P. Law and Justice Regulation VII of 1901. Now we have to see whether the lease deeds are covered by the exemption contained in the notification and were therefore wrongly considered by the lower Appellate Judge to be inadmissible in evidence. The terms of the two leases are no doubt less than five years. The rent in one case is however Rs. 75 a year and in the other Rs. 96 a year. *Prima facie* the rent being more than Rs. 50 the exemption would not apply.

The learned Counsel for the appellant has urged that the word "reserve" does not necessarily mean "fix." He quoted two rulings in support of this proposition. One of them is *Gopalasami Naidu* v. *Lakhmi Ammal* (1). In this case the term of lease was three years. It was stipulated that in the third year the lessor would receive Rs. 400 from the lessee. It was held by a single Judge that no annual rent was "reserved" within the meaning of the exemption and therefore the document was not compulsorily registrable. It may be noted that the notification in Madras is similar to that made by the Punjab. It is obvious that this ruling has no application to the case before us. In the second case reported in *Mengh Raj* v. *Nand Lal* (2), a tenancy at will was created, that is to say the tenancy was terminable at the will of the landlord. Rent was however fixed and a period for the lease was also specified. It was held that there was no reservation of annual rent in the sense in which it was contemplated by the notification. In the present case no such power of cancellation has been given to the lessor and this ruling also has no bearing on the point. The word "reservation" has been defined in Wharton's Law Lexicon, 10th Edn., by J. M. Lely as "a keeping aside or providing." Again in Halsbury's Laws of England, Vol. 18, p. 427, note 887 the term reservation has been defined as follows:

"The term 'reservation' may be used in a wide sense as meaning any benefit in respect of the subject-matter of the grant which is kept by the grantor for himself. Thus, it may imply a keeping back of a physical part of the thing, in which case it is equivalent to an exception, and accordingly, when the context requires it, the word 'reserving' is construed as making an exception; or the word may imply that the grantor reserves to himself some equivalant for the use of the land, such as rent or services in the nature of the rent, and this is the only meaning of 'reservation' when used in its strict legal sense."

It is manifest that the word "reserve" in s. 17 (1) (*d*), Regis. Act, and also in the notification is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee and in common parlance it is equivalent to the word "fix." We therefore arrive at the conclusion that the exemption contained in the notification of 1908 does not apply to the documents before us. It follows that the lower Appellate Judge has rightly held that the documents are inadmissible in evidence and the suit has been correctly dismissed. We dismiss the appeal with costs.

D. *Appeal dismissed.*

(1) A I R 1935 Mad. 305 (1); 156 Ind. Cas. 825; 41 L W 351; (1935) M W N 605 (1); 8 R M 57.

(2) A I R 1939 Lah. 558; 186 Ind. Cas. 106; 41 P L R 646; 12 R L 363.

MADRAS HIGH COURT

Civil Revision Petition No. 550 of 1937

July 22, 1940

WADSWORTH, J.

MAYANDI VENKATESA MUDALI AND ANOTHER—PETITIONERS

versus

KONNE DESAPPA MUDALI—RESPONDENT

Provincial Insolvency Act (V of 1920), s. 6 (e)—Sale of debtor's property in execution of decree for rent, if act of insolvency.

Sale of property which is vested in the debtor and is in his physical possession, in execution of decree for arrears of rent under Mad Estates Land Act, operates as an act of insolvency under s. 6 (*e*), Prov. Insol. Act. 115 Ind. Cas. 356 (1), distinguished.

C. R. P. to revise the order of the District Court, Chittoor, dated December 4, 1936.

Mr. *S. Ramanujachariar*, for the Petitioners.

Mr. *D. Ramaswami Iyengar*, for the Respondent.

Order.—The question is whether the sale of the appellant's property for arrears of rent under the Mad. Estates Land Act operates as an act of insolvency under s. 6 (*e*),

Prov. Insol. Act. It seems to me clear that the decree for rent is a decree for the payment of money notwithstanding the fact that the rent is charged on the holding. The decree in question was passed before the appointment of the *ad interim* Receiver in the previous insolvency. At the time of the sale the Receiver was apparently not in possession though he had been appointed. The property therefore not only vested in the debtor but was in his physical possession and there was nothing except his poverty to prevent him from paying the rent. The property was certainly "his property" within the terms of s 6 (e), Prov. Insol. Act. The case reported in *Lachmi Chand* v. *Bipin Behari Ghose* (1), has no application for in that case there had been an adjudication and the property no longer vested in the debtor. The view taken by the Court below is correct and the petition is dismissed with costs.

N.-S. *Petition dismissed.*

(1) A I R 1928 Cal. 644; 115 Ind. Cas. 356; 32 C W N 716.

NAGPUR HIGH COURT

Civil Revision Application No. 645 of 1937
March 15, 1938
NIYOGI, J.

GOVINDRAM JIWANRAM—OBJECTOR—APPLICANT

versus

HARASAYA GANASAYA MARWADI—DECREE HOLDER—NON APPLICANT

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46, 47—Applicability—Stranger in possession of property in which judgment-debtor has share—R. 46, if applicable—Prohibitory order, if can be issued against stranger.

Where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, r 46 as well as r. 47 of O. XXI, Civil P C., must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. If, r. 46 were not to apply to such a case the result would be stultification of the attachment. While the judgment-debtor will have the prohibitory order served on him the property of which the transfer is forbidden will be sold with impunity by the person in whose possession it happens to be. That will defeat the very purpose of the attachment. Such a result could not be intended by the Legislature.

C. R. App. of the order of the Court of the Subordinate Judge, Second Class, Ellichpur, dated August 4, 1937.

Mr. *D. T. Mangalmorti*, for the Applicant.

Mr. *K. L. Halwe*, for the Non-Applicant.

Order.—This is an application in revision against an order passed in execution proceedings (in Miscellaneous Judicial Case No. 24 of 1937) on August 4, 1937. The non-applicant decree-holder attached some quantity of cotton stored in Pandurang Ginning Factory as being the property of his judgment-debtor. The applicant, who is judgment-debtor's father, objected to the attachment. The lower Court found that the judgment-debtor had a half share in the cotton which alone was liable to attached and sold. It further held that as a prohibitory notice under r. 47 of O. XXI, had not been issued, the attachment was irregular, and ordered a notice under r. 47 to be issued to the judgment-debtor. It, however did not pass any order withdrawing the attachment.

On behalf of the objector who feels aggrieved by the lower Court's order, it is urged that the lower Court ought to have held that the attachment had ceased or should have withdrawn the attachment. Reliance is placed on *Rajendra Nath Das* v. *Chairman Jessore District Board* (1). In that case some movable property of which the judgment-debtor was supposed to be the full owner was attached under s. 43 of O. XXI. On an objection made by a stranger it was found that the judgment-debtor was only a part owner of the property. The original attachment was, therefore, set aside and an order was made to issue a notice to the judgment-debtor under O. XXI, r. 47. That case does not afford much guidance for the decision of this case. In the present case the property was in the possession of the objector although it was in the immediate custody of the ginning factory. The question is whether the lower Court was right in issuing a prohibitory order to him under r. 46 of O. XXI. It is vigorously contended that r. 46 is inapplicable in the circumstances of this case and that the only rule which is relevant is r. 47. I cannot assent to this argument. Rule 46 must be read with r. 43 and r. 47. Rule 43 contemplates a case of attachment of property of which the judgment-debtor is the full owner and in possession. Rule 46 refers to a case where the property of the judgment-debtor is not in his possession but in possession of a third party. Rule 47

(1) 59 C 808; 137 Ind. Cas. 672 (2); A I R 1932 Cal. 408; 54 C L J 488; Ind. Rul. (1932) Cal. 363.

relates to a case where the judgment-debtor is not the full owner of the property intended to be attached. Rule 47 is silent as to whether the property should be in possession of the judgment-debtor or not. Rule 46 only says "in the case of other movable property not in the possession of the judgment-debtor." The other movable property is the property other than that specified in cls. (*a*) and (*b*) of sub-r. (1). It, therefore, relates to all movable property which is not in the possession of the judgment-debtor. It is argued by the learned Counsel for the applicant that if the ownership of the judgment-debtor is fractional instead of being integral r. 46 does not apply. I think it ought to apply for this reason: Rule 47 speaks of "share or interest of the judgment-debtor in movable property" but does not explicitly state whether it refers to property in his possession. In the absence of any express allusion to possession it may well be construed as meaning all movable property which is in his own possession or in the possession of a stranger. If r. 47 must apply in either case, then in the latter case when his property which takes the form of a fractional interest is in possession of somebody else, it must also fall under s. 46 (1) (c) which applies to all cases of movable property belonging to the judgment-debtor not being in his possession. The person who is in possession of the judgment-debtor's property is in possession of the property as a whole nothwithstanding that the judgment-debtor is only a part owner of it. The position would be elucidated in this way. A judgment-debtor may own share or interest in property *A*. When property *A* is in possession of a stranger the stranger must be taken to be in possession of the whole of property although from the point of view of the judgment-debtor it is a fractional share. Consequently, where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, r. 46 as well as 47 must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. If, as contended for by the learned Counsel for the applicant, r. 46 were not to apply to such a case the result would be stultification of the attachment. While the judgment-debtor will have the prohibitory order served on him the property of which the transfer is forbidden will be sold with impunity by the person in whose possession it happens to be. That will defect the very purpose of the attachment. Such a result could not be intended by the Legislature. I am, therefore, of the opinion that the lower Court was right in issuing the prohibitory order to the objector who was in possession of the entire quantity of cotton and further is not withdrawing the prohibitory order addressed to him.

The application is dismissed with costs. Pleader's fee Rs. 20.

D. *Application dismissed.*

LAHORE HIGH COURT

Letters Patent Appeal No. 120 of 1939

May 29, 1940

TEK CHAND AND BHIDE, JJ.

OM PARKASH—PLAINTIFF—APPELLANT

versus

MUKHTAR AHMAD—DEFENDANT—RESPONDENT

Mortgage—Simple mortgage—Characteristics of, stated—Second appeal—Question of law—Deed, document of title and foundation of suit—Its construction is question of law—Registration Act (XVI of 1908), ss. 17, 49—Unregistered simple mortgage deed—Admissibility of, to obtain money decree.

The characteristics of a "simple morgage," are (1) that there must be a loan; (2) that the mortgagor must have bound himself personally to repay the loan; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold, in the event of his having failed to repay and (4 that possession of the property has not been, and is not to be, transferred to the mortgagee during the pendency of the mortgage. These stipulations may be express, or they may appear by necessary implications from the terms of the particular transaction. Thus a promise to pay necessarily arises out of the acceptance of a loan and it need not be stated in so many words in the deed. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner. 38 Ind. Cas. 932 (24) and 135 Ind Cas. 33 (25), relied on *Narotam Das* v. *Sheo Pargash Singh* (26) and *Kalka Singh* v. *Paras Ram* (21), distinguished. [p. 792, col. 1.]

Where a deed is the document of title in the case and is the foundation of the plaintiff's suit, the construction of such a document is a question of law, which can be raised in second appeal. [p. 796, col. 2.]

[Case-law referred to.]

The personal covenant to pay is distinctly divisible or separable in a simple mortgage, from its hypothecation clauses and the bond so regarded, is clear evidence of the debt. Therefore, though a simple mortgage deed creating charge on immovable property over Rs. 100 is unregistered, the deed is ad-

missible in evidence to support the mortgagee's claim for a money decree.
[Case-law reviewed.]

L. P. A. from the judgment of Sale, J., in S. A. No. 76 of 1939, dated May 10, 1939.

Mr. *Achhru Ram*, for the Appellant.
Mr. *Barkat Ali*, for the Respondent.

Tek Chand, J.—The suit which has given rise to this appeal was instituted by the plaintiff-appellant against the defendant-respondent for recovery of Rs 1,057-15-0, on the allegation that on April 4, 1936, the defendant had borrowed Rs. 1,000 in cash from the plaintiff at Lahore agreeing to repay on demand the amount together with interest at 5 annas per cent. per mensem; that in order to secure the amount he had further agreed to hypothecate a house situate at Miani, District Shahpur; that the defendant then actually executed a document (Ex. P-1) in which the above facts were recited, and undertook to have it registered in the Shahpur District, where the house was situate, but subsequently he declined to have this done, and for this reason no charge was actually created on the house. The plaintiff averred that he had made several demands for repayment of the amount advanced and the interest, but the defendant had failed to pay. He accordingly prayed that a decree for Rs. 1,000 as principal and Rs. 57-15-0 as interest be passed against the defendant. The defendant denied the plaintiff's claim. He admitted execution of Ex. P-1, but alleged that he did not receive the consideration. He further pleaded that the document, Ex. P-1, was a mortgage deed affecting immovable property, worth more than Rs. 100 in value, and being unregistered was not admissible in evidence for the purpose of supporting the plaintiff's claim for a money decree. He also denied that he had agreed to pay interest to the plaintiff.

The trial Judge found that Rs. 1,000 had in fact been paid in cash by the plaintiff to the defendant. But he held that Ex. P-1 was inadmissible in evidence even for enforcing a claim for the amount advanced against the defendant personally, as this liability was indivisible from the transaction of the mortgage. On this finding, he dismissed the suit. The plaintiff appealed to the District Judge, who also came to the same conclusion. He held that the deed, Ex. P-1, contained no contract on behalf of the mortgagor to make himself personally liable for the mortgage money, apart from the property which was sought to be mortgaged and therefore it was inadmissible in evidence to support a claim for a money decree. He accordingly dismissed the appeal without coming to any finding on the issues relating to consideration or interest.

On second appeal before a Single Bench of this Court, the question of the interpretation of Ex. P-1 was raised, and it was contended that on a true construction of the deed the transaction was divisible in the sense that the personal obligation to repay the money could be separated from the transaction of mortgage. But the learned Judge held that the interpretation of Ex. P-1 was not a matter which could be raised in second appeal. He observed that this question was concluded by the finding of fact recorded by the District Judge that upon a proper construction of the document the transaction was indivisible and did not contain a personal covenant to repay the loan. He then held that as the deed related to a single and indivisible transaction with a covenant that the mortgage money was recoverable from immovable property, over Rs. 100 in value, and as it was unregistered, it was inadmissible to prove the loan and therefore no money decree could be passed. In support of this proposition, the learned Judge relied upon *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1), *Thakur Das* v. *Fatte Khan* (2), *Jai Sukh* v. *Mahomed Khan* (3), *Chuhar* v. *Wazira* (4), *Fatte Singh* v. *Mian Singh* (5) and *Ghansham Das* v. *Hem Raj* (6) He, accordingly, affirmed the decision of the Courts below dismissing the suit. On an application by the plaintiff, however, he granted a certificate for a further appeal under cl. 10, Letters Patent.

The most important question in the case is the determination of the real nature of the transaction between the parties, as embodied in Ex. P-1 and therefore the decision of the case depends upon its construction. Admittedly, Ex. P-1 is the document of title in this case. It is the foundation of the plaintiff's suit, and it is well-settlad that the construction of such a document is a question of law, which can be raised in second appeal. In *Chander Coomar* v. *Namni Khanum* (7), it was held by Sir Richard Couch, C. J. of Calcutta, as far back as 1873, that the misconstruction of a

(1) 4 C 83; 2 C L R 428.
(2) 60 P R 1880.
(3) 89 P R 1880.
(4) 17 P R 1881.
(5) 131 P R 1883.
(6) 92 P R 1890.
(7) 19 W R 322; 11 Beng. L R 434 (P B).

document, which is the foundation of a suit, or which is in the nature of a contract or a document of title, is a good ground for second appeal; but a second appeal does not lie merely because some portion of the evidence is in writing and a mistake has been made as to its meaning. This has been followed in numerous cases in various High Courts: *see inter alia Dursan Singh* v. *Durbejoy Singh*, 1 Ind. Cas. 530 (8), *Buzlal Karim* v. *Satish Chandra*, 10 Ind. Cas 325 (9), *Palaniandy Chetty* v. *Kambaraya Chetty*, 24 Ind. Cas. 87 (10), *Vithoba Madhav* v. *Madhav Damodar* (11), *Rudreshwari Prasad Singh* v. *Dhana Mahto*, 52 Ind. Cas. 119 (12), *Dayal Singh Harnam Singh* v. *Beli Ram Nathu Ram* (13), *Ali Ahmad* v. *Khan Muhammad* (14), *Abdul Latif* v. *Rahmatullah* (15), *Allah Ditta* v. *Khuda Bakhsh* (16), *Ram Diyal* v. *Darbari Ram* (17), *Kanshi Nath* v. *Chakar Dhar* (18), *Hans Raj* v. *Tulsi* (19) and *Ram Ranbijaya Prasad Singh* v. *Krishna Madho Singh*, 182 Ind. Cas. 982 (20). It must, at the same time, be stated that there are cases in which the distinction has not always been kept in view. The matter however is concluded by recent pronouncements of their Lordships of the Privy Council.

In *Fateh Chand* v. *Kishen Kaur* (21), the lower Appellate Court, on a construction of the *wajib-ul-arz* and other documentary evidence, had held that the plaintiffs were proprietors of the land. On second appeal to the High Court, it was sought to be contended that the Court was bound to accept this finding as conclusive, the question being one of fact; but the High Court rejected the contention and held that on a true construction of the documents the plaintiffs were tenants of the land and not proprietors as found by the lower Appellate Court. Their Lordships, in affirming this decision, held that the Subordinate Judge's decision had been arrived at by inferences drawn from a misconstruction of the *wajib-ul-arz*; and that "the right construction of documents was a question of law" which the Court on second appeal was not precluded from considering. Again, in *Midnapur Zamindari Co. Ltd.* v. *Uma Charan Mandal* (22), Lord Sumner, in delivering the judgment of the Judicial Committee, emphasized the distinction between "documents which were instruments of title or otherwise the direct foundation of rights" and those which were "really historical materials." He observed that when the question to be decided was one of fact, it did not involve an issue of law merely because documents, which were not instruments of title or otherwise the direct foundation of rights, had to be construed for the purpose of deciding the question. This proposition was re-affirmed by another Board of the same high tribunal in the well-known case in *Wali Muhammad* v. *Mohammad Bakhsh* (23), at (p. 207) in which the scope of s. 100, Civil P. C., was more fully discussed. In *Wali Mohammad* v. *Mohammad Bakhsh* (23), their Lordships cited with approval the rule laid down by Sir Richard Couch, C. J. in *Chander Coomar* v. *Namni Khanum* (7), to which reference has been made above.

In view of this authoritative statement of the law and having regard to the fact that in the case before us, Ex. P-1 is the foundation of the suit, Mr. Barkat Ali for the respondent frankly conceded that its construction is a question of law which could be raised in second appeal and should have been decided by the learned Judge. Turning to the document, we find that in heading it is described as an "*ar rahn nama* (simple mortgage deed). After giving the name and particulars of the executant and describing in detail the house owned by him, it is expressly stated that in lieu of the sum of Rs. 1,000, which the executant had already received from the plaintiff, he

(8) 1 Ind. Cas. 530; 9 C L J 623.
(9) 10 Ind. Cas. 325; 13 C L J 418; 15 C W N 752.
(10) 24 Ind. Cas. 87; A I R 1914 Mad. 685; 1 L W 416.
(11) 42 B 341; 46 Ind. Cas. 734; A I R 1918 Bom. 158; 20 Bom. L R 654.
(12) 52 Ind. Cas. 119; A I R 1919 Pat. 334.
(13) A I R 1929 Lah. 38; 115 Ind. Cas. 77; Ind. Rul. (1929) Lah 333.
(14) A I R 1929 Lah. 833; 120 Ind. Cas. 420; Ind. Rul. (1930) Lah. 52.
(15) A I R 1930 Lah. 139; 123 Ind. Cas. 533; Ind. Rul. (1930) Lah 453.
(16) A I R 1930 Lah. 691; 125 Ind. Cas. 610; Ind. Rul. (1930) Lah. 626.
(17) A I R 1934 Lah. 35; 149 Ind. Cas. 934; 6 R L 761 (1).
(18) A I R 1934 Lah. 193 (1); 149 Ind. Cas. 1016; 36 P L R 98; 6 R L 781.
(19) A I R 1939 Lah. 264; 41 P L R 326.
(20) 182 Ind. Cas 982; A I R 1939 Pat. 364; 20 P L T 677; 5 B R 864; 12 R P 89; 20 P L T 677.
(21) 34 A 579; 16 Ind. Cas. 67; 39 I A 247; 10 A L J 335; 16 C W N 1073; 23 M L J 330; 12 M L T 413; (1912) M W N 1065; 14 Bom. L R 1090; 17 C L J 1 (P C).
(22) 29 C W N 131; 74 Ind. Cas. 432; A I R 1923 P C 187; 21 A L J 723; 4 P L T 627; 33 M L T 291; (1923) M W N 832; 45 M L J 663; 25 Bom. L R 1287; 40 C L J 16 (P C).
(23) 11 L 199 (207); 122 Ind. Cas. 316; A I R 1930 P C 91; 57 I A 86; (1930) A L J 292; Ind. Rul. (1930) P C 124; 31 P L R 145; 31 L W 321; 32 Bom. L R 380; 51 C L J 516; 59 M L J 54 (P C).

had transferred the property as *ar rahn ya'ni bila qabza* (by way of simple mortgage, *i. e.* without possession). The executant then stipulates to pay the amount borrowed, together with interest thereon at 5 annas per cent. per mansem, *indultalab yak musht* (in one lump sum, on demand by the mortgagee), on payment of which the house would be redeemed. Lastly, there is the clause that in case the plaintiff was unable to realize the amount due by sale of the house mentioned above, or because of any defect in his title, the person and other property of the executant would be liable for the balance. These terms show unmistakably that the transaction was in fact, what it was described to be, namely that of a simple mortgage. In s. 58 (*a*), T. P. Act, 'mortgage' is defined as follows:

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, or to be advanced, by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability."

Clause (*b*) of this section contains the definition of a "simple mortgage":

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

The characteristics of a "simple mortgage," thus, are (1) that there must be a loan; (2) that the mortgagor must have bound himself personally to repay the loan; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold, in the event of his having failed to repay, and (4) that possession of the property has not been, and is not to be, transferred to the mortgagee during the pendency of the mortgage. These stipulations may be express, or they may appear by necessary implications from the terms of the particular transaction. Thus a promise to pay necessarily arises out of the acceptance of a loan and it need not be stated in so many words in the deed. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner. This matter is now concluded by the highest authority. In *Ram Narayan Singh* v. *Adhindra Nath* (24) their Lordships of the Privy Council laid down the following propositions: (*a*) that a 'loan' *prima facie* involves a personal liability; (*b*) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; (*c*) but that the nature and terms of such security may negative any personal liability on the part of the borrower. As explained by Dalip Singh, J., while delivering the judgment of the Division Bench in *Parsram* v. *Brij Mohan* (25) at p. 266:

"In all mortgages a personal covenant to repay the mortgage must be presumed unless there is something in the nature and the terms of the mortgage deed to negative it. Of the various kinds of mortgages enumerated in s. 58, T. P. Act, two, namely a simple mortgage, and an 'English mortgage' necessarily connote that the mortgagor binds himself to repay the mortgage money In the other four forms, namely 'mortgage by conditional sale' 'usufructuary mortgage,' 'mortgage by deposit of title-deeds' and 'anomalous mortgage,' the Court would not necessarily come to any conclusion by deciding the nature of the deed as to whether there was, or was not, a personal liability."

The terms of the deed will have to be examined and ultimately determined whether the personal liability has been, or has not been enforced."

It will be seen that the transaction described in Ex. P. 1 contains all the characteristics of a simple mortgage. There is nothing in its terms which excluded the personal liability of the mortgagor, which is implicit in every transaction of simple mortgage. Nor is it stated that the obligee must look to the mortgaged house alone for recovery of his money. On the other hand, the personal obligation of the executant is clear from the undertaking to pay the money (*indul talab*) "on demand" by the mortgagee. It is further emphasized that this liability would subsist even after the house has been sold, if the sale proceeds are found to be insufficient to discharge the amount due as principal and interest. Mr. Barkat Ali referred us to two decisions of their Lordships of the Privy Council and urged that the plaintiff could not maintain the suit for a personal decree against the defendant. The facts of both

(24) 44 C 388; 38 Ind. Cas. 932; A I R 1916 P C 119; 44 I A 87; 21 M L T 12; 15 A L J 107; (1917) M W N 94; 32 M L J 39; 25 C L J 121; 21 C W N 383; 19 Bom. L R 194 (P C).

(25) 13 L 259 (266); 135 Ind. Cas. 33; A I R 1932 Lah. 164; 33 P L R 536; Ind. Rul. (1932) Lah. 17.

these cases were however materially different. In *Narotam Dass* v. *Sheo Pargash Singh* (26) a *taluqdar* the management of whose *taluq* at the time, was vested in an officer under the Oudh Taluqdars' Relief Act, had made an instrument purporting to hypothecate the *taluq* to secure payment of money borrowed by him. On an examination of the terms of the instrument their Lordships held that the contract was to pay out of the hypothecated estate alone and there was no covenant to pay out of his personal property. The facts of the other case, *Kalka Singh* v. *Paras Ram* (27) are still more dissimilar. In that case their Lordships reiterated the general rule that an unqualified admission of a debt implies a promise to pay, but such a promise may be negatived by an express promise appearing in a subsequent part of the deed to pay the amount in a particular manner and on the happening of a certain event. On an examination of the terms of the particular document before them, they found that the agreement was to repay the loan out of a particular fund and in a particular manner and that there was no personal obligation which could be separately enforced against the obligor.

The other cases cited by Mr. Barkat Ali, *Kuraishi Begam* v. *Mumtaz Mirza*, 3 Ind. Cas. 871 (28) and *Raghuntah* v. *Sheolal*, 39 Ind. Cas. 849, (29) are equally inapplicable. In both of them the transactions in dispute were held to be mortgages by way of conditional sale, in which there can be no personal liability on the part of the mortgagor. This is not so in the case before us. Here the transaction is one of simple mortgage, which contained a personal covenant to pay as well as purported to create a charge on immovable property, admittedly over Rs. 100 in value. For the latter purpose, the document required to be compulsorily registered under s. 17, Regis. Act, and, being unregistered, it cannot, as laid down in s. 49 of the same Act, be received as evidence of any transaction affecting such property. But that section does not say that it is inadmissible in evidence even for the purpose of enforcing the personal covenant which in a transaction of simple mortgage is separable and divisible. In this connection reference may be made to *Sheo Dial* v. *Prag Dat* (30) which has been described as the leading case on the subject. In that case, as in that before us, the plaintiff sued to recover money on an unregistered hypothecation bond. The consideration had been received in cash, the obligor had agreed to repay the amount with interest within one year, and had also hypothecated immovable property as collateral security. The plaintiff did not seek to enforce the hypothecation contained in the bond for the reason that it was unregistered, but merely asked for a money decree. The defendant pleaded that the bond, being unregistered, was inadmissible in evidence even to enforce the personal obligation. The Full Bench repelled the contention and held that

"in such cases the personal covenant in the bond is distinctly divisible or separable from its hypothecation clauses and, so regarded, the bond is clear evidence of the debt.

Two years later, the same question came up for consideration before a Full Bench of five Judges of the Calcutta High Court in *Ulfatunnisa* v. *Husain Khan* (31). There, also, an unregistered hypothecation bond recited that Rs. 2,600 had been received in cash at the time of the execution of the bond, that the obligor would "pay the amount peaceably" within a year; failing which the obligee would be entitled to sell the hypothecated property and then proceed against the other property of the obligor. The suit was for a simple money decree for the principal and interest. The Full Bench held that the bond, though unregistered, could be used in evidence to enforce the personal obligation. This ruling was followed in Madras in *Gonaji* v. *Subbarayappa* (32) where a simple mortgage had been created by an unregistered bond and the agreement was to re-pay the amount on demand, failing which the mortgagee was entitled to bring the mortgaged property to sale. It was held that the mortgagee was entitled to sue on the personal covenant and obtain a personal decree. Similarly, in *Vani* v. *Bini* (33) at p. 557, it was laid down that an unregistered bond for Rs. 100, or upwards, may be admissible in evidence to prove the simple debt or a personal obligation, though it is inadmissible to prove any right to immovable property. To the same effect are the decisions of the Rangoon High Court in *Maung Po Din* v. *Mg, Tha Saing*, 126

(26) 10 C 740; 11 I A 83; 4 Sar 522 (P C).
(27) 22 C 434; 22 I A 68; 6 Sar. 545 (P C).
(28) 3 Ind. Cas. 871; 12 O C 275.
(29) 39 Ind. Cas. 849; A I R 1916 Nag. 120; 13 N L R 69.
(30) 3 A 229 (F B).
(31) 9 C 520; 12 C L R 209 (F B).
(32) 15 M 253.
(33) 20 B 553 (557).

Ind. Cas. 655 (34) and *Motiram* v. *Daw Hnin E.* (35).

That the personal covenant to repay is implicit in such transactions, and is separable and divisible from the charge created on the property, is the foundation of the decisions in another class of cases in which it has been held that where a document, which purported to be a mortgage but was not a mortgage owing to non-compliance with certain provisions of the law was admissible to prove the personal covenant to pay. It was held that the failure to comply with the statutory provisions could have no further effect than to invalidate the intended transfer of immovable property; it did not affect the validity of the contract to pay the debt: *Saddu Kaiaur* v. *Tadepally Basaviah* (36) and *Kunhu Moidu* v. *Madhava Menon* (37). Another instance of the recognition of this principle will be found in cases like *Mathura Pershad* v. *Chandra Narayan* (38) where registration of a document was held to be invalid as registration had been effected in a district where no part of the property really sought to be mortgaged was situate. The document was therefore held to be inadmissible to support a claim on the basis of the mortgage transaction comprised in it but at the same time their Lordships recognized that the creditor could maintain "the alternative claim for a personal judgment for the mortgage debt" and they remanded the case to the High Court for investigation of the plea of limitation and other defences to this claim. This was followed by the Madras High Court in *Rama Rao* v. *Vedayya* (39) where the facts were similar. In these cases the personal covenant which exists in every transaction of mortgage, was taken to be separable and divisible from the mortgage and the deed held admissible to prove it. In support of their decision to the contrary, the Courts below have relied principally upon *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1) which has been described as the "basic ruling" on the subject. The terms of the document in question in that case were very peculiar and the learned Judges observed that it was "doubtful whether having regard to the terms of the loan the defendant was personally liable for the money and whether the only remedy of the plaintiff was not against the mortgaged property."

They observed that the document disclosed that the intention of the parties, in any case, appeared to be that the money was to be realized in the first instance from the property. Therefore they held that the loan and the pledge could not be separated and the transaction was not divisible in its nature. This case is therefore no authority for the broad proposition that, in the absence of a clear stipulation to the contrary, a transaction of a simple mortgage must be taken to be single and indivisible, and, consquently, the document held to be inadmissible not only to affect immovable property but also to support a claim for recovery of the money from the obligor. As pointed out in *Sheo Dial* v. *Prag Dat* (30) at pp. 232-3* by Straight, J., *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1) must be taken to have been decided on "the special language of the document involved in the suit before the Court." Indeed, it could not have been the intention of the learned Judges who decided *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1) to lay down any such general proposition for (as pointed out in *Krishto Lall* v. *Bonomalee Roy* (40) at p. 613), they themselves in their judgment had distinguished the case before them because of the peculiar terms of the document, from the earlier Full Bench ruling of their own Court in *Lachmipat Singh* v. *Mirza Khairat Ali* (41) where it had been held by Sir Barnes Peacock, C. J. (with the concurrence of four other Judges), that an unregistered hypothecation bond, though inadmissible under s. 49 of Act XX of 1866, affecting an interest in the land, was admissible to support a suit for recovery of money due on the bond. In *Gour Churn* v. *Jinnut Ali* (42) at p. 167 another Division Bench of the Calcutta Court took the same view of *Mattongeny Dossee* v. *Ramnaroin Sad Khan* (1) and the matter appears to have been put beyond doubt by the Full Bench in *Ulfat-un-nisa* v. *Husain Khan* (31) where Sir Richard Garth, C. J., (who had delivered the judgment in *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1) reaffirmed the Full Bench decision in *Lachmipat Singh* v. *Mirza Khairat Ali* (41) holding that no change in the law had been effected

(34) 126 Ind. Cas. 655; A I R 1930 Rang. 142; Ind. Rul. (1930) Rang. 335.
(35) 153 Ind. Cas. 56; A I R 1934 Rang. 196; 7 R Rang 192.
(36) 30 M 284; 17 M L J 167.
(37) 32 M 410; 1 Ind. Cas. 1; 19 M L J 584.
(38) 48 C 509; 63 Ind. Cas. 770; A I R 1921 P C 8; 48 I A 127 (P C).
(39) 46 M 435; 73 Ind Cas. 188; A I R 1923 Mad. 447; 44 M L J 373; (1923) M W N 166; 32 M L T 222; 17 L W 695.
(40) 5 C 611 (613); 5 C L R 43.
(41) 4 Beng. L R 18; 12 W R 11 (F B).
(42) 11 C L R 166 (167).

*Page of 3 A—[*Ed.*].

by the amendment made in s. 49 by Act III of 1877, and ruled that an unregistered bond containing a personal undertaking to repay the money borrowed and also a hypothecation of land above Rs. 100 in value as security may be used in evidence to enforce a personal obligation.

In the Punjab, the earliest reported case is *Bishen Singh* v. *Sunder* (43) in which it was held, in general terms, that though an unregistered deed of mortgage cannot be received in evidence to affect the property mortgaged, it is receivable in evidence to prove the debt for the purpose of granting a money decree. This rule appears to have been modified in some cases decided in the early eighties after the decision in *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1). The judgments in these cases are brief and the exact terms of the documents under consideration are not set out in detail. It is possible that the particular transactions were similar to that in *Mattongeny Dossee* v. *Ramnarain Sad Khan* (1) and therefore the decisions proceeded on their special terms. An examination of the judgments however discloses that a distinction was drawn between (1) cases in which the deed contained either an acknowledgment of a pre-existing debt or a distinct and formal undertaking to repay the loans, and (2) those in which the deed merely recited that immovable property had been given as security for the debt. In the former class of cases it was held that the personal obligation was divisible and that a claim for a money decree could be maintained on the deed : *Muhammad Khan* v. *Jai Sukh* (44), *Khuddu Mal* v. *Kunji Lall* (45) and *Prem Singh* v. *Mula Mal* (46). In the latter class, however, it was laid down that the unregistered bond was not admissible, as in the absence of clear words to this effect the transaction mentioned must be taken to be a "mortgage and mortgage only ;" it could not be said that "it comprised two distinct transactions—one the mortgage and the other a personal undertaking to pay" ; *Thakur Das* v. *Fatte Khan* (2), *Jai Sukh* v. *Mahomed Khan* (3), *Chuhar* v. *Wazira* (4) and *Fatteh Singh* v. *Mian Singh* (5). This distinction however has not been recognized in subsequent ruling (see *e. g. Basant Lal* v. *Jowahir Singh*, 87 Ind. Cas. 609 (47) and if I may say so with respect it can no longer be maintained in view of the pronouncements of the Privy Council already referred to, that every loan involves a promise to repay and that such a liability is not displaced by the mere fact that security is given for its repayment with interest, unless the nature and terms of such security negative any personal liability on the part of the borrower.

In the case before us there is nothing in Ex. P-1 which expressly or by necessary implication excludes the personal obligation of the defendant. On the other hand, as shown above, this obligation is recognized in the stipulation to repay the amount borrowed "on demand" (*indul talab*) and is re-affirmed in the succeeding clauses. It must therefore be held that Ex. P-1 is admissible in evidence to support the plaintiff's claim for a money decree. I would accordingly accept this appeal, set aside the judgment of the learned Judge in Single Bench, and remand the case to the District Judge for decision of the issues as to consideration and interest which he had left undecided. Court-fee on this appeal as well as on the appeal before the Single Bench shall be refunded; other costs shall be costs in the cause. Counsel have been directed to cause their clients to appear before the District Judge, Shahpur (at Sargodha), on June 24, 1940, when a date for the hearing of the appeal will be fixed.

Bhide, J.—I agree,

S. *Order accordingly.*

(43) 40 P R 1874.
(44) 88 P R 1880.
(45) 80 P R 1881.
(46) 10 P R 1883.
(47) 87 Ind. Cas. 609; A I R 1925 Lah. 356; 7 Lah. L J 3.

BOMBAY HIGH COURT

First Appeal No. 305 of 1379
July 19, 1940
BEAUMONT, C. J. AND WASSOODEW, J.
SHRIPADGOUDA VENKANGOUDA APARANJI—PLAINTIFF—APPELLANT
versus
GOVINDGOUDA NARAYANGOUDA APARANJI—DEFENDANT—RESPONDENT

Evidence Act (1 of 1872), s. 44—"Obtained by fraud" and "collusion" in s. 44, explained—X executing pro-note in favour of Y, to shield property from creditors—Y agreeing not to execute decree on pro-note—Suit on pro-note—X and Y making bogus reference to arbitration—Decree passed on award—Y executing decree inspite of agreement to contrary—Suit by X to set aside decree as fraudulent and collusive—X and Y held, both being in pari delicto, *X could not vacate decree—Proper remedy of X stated—Decree—Consent decree and decree obtained on award, difference.*

A judgment or order obtained by fraud upon a Court binds no such Court, and its nullity may be alleged in any collateral proceeding without the necessity of setting it aside. The expression "obtained by fraud" in s. 44, Evi. Act, expressly refers to the fraud practised against the Court by any one party, or it may also imply a fraud against any party to the proceeding. The term 'collusion' is used apparently in a different sense, and the language of the section is so comprehensive that it might enable a party to the collusion to lead evidence of his own fraud. But as the section lays down a rule of proof it would not abrogate the rule of larger equity which must guide the Court in granting relief. The collusive decree can be impeached by innocent persons claiming under the parties to the judgment or represented by them therein, or by strangers who were neither privies to nor representatives of the parties to the former suit. If, however, fraud is practised by both the parties on the Court, neither of them can impeach the judgment on the ground that it was collusively procured. [p. 797, col. 2; p. 798, col. 1.]

X executed a promissory note in favour of *Y* in order to shield his property from his creditors. *Y* agreed not to execute the decree on the pro-note. *Y* broughht a suit on the pro-note and both *X* and *Y* made a bogus reference to arbitration and obtained a decree on the award by falsely representing the award to be genuine and thus practised fraud on the Court. Subsequently *Y* in violation of his agreement put the decree into execution. *A* then brought a suit to set aside the decree as being collusive and fraudulent;

Held, that both parties having colluded and practised fraud on the Court, were *in pari delicto* and it was not, therefore, open to one of the parties to vacate the decree and thus take advantage of his business. Nor could the collusive decree be dealt with on the analogy of a transfer fraudulently effected under s. 84, Trusts Act. 126 Ind. Cas. 305 (17), relied on

[English and Indian case-law discussed]

Held, further that proper remedy for *X* for preventing *Y* from executing the decree in breach of his agreement was by way of suit for injunction and not by a suit for setting aside the decree.

A decree obtained upon an award given after hearing the parties by an arbitrator duly selected by them, cannot be treated on the same footing as a consent decree. The two are radically different. The Court's power in recording compromises cannot be used for disturbing an agreement between the parties. On proof of the compromise, the Court is bound to record the adjustment, unless it is unlawful, and to pass a decree in terms thereof. In the matter of awards, the procedure is laid down, so far as the *mofussil* Courts are concerned, in Sch. II, Civil P. C. If the award is not challenged on any of the grounds in para. 15 of that Schedule, the Court's business would be to record the award and pass judgment accordingly. The difference between a compromise decree and an award decree is this; that while the former is the result of the agreement of the parties with the Court's seal of approval, the award is the act of a Court or a tribunal set up by the parties of their own choice and is independent of the agreement of the parties. Moreover, if an award were irregular and offended against the provisions of the law, or if there were other grounds sufficient to invalidate it, the procedure to be followed to impeach the award would be the procedure laid down in the Code. [p. 799, col. 2; p. 800 col. 1.]

F. A. from the decision of the Joint First Class Sub-Judge, Dharwar, in Special Civil Suit No. 34 of 1934.

Mr. *R. A. Jahagirdar*, for the Appellant.

Messrs. *D. R. Manerikar* and *V. G. Wagle*, for the Respondent.

Wassoodew, J.—This appeal arises from an action instituted by the plaintiff-appellant in the Court of the First Class Subordinate Judge at Dharwar to set aside, on the ground of fraud and false representation, a decree upon an award passed in Suit No. 53 of 1931 between the parties on April 1, 1932. That decree was passed by the same Court in which it is now challenged. The former suit was instituted by the defendant to recover Rs. 12,000 with interest upon a promissory note executed in his favour on April 22, 1930. The plaintiff, who was the defendant in that suit, had filed a written statement in which he contended *inter alia* that he was liable to pay only Rs. 2,000, a debt due from the family and contracted by his eldest brother Pralhad in his lifetime while he was the manager of the family, that the balance of the claim was fraudulent, and that the promissory note was obtained by fraud, misrepresentation and undue influence. After that defence was filed and before the hearing commenced, both the parties asked the Court to refer the matter in dispute to arbitration, and accordingly it was so referred to one Narsingrao, a friend of the parties and also a distant relative of the plaintiff, for the determination of the dispute. Upon that reference the arbitrator made his award, and after hearing the parties the decree now impeached was passed by the Court. The arbitrator refused interest to the defendant and granted instalments to the debtor-plaintiff. The plaintiff's allegations of fraud and false representation, which form the basis of the suit for setting aside the decree, are fully set out in the plaint and the plaintiff's statement.

After stating that the claim was false and fraudulent inasmuch as there was no consideration for the promissory note and that the defendant had represented to the plaintiff that by passing a promissory note to him (defendant) the plaintiff's other creditors could be coerced into accepting a lesser amount in satisfaction of their debt, for they would by suing the plaintiff be subjecting their claim to a decree which could be paid off rateably out of his assets, the plaint proceeds to say as follows:

"The defendant further represented to him (plaintiff) that the mere taking of promissory notes was not sufficient to threaten other creditors and that if a decree were obtained (on the promissory notes) it would be effective, and that the other creditors

could be asked to adjust their debts by giving remissions and that (in this way) his property could be shielded and that no loss to the plaintiff would be caused. By such representation and without giving the plaintiff any opportunity to secure independant advice in the matter, and by fraudulent misrepresentation and undue influence the defendant got the plaintiff to consent to the arbitration and got from him the necessarry documents and got one Narsingrao Nadagouda, a relation and a friend of his, to act as arbitrator in the case. The arbitrator also without making any inquiry passed an award in accordance with the wishes of the defendant."

It is also suggested that the defendant represented to the plaintiff that even if a decree were passed on the award, it would not be executed to the plaintiff's detriment. The plaint then proceeds to say that notwithstanding that representation after the decree was obtained, the defendant attached certain property of the plaintiff and applied for execution of the decree. Then the plaint winds up as follows:

"The plaintiff being alarmed by these proceedings asked the defendant to take lands for whatever sum that was found due to him on accounts being taken as promised by him. The defendant refused to render such account and so betrayed his real intention of recovering the full amount of the decree by bringing to sale the whole of his properties. In this way, the plaintiff came to know about the defendant's fraudulent intention."

Now, upon that statement, apart from the allegations that the claim made by the defendant in the former proceedings was false and that the promissory note upon which that claim was based was obtained by fraud and misrepresentation and without consideration, the plea in substance amounts to this: that both the plaintiff and the defendant had agreed to obtain the award with the object of depriving the plaintiff's creditors of their just dues, or bringing pressure upon them to reduce their claim, and that the consent of the plaintiff was procured by the defendant's assurance that the decree passed upon the award would not be enforced. In other words, the plaintiff alleges that the judicial proceedings were collusive, and that he consented to the order of reference and the decree upon the representation made to him by the defendant. The necessary implication is that that secret understanding between him and the defendant as well as the fact alleged, namely that the arbitrator Narsingrao had agreed to give his award as the parties desired him to give, as a result of their collusion, was suppressed from the Court with a purpose. That purpose was evidently fraudulent for the object was to defeat the creditors of the plaintiff. There is not the slightest suggestion in the plaint that any material fact was suppressed from the plaintiff himself, and it is important and significant to note that the plaintiff's action is not founded on deceit either for damages or for injunction.

If, therefore, upon the pleadings, the fraud alleged was a fraud by the parties to the suit on the Court in obtaining an order of reference and the order making the award the decree of the Court, the question is whether such a collusive conduct in a judicial proceeding can be made the basis of an action to nullify a judgment of that Court. That aspect of the case does not seem to have been clearly appreciated in the Court below, which proceeded to consider the evidence led by the plaintiff as to the nature of the claim on the promissory note and the agreement between the parties to refer the dispute to arbitration. The lower Court came to the conclusion that the promissory note itself was for consideration, that the promissory note and the decree were not obtained by fraud, and that the defendant was justified in recovering the amount of the decree. The question, whether the defendant agreed not to execute the decree, was also considered and decided against the plaintiff. Accordingly the plaintiff's suit was dismissed. It is now well settled that a judgment or order obtained by fraud upon a Court binds no such Court, and its nullity may be alleged in any collateral proceeding without the necessity of setting it aside: *see Reg.* v. *Saddler's Co.* (1), at p. 431. James, L.J. in *Flower* v. *Lloyd* (2), observed that

"in the case of a decree being obtained by fraud, there always was power, and there still is power, in the Courts of law in this country to give adequate relief."

In *Ex parte White* v. *Tommey* (3), the House of Lords discharged its own order as having been obtained by suppression and misrepresentation. The jurisdiction to set aside a decree has been recognized in Indian decisions. In *Gopi Wasudev Bhat* v. *Markande Narayan Bhat* (4), there was a collusive mortgage supported by a collusive decree, and West, J. remarked that

"if the ostensible sale or mortgage was really a mere colourable transaction, the vendee from the mortgagor may claim to have it disregarded, even though the fraud has been carried a stage further, so as to give to the sham mortgage the corroboration of a decree which is then allowed to lay by unexecuted for several years."

In another case in *Narayan Gop Habbu* v.

(1) (1863) 10 H L C 404 (431); 32 L J Q B 337; 9 Jur. (N S) 1081; 9 L T 60; 11 W R 1004.
(2) (1877) 6 Ch. D 297; 46 L J Ch. 838; 37 L T 419. 25 W R 793.
(3) (1853) 4 H L C 313; 94 R R 125.
(4) 3 B 30.

Pandurang Ganu (5), the jurisdiction to set aside a collusive decree was not questioned; the Court however held that the allegation of collusion failed altogether. Those were cases where the collusive decree was impeached not by the parties to it but by innocent persons claiming under the parties to the judgment, or represented by them therein, or by strangers who were neither privies to nor representatives of the parties to the former suit. The question is whether, if fraud is practised by both the parties on the Court, either of them could impeach the judgment on the ground that it was collusively procured. Wharton in his Law Lexicon (Edn. 15, p. 212) defines "collusion" as "uniting in the same play or game, and thus uniting for the purposes of fraud or deception," and therefore implying:

"an agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose."

He says:

"Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose, and appears to be of two kinds: (1) when the facts put forward as the foundation of the sentence of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the sentence."

A decree obtained by collusion has been described in the well-known argument in the *Duchess of Kingstons case* (6) as *fabula, non judicium, hoc est; in scena, non in foro, res agitur*: see *Nistarini Dassi* v. *Nundo Lall Bose* (7) and *Sardarmal* v. *Aranvayal Sabhapathy* (8), where the question as to what amounts to collusion has been considered. There can be no doubt, in my opinion, that as between the parties such a decree would be binding. In *Prudham* v. *Philips* (9), Willes, C. J., said that "if both parties colluded it was never known that one of them could vacate it." The authorities show that strangers could repudiate it. In that connection, I might refer to the provisions of s. 44, Evi. Act. That section says that

"any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The expression "obtained by fraud" in my opinion expressly refers to the fraud practised against the Court by any one party, or it may also imply a fraud against any party to the proceeding. The term 'collusion' is used apparently in a different sense and I must confess that the language of the section is so comprehensive that it might enable a party to the collusion to lead evidence of his own fraud. But the Evi. Act lays down a rule of proof and assuming that a party was allowed to prove his own collusion, that would not abrogate the rule of larger equity which must guide the Court in granting relief. In *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (10) the question of fraud as affecting the judgment of a Court was considered on general grounds and numerous English authorities have been considered on the question as to what classes of persons would be affected by the judgment such as, (1) the parties and privies to it (2) the representatives of such privies and parties and (3) strangers who are neither privies to nor representatives of the parties. The defendants, who were in the position of residuary legatees, were allowed to dispute a decree of 1876 obtained by the plaintiff against an administrator, on the ground that the decree represented a private debt due by the administrator to the plaintiff and had been obtained by fraud and collusion. That was clearly a case where the representatives of the parties to the suit challenged the decree on the ground of the fraud of the representatives. On similar principles Courts have allowed a minor to challenge a decree obtained against him on account of the fraud of his guardian: *see Cursandas Natha* v. *Ladkavahu* (11) and *Bhanudas* v. *Krishnabai* (12.) There are other cases of Indian Court where the same principle was affirmed. In *Pran Nath Roy* v. *Mohesh Chandra Moitra* (13) the plaintiff who had unsuccessfully attempted to set aside an *ex parte* decree under ss. 108 and 311 of Act XIV of 1882, and who had not appealed against the order under s. 103, was held not to be disentitled to sue to have the decree set aside on the ground of fraud. In *Nistarini Dassi* v. *Nundo Lall Bose* (7) the authorities were reviewed by Stanley, J. There a preliminary objection was taken that the High Court had no jurisdiction to set aside a decree of the Alipore Court passed upon an award to which the consent of the plaintiff, a *pardanashin* lady, had been fraudu-

(5) 5 B 685.
(6) (1776) 20 Howell's St Tr. 537.
(7) 26 C 891; 3 C W N 670.
(8) 21 B 205.
(9) (1775) 2 Amb. 763.
(10) 6 B 703.
(11) 19 B 571.
(12) 28 Bom. L R 1225; 99 Ind. Cas. 307; A I R 1927 Bom. 11; 50 B 716 (F B).
(13) 24 C 546.

lently obtained, and that the relief sought would be in the nature of a bill of review filed in the Alipore Court. The objection was held to be unsustainable. In applying the rule in *Reg.* v. *Sadlers Co.*, (1) Stanley, J., said (p 908*) :

"It matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm; in all cases alike it is competent for every Court, whether superior or inferior to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

There is however, clear authority of this Court on the question in issue in the judgment of West, J., in *Chenvirappa* v. *Puttappa* (14). In that case the plaintiff had bought a house from a person and allowed the vendor to execute the conveyance in the name of the defendant. That was done with the object of protecting the property against the claims of the plaintiff's creditors. After the conveyance the plaintiff occupied the house, ostensibly as a tenant of the nominal purchaser for nominal rent. Later on, the *benamidar* or the nominal purchaser brought a suit against the plaintiff to recover possession of the house and obtained an *ex parte* decree. He then applied for execution of the decree but allowed the execution proceedings to drop. The plaintiff realizing that the *benamidar* was intent on executing his decree for possession filed a suit for declaration of his title to the house in question, and of his right to retain possession, alleging that the defendant was a mere *benamidar*, that the sale deed and the *ex parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors and that the nominal purchaser was merely a trustee or a transferee for his benefit. On the question arising as to the effect of the decree for possession it was held, upon the general principle of *res judicata*, that the plaintiff was estopped from raising the question of fraud in that suit and that he was bound by the decree in the defendant's favour although it was a collusive decree. The plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance even if the trust was enforceable in his favour for it arose *ex turpi causa*. In dealing with the remarks that a decree obtained by fraud and collusion could be impeached in a collateral proceedings, in *The Queen* v. *Wardens and Assistants of The Saddlers' Company* (15), it was pointed out that the expression "impeached in any collateral proceeding" should be understood as "impeached by one not a party to the fraudulent decree." The learned Judge then proceeded to make the following observations (p. 721*) :

"In the present case the parties are the same; the proceeding is not collateral; it is in direct contradiction to the decree, and proposes to avoid it by setting one judgment up against another. This incongruity the law will not tolerate : see *Castrique* v. *Behrens* (16)."

That is a clear authority for the proposition that a party to the decree cannot complain of any fraud practised by himself and another upon the Court. In other words, a party could not be permitted to take advantage of his own baseness or permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. It would indeed be otherwise if one of the parties and the Court were deceived by the fraud of another. In such a case, as I have pointed out, the jurisdiction of the Court to set aside a decree cannot be denied provided the alleged fraud is established, and there is no excessive delay in bringing the action after the discovery of fraud.

But it is urged before us that inasmuch as the real intention of the plaintiff was fraudulently suppressed in obtaining his consent to the reference to arbitration, the real intention being to execute the decree, the decree obtained upon the award which was no better than a consent decree, should be set aside on account of that deception. The underlying assumption is that an award decree is on the same footing as a consent decree and as a consent decree could be set aside on any of the grounds invalidating a contract, the award decree could be similarly treated. Now, it seems to me, without expressing any opinion as to the alleged misrepresentation or fraud, that a decree obtained upon an award given after hearing the parties by an arbitrator duly selected by them, could not be treated on the same footing as a consent decree. The two are radically different. The Court's power in recording compromises cannot be used for disturbing an agreement between the parties. On proof of the compromise, the Court is bound to record the adjustment, unless it is unlawful, and to pass a decree in terms thereof. In the matter of awards, the procedure is laid

(14) 11 B 708; 12 Ind. Jur. 102.

(15) (1861) 30 L J Q B 186; 3 El. & El. 42; 6 Jur. (N S) 1113; 2 L T (N S) 502.

(16) (1860-61) 30 L J Q B 163; 3 El. & El. 709; 7 Jur. (N S) 1028; 4 L T (N S) 52; 122 R R 910.

* Page of 26 C.—[*Ed.*]

* Page of 11 Bom.—[*Ed.*]

down, so far as the *mofussil* Courts are concerned, in Sch. II, Civil P. C. If the award is not challenged on any of the grounds in para. 15 of that schedule, the Court's business would be to record the award and pass judgment accordingly. The difference between a compromise decree and an award decree is this: that while the former is the result of the agreement of the parties with the Court's seal of approval, the award is the act of a Court or tribunal set up by the parties of their own choice and is independent of the agreement of the parties. Moreover, if an award were irregular and offended against the provisions of the law, or if there were other grounds sufficient to invalidate it, the procedure to be followed to impeach the award would be the procedure laid down in the Code. We are not referred to any authority for the proposition that when an award in obtained by collusion of the parties and the arbitrator, the decree upon such an award could be impeached in an independent proceeding. The case in *Raoji Narainji* v. *Ratansi Kanji* (17), at p. 703 is an authority to the contrary. Consequently, on the grounds urged in the plaint it is difficult to grant the prayer for setting aside the decree. The argument that a collusive decree should be dealt with on the analogy of a transfer fraudulently effected under the provisions of s. 84, Trusts Act, is clearly not well founded.

As I have already remarked, if the implication of the statements in the plaint was that the defendant had failed to carry out his undertaking not to execute the decree, the cause of action for relief against the defendant's refusal to observe that undertaking would be entirely different. As I have said this is neither an action for injunction nor an action in damages for deceit. We were referred to a passage in the plaint which deals with an ancillary relief by way of injunction prohibiting the defendant from further executing his decree and it is suggested that this suit should be converted into a suit for an injunction restraining the defendant from executing further the decree on the ground that he has failed to observe his undertaking. The pleadings are not clear, and no issue was raised expressly upon a cause of action founded on breach of contract. With the exception of two witnesses who were casually asked questions about the alleged undertaking, the questions to the other witnesses were not directed to that point. Therefore, we are reluctant to convert this suit into a suit for injunction. Consequently, I do not think it desirable to express an opinion on the merits of the allegation in that respect. It is sufficient for me to say that the claim as based on the pleadings is not sustainable, and the appeal must therefore fail. Accordingly the appeal would be dismissed with costs.

(17) 54 B 696 (703); 126 Ind. Cas. 305; A I R 1930 Bom. 431; 32 Bom. L R 389; Ind. Rul. (1930) Bom. 401.

Beaumont C. J.—I agree. The essence of the plaintiff's case is that a decree was obtained in favour of the defendant, which would have the effect of preventing the plaintiff's creditors from claiming his property, and that the defendant represented that he would not enforce that decree. The plaintiff alleges that by reason of that representation he consented to a reference of the defendant's claim on promissory notes to arbitration, and agreed that the arbitrator should give an award in favour of the defendant, and that the award should be embodied in a decree of the Court. Now, that is really a case of obtaining a collusive decree. Both parties were *in pari delicto*. The plaintiff and the defendant each knew the facts, and both agreed that a bogus reference to arbitration should be made, and that a decree of the Court should be obtained on the award, and they deceived the Court by representing that the award was a genuine award, though in fact it was not. That is the plaintiff's case, and on that case, as I have said, the decree is a collusive decree. I know of no authority for the proposition that one party to such a decree can obtain relief by getting the decree set aside, and the case to which my learned brother has referred, *Reg* v. *Sadlers' Co.* (1), is a direct authority against such a proposition.

The only real complaint, when one analyses the pleading of the plaintiff as against the defendant, is that the defendant is not carrying out the bargain on which the decree was obtained, namely that the defendant would not execute it. But, if that is the plaintiff's case, he is seeking the wrong remedy. There is no case for setting aside the decree, his only claim would be for an injunction to restrain the defendant from executing the decree in breach of his agreement or for damages. But such a claim is not made out in this suit, and no issue was raised upon it and the bulk of the evidence was not directed

to that case. Therefore, it would not, I think, be right to give leave to amend the plaint by raising that case now. The learned Judge in the Court below held against the plaintiff on merits, and I am certainly not suggesting that his judgment was wrong. It is not necessary, in our view, to go into the merits of the case on this appeal. The appeal must fail on the legal point that the plaintiff is not entitled to the remedy he seeks. If he has any case against the defendant for breach of agreement, he will have to bring it in a separate suit, and I express no opinion upon the question whether such a suit lies. I agree that the appeal fails and must be dismissed with costs.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Original Side Appeal No 64 of 1938

January 24, 1940

LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.

V. G. MANICKA MUDALIAR—APPELLANT

versus

ANDALAMMAL—RESPONDENT

Madras High Court (Original Side) Rules—Questions raised, within province of Judge—When can be referred to Official Referee—Consent of parties—Consent withdrawn—Report of Official Referee, value of.

The Official Referee is not a Judge of the Court but only a Commissioner and the adjudication by him of the questions, which under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself cannot confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case Questions as to the substantive rights are solely within the province of a Judge and matters of detail, *i. e.*, the working out of those rights either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee. 73 Ind. Cas. 903 (1), followed. [p. 802, col. 2]

Where the questions raised in the issues are entirely within the province of the Judge, the Court has no jurisdiction to refer them to any one for decision unless the parties have agreed to submit their disputes to arbitration. When the consent of the party to the matter proceeding before the Official Referee is withdrawn the report of the Official Referee should not be considered If, however, the parties have expressly agreed that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration. [p. 803, col. 1.]

O. S. A. against the judgment of the Venkataramana Rao J., in O. S. No. 562 of 1930, dated July 25, 1938.

Mr. *W. S. Krishnaswamy Naidu*, for the Appellant.

Mr. *A. Seshachariar*, for the Respondent.

Leach, C. J.—This appeal arises out of a suit filed by the respondent on the original side of this Court for a declaration that a piece of land conveyed to the appellant under a deed dated October 30, 1925 is her property and that she is also entitled to the house built thereon. The respondent's case is that she acquired the site and built the house out of the proceeds of a milk business belonging to her. The appellant claimed that the milk business belonged to him and that the property was his. The suit was tried by Venkataramana Rao, J. who held that the property belonged to both of them in equal shares. Consequently, the learned Judge granted a decree for partition and the delivery to the respondent of her half share with mesne profits The respondent has not appealed, and the main question which the Court is called upon to consider is whether the appellant is entitled to the share allotted to the respondent; in other words whether he is absolute owner of the site and the house. The procedure which was adopted in this case was not in accordance with that contemplated by the Civil P. C., and it is necessary also to consider the effect of this. It will be convenient to deal first with the question relating to the procedure adopted. The plaint was filed on November 18, 1930. The hearing was interrupted after a portion of the plaintiff's evidence had been recorded by Lakshmana Rao, J. and on October 1, 1935, the following order was passed by the learned Judge with the consent of the parties:

"(1) That this suit be and is hereby referred to the Official Referee of this Court for the determination of the following issues, *viz*,:

(*i*) Did the plaintiff carry on milk business or any other business of her own and was the defendant entrusted with the management of all or any of the said business as her agent? If so is the defendant liable to render an account;

(*ii*). Was the said house No. 14 Pallappan Street, Triplicane, Madras, purchased and constructed out of funds belonging to the plaintiff in the name of the defendant *benami* for the plaintiff? If so is the defendant liable to account to the plaintiff for the mesne profits?

(*iii*). Is the defendant in possession of all the movable properties mentioned in Sch. "B" to the plaint and do any of them belong to the plaintiff?

2. That the said Official Referee do give his findings on the said issues and submit his report and proceedings thereon to this Court expeditiously.

3. That the evidence recorded herein so, far, shall be treated as evidence before the said Official Referee and the said Official Referee do continue the enquiry from the stage at which it was stopped.

4. And that the further consideration of this suit do stand adjourned until after the receipt of the report of the said Official Referee by this Court."

In accordance with this order the Official Referee recorded the further evidence tendered by the parties and the depositions and exhibits comprise a volume of nearly 200 printed pages. The Official Referee presented his report to the Court on September 2, 1937, and it was considered by Venkataramana Rao, J. on May 12, 1938. I should mention that shortly after the consent order of October 1, 1935, had been passed the respondent applied to Lakshmana Rao, J. to recall the order on the ground that the Official Referee had no jurisdiction to conduct the inquiry into the questions set out therein and that it had been passed without the position being fully realized. The learned Judge, however, refused to recall the order and stated his reasons in these words :

"The suit was referred to the Official Referee by consent and it is this Court that goes finally into all the questions and decides the right of the parties. There is therefore no need to or ground for review and the application is dismissed with costs."

The question relating to the procedure adopted, was raised before Venkataramana Rao, J. who considered that it was unlawful and expressed the opinion that Lakshmana Rao, J. should have recalled the order of reference. Inasmuch as the suit was of long standing and the parties had agreed that the evidence recorded by the Official Referee should be treated as evidence in the trial, the learned Judge decided not to put the case back for trial *de novo* and gave his judgment on the evidence recorded by the Official Referee, but he did not ignore the Official Referee's report altogether. There can be no doubt that the procedure adopted in this case was not only irregular, but was opposed to the provisions of the Civil P. C., and had no sanction from the rules of practice of the original side of this Court. I entirely agree with the observation of Venkataramana Rao, J., that Lakshmana Rao, J. should have recalled the order of reference when the application was made to him by the respondent. As a matter of fact he ought to have refused to pass the consent order. The questions raised in the issues were entirely within the province of the Judge, and, as Venkataramana Rao, J. has said, the Court had no jurisdiction to refer them to any one for decision unless the parties had agreed to submit their disputes to arbitration. This very question was raised before Kumaraswami Sastri, J. in C. S. No. 661 of 1920 *Abdul Wahab* v. *Rokia Bibi* (1), and, with Venkataramana Rao, J., I am in agreement with the following observations which Kumaraswami Sastri, J. made in that case :

"He (the Official Referee) is not a Judge of the Court but only a Commissioner and I think that the adjudication by him of these questions, which under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, *i. e.*, the working out of those rights either by taking out accounts or effecting a partition or selling properties are under the rules, functions which the Judge may delegate to the Official Referee..... It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply en bloc to the Original Side except so far as our own rules modify them."

In a suit of the description of the one now under consideration the Court has no power to adopt the rules of practice in England. Order XXVI, Civil P. C., states when commissions may be issued. They may be issued for the examination of witnesses for the purpose of local investigations, for the purpose of examination of accounts and for the effecting of partition but for no other purposes. Order XXIII, of the rules of the original side states the procedure which should be followed when there is a reference, but they do not purport to enlarge the powers of the Official Referee or authorize the issue of commissions beyond those mentioned in the Civil P. C.

Counsel are agreed, as they were agreed before Venkataramana Rao, J. that the Court shall treat the evidence recorded by the Official Referee as being evidence recorded by the Court and they are content that the rights of the parties shall be decided on what appears in the printed record, but they suggest that the report of the Official Referee should be eliminated. It seems to me that it is open to the Court in the circumstances of this case to adopt this course. I consider that the Court should ignore the report of the Official Referee, and I may say that neither I nor my learned brother has read it. Approval for the suggested course may be obtained from the

(1) A I R 1921 Mad. 406; 73 Ind. Cas. 903.

decision of the Privy Council in *Sri Thakur Ramakrishna Muraji* v. *Ratan Chand* (2). In that case an ancestral business of a Mitakshara joint family had been carried on in partnership with another person. The stranger partner retired and thereupon the partnership was dissolved and wound up. The business was then carried on in the same commodities and in the same premises though under a new firm name and with new books. It was alleged that speculative transactions were subsequently entered into and it was contended that the business could not be regarded as a family affair. When the case was before the High Court on appeal a Commissioner was appointed to examine the books and report whether the new business was of a gambling nature. The Privy Council disapproved of this course as this question was one for determination by the Judge alone. As their Lordships were not aware whether the order referring to the Commissioner was made under protest by the appellant-defendant or with his consent, they were not prepared to hold that the report of the Commissioner should be disregarded and in fact took it into consideration along with the other evidence in the case. In the case before us the consent of the respondent to the matter proceeding before the Official Referee was withdrawn and it is for that reason that I consider that the report of the Official Referee should not be considered. As the parties have expressly agreed before us that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration, but at the same time I trust that in future similar references will not be made to the Official Referee.

Turning now to the facts, the respondent is the wife of one Balasundara Mudaliar whom she married in 1895. In 1919 the appellant married the daughter of the respondent's brother. He had been married before, but his first wife has died. At the time of the appellant's marriage the respondent and her husband were living in her brother's house with her brother and his family. In 1920 the appellant became ill and he went to live in his father-in-law's house. That year his wife and his daughter by his first wife were accidentally drowned. The appellant continued to live in the respondent's brother's house and it is now common ground that improper relations developed between the appellant and the respondent. This was persisted in and resulted in the respondent's husband leaving the house in 1921, since when he has never returned to live with the respondent. The illicit intercourse between the appellant and the respondent continued and eventually they lived openly as man and wife. The site of the house was bought in 1925 and the house was built during the years 1927 and 1928. When it was completed the appellant and the respondent left the respondent's brother's house and went to live in the new house and continued to do so until 1930 when they quarrelled.

The appellant says that he provided the whole of the money for the purchase of the land for the building of the house, but it appears to me to be abundantly clear that he had not sufficient resources of his own to meet anything like the cost of this property. The site was bought for Rs. 1,939-5-4 and over Rs. 10,000 was spent on the building of the house. The appellant was a Police constable and never in his service drew more than Rs. 38 a month. He retired from the Police force in 1924 on a pension of Rs. 11 a month. The evidence discloses that the respondent had means. It is admitted that when the appellant went to live in her brother's house she had two businesses one in *dhall* and the other in *lungis*, and it has been proved that she was carrying on a milk business as long ago as 1911. The *lungi* business was closed in 1922 because of the fall in price of piece-goods and the *dhall* business was closed in 1924. The reason given for the closing of the *dhall* business was that the milk business in which the appellant was assisting had so grown and was so profitable that there was no time for the *dhall* business. The evidence also discloses that the respondent was in the habit of lending money and that she had a post office savings bank account.

I agree with the learned trial Judge that the fact that the land was bought in the name of the appellant is not of very great importance. When it was bought the appellant and the respondent were living openly as man and wife and this no doubt accounts for the fact that the land was taken in the name of the ap-

(2) 53 A 190; 132 Ind. Cas. 613; A I R 1931 P C 136; 58 I A 173; (1931) A L J 458; 53 C L J 390; 33 Bom. L R 988; 35 C W N 841; Ind. Rul. (1931) P C 197, (1931) M W N 733; 34 L W 175; 61 M L J 665 (P C).

pellant. It is also true that some of the money for the building of the house was borrowed in the appellant's name. It would be far easier for a man, than a woman, to borrow money and as they were living together and were going to live in the new house it was only natural that the appellant should borrow money in his own name. I concur in the finding of the learned trial Judge that the milk business belonged to the respondent and that the house was really bought from the profits of this business. The learned Judge awarded the appellant a half share in the property because he considered that it was

"unlikely that the appellant would have retired from service but for some understanding between them that the business should be shared equally between them and that whatever was earned by either must be shared by either."

In these circumstances the learned Judge considered that there was an agreement of partnership subsisting between them. As I have indicated, this finding has not been challenged. It has been stated at the Bar that the respondent had not the means to pay the court-fee necessary for a cross appeal. That is a question which the Court cannot go into now. There was no appliion for leave to appeal *in forma pauperis* and the Court can only assume that the respondent acquiesced in this part of the judgment of Venkataramana Rao, J. On the evidence the appellant can clearly not maintain a claim for more than what has been awarded to him. The learned Judge has discussed the evidence in detail and I consider that the reasons which he has given for finding in favour of the respondent to the extent of a half share in the property cannot be seriously challenged. Whether the respondent might have succeeded if a cross appeal had been filed is a question which does not in the circumstances require to be considered. For the reasons indicated I would dismiss the appeal with costs.

Krishnaswami Ayyangar, J.—I am in entire agreement with the judgment just pronounced by my Lord I shall however add a few words on the question as to what matters are properly referable for inquiry to the Official Referee. Before the creation of the office of the Official Referee some 25 or 30 years back, the practice on the original side was to entrust inquiries into accounts and such other matters as are referable to a Commissioner under O. XXVI, Civil P. C., to a Commissioner appointed *ad hoc* by the Court. There were delays in the submission of reports and defects noticed in them which necessitated fresh references. For these and other reasons, it was felt it would be a great advantage to have a permanent officer with the necessary training and experience to enable him to do in a more satisfactory way what was till then being done by a Commissioner. To start with, it was certainly not the idea to delegate to the Official Referee any of the functions of the Court. Neither is there anything in the rules of the original side to warrant the view that there has since been an enlargement in the scope of the functions of the Official Referee. He is to be no more than a permanent Commissioner for the purpose of taking the accounts and making the inquiries contemplated by the Civil P. C. Order XXIII, of the rules of the original side contain the provisions relating to the appointment of a Commissioner, and a definition of the matters which could be left to him for enquiry and report. There is nothing in O XXIV, of the Original Side Rules to suggest that it was the intention to give him an extended jurisdiction. Rule 1 of this Order says that:

"Subject to the rules hereinafter contained, O. XXIII of the rules relating to accounts and enquiries referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee.

This is a fair indication that the Official Referee is only expected to perform the functions of a Commissioner under the Code and that it was never intended that he should have power to deal with or decide material questions of fact or law on which the decision of the suit itself depends. So far as my knowledge goes questions of this character were rarely, if ever, referred to the Official Referee for decision or report. Such a course might have been taken in a few exceptional instances, but I think that it happened almost always because both sides consented to it and invited the presiding Judge to adopt this procedure. In such cases the inquiry generally went on without demur and the report when made was taken into consideration by the Court. I am not aware that there has been any instance of a reference being made on substantial questions in contest between the parties, without their express consent, or the Referee's report considered valid in spite of objection taken to his jurisdiction to try.

I may also observe that whenever during an inquiry before the Official Referee material questions of fact or law arose it

has been the practice ordinarily for the Referee to refer those questions to the Court or ask the parties to take the orders of the Court thereon. Questions of title to property and such other material questions were as a rule dealt with by the Court. I agree that in view of the fact that in the present case the consent had been withdrawn even before the commencement of the inquiry before the Official Referee there is good reason for ignoring the findings of the Referee altogether, though there can be no objection to the evidence recorded by the Official Referee being treated as evidence in the case with the consent of the parties. It is on this footing that we have considered the appeal, learned Counsel on both sides having expressly assented to this course.

N.-S. *Appeal dismissed.*

NAGPUR HIGH COURT

Civil Revision Application No. 501 of 1939
September 18, 1940
BOSE, J.

ABDUL AZIZ AND OTHERS—DEFENDANTS—APPLICANTS
versus
Sheikh AMIR AND ANOTHER—PLAINTIFFS—NON-APPLICANTS

Limitation—Minor — Suit against— Plaint within time—Subsequently defendant found to be minor—Guardian ad-litem *appointed, but beyond limitation —Suit, if barred — Civil Procedure Code (Act V of* 1908), *O. XXXII, r.* 3 (*C. P. Amendment*)*—Scope and interpretation—Specific Relief Act (I of* 1887), *s.* 9*—Suit under - Each party claiming exclusive possession —Neither claiming joint possession — Court, if can pass decree for exclusive possession,*

Order XXXII, r 3 of Civil P. C., as amended in the Central Provinces contemplates distinctly a suit brought against a certain defendant in which a dispute about minority is raised and in which the Court has to be satisfied about the fact of minority and then on being satisfied it has to appoint a proper person to be guardian. It does not mean that the suit is a nullity until that is done or that no suit can be taken to have been instituted until a guardian has been appointed. The Lim. Act contemplates a suit brought against particular person; it does not matter whether that person is a major or a minor The suit is not instituted against the guardian but against the minor himself and the minor does not become another person simply because he is subsequently described as a major. Consequently the suit, so far as the Lim. Act is concerned, is against the proper person, whether he is described as a major or a minor and therefore is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the person who in point of fact is a minor. If no proper guardian is appointed, the suit of course in the result becomes a nullity. But it is a nullity not because it is not instituted in time but because the procedure for continuing the suit against the minor and for obtaining a decree or order against him has not been carried into effect. 29 Ind. Cas. 314 (1), explained.

Where in a suit under s. 9, Specific Relief Act, neither side contends that within the six months preceding the suit either had been in joint possession but each claims to be in exclusive possession, the Court is right in not going into the question of joint possession and in placing that party in exclusive possession which on the facts before it it considers to have been in possession at the date of the dispossession.

It may well be that a joint owner of property is still at the date of suit under s. 9 entitled to the property and would be given possession in a suit probably instituted for that purpose. But nevertheless it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under s. 9, then for the purposes of s. 9 that ouster would hold good even though the title of the plaintiff may not be extinguished. Consequently the admission of the defendants which go to the question of title do not oust the jurisdiction of the Court, and where neither side contends that they were in joint possession within six months before the suit is filed, the lower Court is right in placing the plaintiff in exclusive and not in joint possession.

C. R. App. of the decree of the Court of the Third Subordinate Judge. Second Class, Nagpur, dated July 31, 1939.

Messrs. *Fida Hussain* and *N. B. Chandurkar*, for the Applicant.

Messrs. *A. D. Mande* and *G. S. Padhye*, for the Opposite Party.

Order.—The suit was under s. 9 of the Specific Relief Act. The lower Court holds that the plaintiff was in p ssession within six months of the suit, that is to say, on January 7, 1938, and that the defendants ousted him and, therefore, has passed an order in the plaintiff's favour. Two questions are raised in revision. The first is whether the suit is within limitation and the second is whether the Court could pass and order placing the plaintiff in exclusive possession without determining whether the parties had been in joint possession and, therefore, entitled to joint possession.

As regards the first point, the matter arises in this way. The cause of action is stated in the application to have arises on January 8, 1938. The suit was filed on February 24, 1938. In the entitling the third defendant was shown as a major. In the course of the proceedings it was objected that he was in point of fact a minor. The plaintiff accepted this without contest and a guardian was appointed on Septem-

ber 5, 1938. It is argued on behalf of the defendants that the suit as against the minor defendant must be taken to have been instituted on September 5, 1938, and that as this makes it more than six months beyond the date of dispossession the suit under s. 9 did not lie. Reliance is placed for this on *Payidanna* v. *Lakshminarasamma* (1).

I am not able to agree. Order XXXII, r. 3. of the Civil P. C. as amended locally, states that

"where the defendant is a minor, the Court, on being satisfied of the fact of the minority, shall appoint a proper person to be guardian for the suit of such minor."

This appears to me to contemplate distinctly a suit brought against a certain defendant in which a dispute about minority is raised and in which the Court has to be satisfied about the fact of minority and then on being satisfied it has to appoint a proper person to be guardian. It does not mean that the suit is a nullity until that is done or that no suit can be taken to have been instituted until a guardian has been appointed. It seems to me clear that the Lim. Act contemplates a suit brought against a particular person: it does not matter whether that person is a major or a minor: so long as the suit is brought it is brought against that person. The suit is not instituted against the guardian but against the minor himself and the minor does not become another person simply because he is described as a major. He still is the same person. Consequently the suit, so far as the Lim. Act is concerned, is against the proper person, whether he is described as a major or a minor, and, therefore, is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the person who in point of fact is a minor. If no proper guardian is appointed, the suit of course in the result becomes a nullity and that is the decision in *Payidanna* v. *Lakshminarasamma* (1). But it is nullity not because it is not instituted in time but because the procedure for continuing the suit against the minor and for obtaining a decree or order against him has not been carried into effect.

The next question is whether the lower Court is right in ordering the property to be placed in the exclusive possession of the plaintiff. The plaint claims that the plaintiff was in exclusive possession and that he was dispossessed. The written statements of the defendants state on the other hand that they and not the plaintiff have been in possession. Therefore, neither side contended that within the six months preceding the suit either had been in joint possession. Each claimed to be in exclusive possession. Consequently the lower Court was right in not going into the question of joint possession and in placing that party in exclusive possession which on the facts before it, it considered to have been in possession at the date of the dispossession.

Reliance is, however, placed by the learned Counsel for the applicant on certain statements in the written statements where the defendants admit that the property is the joint property of the plaintiff and the defendants and on a statement of defendant No. 5 where she admits that they have a joint title. That, however, has nothing to do with the question of possession under s. 9. It may well be that a joint owner of property is still at the date of suit under s. 9 entitled to the property and would be given possession in a suit probably instituted for that purpose. But nevertheless it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under s. 9, then for the purposes of s. 9 that ouster would hold good even though the title of the plaintiff may be extinguished. Consequently the admissions of the defendants which go to the question of title do not oust the jurisdiction of the Court, and as neither side contended that they were in joint possession within six months before the suit was filed, the lower Court was right in placing the plaintiff in exclusive and not in joint possession. The application is dismissed with costs. Counsel's fee Rs. 15.

D. *Application dismissed.*

(1) 38 M 1076; 29 Ind. Cas. 314; A I R 1916 Mad. 33; 28 M L J 525.

CALCUTTA HIGH COURT

Appeal No 211 of 1936
May 10, 1940
NASIM ALI AND NARSING RAU, JJ.
SECRETARY OF STATE—DEFENDANT—APPELLANT
versus
Syed SADEK REZA—PLAINTIFF—RESPONDENT

Bengal Public Demands Recovery Act (III of 1913), ss. 35, 37, 5 — Cancellation of certificate on ground that it is not duly filed or question whether certificate is duly filed, whether excluded from jurisdiction of Civil Court—Jurisdiction of certificate officer, whether depends upon situation of property in respect of which demand arises or upon place where money is payable or demandable — Murshidabad Estate Administration Act (XXIII of 1933), s. 19 (1)—"Arrears", if covers arrears due before Act came into force.

Per *Narsing Rau, J.*—Cancellation of certificate on ground that the certificate has not been "duly filed" is not beyond the jurisdiction of the Civil Court under s 35, Ben. Public Demands Recovery Act. Similarly under s. 37 the question whether the certificate has been duly filed under the Act is not excluded from the purview of the Civil Court, therefore the Civil Court can go into this question by virtue of the general provision in s. 9, Civil P. C. [p. 812, col. 1.]

Whether certificate officer is a Collector or a Sub-Divisional Officer or some officer appointed by the Collector under s. 3 (3) of the Act, he is a certificate officer of the district and not of any local area in the district; and he exercises jurisdiction in the district as implied in s. 5 and not merely in some local area in the district. The certificate officer referred to in s. 5 is the certificate officer of the place where the public demand is payable; for it is there that it is a demand at all. The jurisdiction of the certificate officer under s. 5 does not therefore depend upon the situation of the property in respect of which the demand arises, but upon the place where the money is demandable or payable. If this place is within the district where the certificate officer holds office, the certificate officer has jurisdiction to receive the requisition and to make a certificate. [p. 812, col. 2; p. 813, col 1.]

The word "arrears" in s. 19 (1), Murshidabad Estate Administration Act, covers "arrears" which became due before the Act came into operation.

A. from the original decree of the Sub-Judge, Murshidabad, dated June 30, 1936.

Mr. *Ramaprasad Mookherjee*, for the Appellant.

Messrs. *Amarendra Nath Bose* and *Hemendra Kumar Das*, for the Respondent.

Nasim Ali, J.—On February 11, 1924, the plaintiff in the present suit obtained from the Nawab Bahadur of Murshidabad an Ijara settlement of certain properties appertaining to Mahal Taraf Sambalpur within Tauzi No. 210, Parganah Kanagjole in the District of Maldah on an annual rent of Rs. 10,172 for a period of 21 years commencing from *Baisak* 1330 *B. S.* to the end of *Chaitra* 1350. The material terms of this Ijara were: (1) That the rent reserved is to be paid by the lessee *kist* by *kist* in the Sadar Kachery of the Nawab Bahadur in Lalbagh in the district of Murshidabad. (2) That during the term of settlement, the lessor would have nothing to do with possession or dispossession of the properties covered by the Ijara and that the lessee will have to pay the fixed annual rent without any objection. (3) That the lessee will have no right to surrender his rights under the Ijara during the fixed term of the Ijara. (4) That if during the term of the present lease the lessor wants to take Khas possession of the Mahals, he shall have to give 15 days notice and from the date of the receipt of the notice the Khas possession of the Mahals will be made over to the lessor.

In the year 1929 the Nawab Bahadur of Murshidabad instituted a suit for ejecting the plaintiff from the Ijara Mahals. This suit was subsequently converted into a suit for arrears of rent of the Ijara Mahal due up to the end of *Chaitra* 1337 *B. S.* In the year 1930, another suit for ejectment was instituted by the Nawab Bahadur against the plaintiff. Both these suits were compromised on April 24, 1931. By this compromise, the Ijara was declared to be valid and binding on the Nawab Bahadur of Murshidabad for the Ijara period, namely 21 years and the right of the Nawab Bahadur of Murshidabad to take Khas possession of the Mahal during the continuance of the lease by giving 15 days' notice to quit was extinguished. The plaintiff in the present suit executed a handnote for Rs. 22,000 in favour of the Nawab Bahadur at the time of this compromise and both the suits were dismissed in terms of the compromise. On September 21, 1933, the Murshidabad Estate Administration Act (Act XXIII of 1933) came into operation. Mr. K. C. De was appointed manager of the Murshidabad estate under s. 3 of this Act. Thereafter, the manager filed a requisition under s. 5, Public Demands Recovery Act, before the certificate officer of Lalbagh for realization of arrears of rent of the Ijara Mahal for the years 1338, 1339 *B. S.* and for the six months of 1340 *B. S.* The certificate officer thereupon filed a certificate on November 21, 1933. Another certificate was filed by the same certificate officer

for the arrears of rent of the remaining six months of 13¹0 on May 10, 1934.

On April 30, 1934 the manager cancelled the Ijara settlement under s. 12 of Act XXIII of 1933. The plaintiff appealed to the Board of Revenue against this order of the manager under s. 13 of the Act. On August 16, 1934 the Board of Revenue asked the manager to re-consider the case, to give the plaintiff another trial and to help him to recover the arrears due to him from his tenants. The Board of Revenue, however, observed that if the plaintiff did not pay the arrears after this arrangement by reasonable instalments, vigorous steps should be taken to realise them by certificate, etc. On August 25, 1934 the manager asked the plaintiff to state on what conditions he was willing to continue the lease and what terms he would propose for payment of the arrears due from him. On September 19, 1934, the plaintiff proposed certain terms. The material portion of this proposal is as follows: (1) a responsible officer of the Murshidabad estate is to be deputed at the cost of the estate during the rent realisation season to assist the plaintiff's officer in the realisation of rent from the tenants; (2) the plaintiff would pay sums of money that would be realised from time to time from the tenants either in payments of rents due or in execution of decrees for arrears of rent which had been already obtained by him deducting 25 per cent. thereof for collection expenses of the plaintiff and maintenance cost of himself and his family. On the same day, the manager accepted these terms but stated that the certificate cases would not be withdrawn as there would be no way of recovering arrears if the proposed arrangement failed. The manager added that he would not apply for coercive measure from the certificate officer so long as the arrangement would work. On November 28, 1934, an officer was appointed by the manager in accordance with this arrangement. On March 11, 1935, the Board of Revenue wrote to the lessee that he had paid only Rs. 149 4·0 within the last three months and that unless reasonable amount was paid without further delay, certificates would be executed. On June 29, 1935, the manager reported to the Board of Revenue that the arrangement had failed and asked for permission to execute the certificates against the plaintiff. On July 9, 1935, the Board approved the proposal of the manager. The services of the officer who was appointed in accordance with the arrangement were dispensed with by the manager on August 15, 1935. On October 8, 1935, the plaintiff applied to the Board to postpone all proceedings for execution of the two certificates. This application, however, was refused. On October 25, 1935, the certificate officer of Lalbagh issued an order upon the tenants of the Ijara Mahal prohibiting them from paying any rent to the lessee under r. 18 (1) (*a*) and (*c*) of the Rules in Sch. II, Public Demands Recovery Act. On the same day, he ordered that the Ijara Mahal would be sold by public auction.

On January 16, 1936, plaintiff served a notice on the Secretary of State for India in Council represented by the manager of the Murshidabad Estate under s. 80, Civil P. C. The cause of action and the relief claimed as stated in this notice are these: The two certificates obtained by the manager were bad as the Nawab Bahadur of Murshidabad could not put the plaintiff in possession of some of the Ijara properties and consequently the plaintiff was not liable to pay any rent for the Ijara. The manager had no power to execute the certificates in violation of the contract and adjustment between him and the plaintiff on September 19, 1934. The plaintiff was therefore entitled to get a declaration that the agreement of September 19, 1934 was binding on the Secretary of State for India in Council that the proceedings in execution of the certificate were illegal, void, and *ultra vires* and that the plaintiff was entitled to get a permanent injunction restraining the Secretary of State for India in Council from taking any steps in execution of those certificates. On April 6, 1936, plaintiff raised the present suit.

The case of the plaintiff so far as it is material for the purposes of the present appeal is this: The Nawab Bahadur of Murshidabad failed to deliver possession to the plaintiff of Khord Joyrampur, one of the properties covered by the Ijara. The rent reserved by the Ijara was a lump rent for the entire Ijara Mahal. The plaintiff was therefore, entitled to total suspension of the entire rent from 1338 to 1340 *B. S.* In spite of the faithful performance of the agreement between the plaintiff and the defendant's manager, the plaintiff was arrested in execution of the certificates on July 23, 1935. He was released on July 25. The prohibitory

order and the order for sale made by the certificate officer on October 24, 1935 were without jurisdiction as the properties affected by the said orders were outside the district of Murshidabad. The plaintiff is therefore entitled to get, (*a*) a declaration that the agreement and arrangement of September 19, 1934, are in force and were being performed by the plaintiff and binding on the defendant, (*b*) a declaration that the issue of certificate as well as execution proceedings started thereunder are void, fraudulent, illegal and without jurisdiction, (*c*) a perpetual injunction restraining the defendant from taking any steps under the said certificates and from interfering with plaintiff's right and enjoyment of the Ijara Mahal up to the year 1350 *B.S.*

The Secretary of State for India in Council opposed this suit. His main defences are these: (1) That the suit is barred by s. 34 and s. 37, Ben. Public Demands Recovery Act, (Ben. Act III of 1913). (2) That at the time when the Ijara lease was executed, the Nawab Bahadur of Murshidabad was not in possession of Khord Joyrampur and that the plaintiff was aware of this fact at the time when he took the Ijara. (3) That as the Nawab Bahadur of Murshidabad was out of possession of Khord Joyrampur at the time of the Ijara settlement, the assets of this property were excluded when the rent of the Ijara was settled. (4) That the plaintiff not having based his cause of action on the ground of suspension of rent for non-delivery of possession of Mouza Khord Joyrampur in the notice under s. 80, Civil P. C. is not entitled to raise this question in this suit. (5) That the order of the manager on September 19, 1934 accepting the proposals made by the plaintiff was not an agreement between the plaintiff and the defendant's manager and that even if it was, it was not binding on the defendant as it was not entered into with the previous sanction of the Board of Revenue. (6) That the plaintiff's allegation that he had acted according to the terms of the arrangement between him and the manager is false. (7) That the certificate officer had jurisdiction to issue the prohibitory order restraining the tenants of the Ijara Mahal from paying their rent to the plaintiff. The following issues were framed on the pleadings of the parties before the trial Judge:

"(1) Is the suit barred by ss. 34 and 37, Public Demands Recovery Act?

(2) Was any agreement or arrangement made on September 19, 1934 that the Murshidabad Estate would not take any coercive measures against the plaintiff in the matter of the certificates in question?

(3 Was it an agreement or arrangement or order? Was it illegal and void *ab initio*? Was it set aside by the Board of Revenue?

(4) Has such agreement or arrangement, if any, ceased to be in force? Is the defendant precluded thereby from executing the certificates in question?

(5) Are the certificates in question as well as the execution proceedings thereunder without jurisdiction, illegal and void?

(6) Is the plaintiff entitled to the declaration asked for?

"(7) Is he entitled to the permanent injunction claimed?"

The trial Judge after considering the evidence in this case recorded the following findings: (1) That the present suit was not hit by ss. 34 and 37, Public Demands Recovery Act. (2) That the arrangement accepted by the manager on September 19, 1934 was not a valid agreement. It was in the nature of a trial and the defendant had the option of not risking it any longer. (3) That the defendant was not precluded by this arrangement from executing the certificates in question. (4) That the certificate officer of Lalbagh Sub-Division of Murshidabad had no jurisdiction to entertain requisitions or file certificates in respect of demands relating to property situated outside the district of Murshidabad and consequently the certificates were invalid. (5) That the plaintiff took lease of the entire Mahal including Khord Joyrampur with the knowledge that this latter Mauza was not in possession of the lessor and that the gross annual assets on the basis of which the rent reserved by the Ijara was calculated did not include the assets of Khord Joyrampur. (6) That the possession of the plaintiff in the Ijara Mahal was not interfered with by the Nawab Bahadur's estate in the years 1338 to 1340 *B. S.*

On these findings, the learned Subordinate Judge decreed the suit. Hence this appeal by the defendant. From what has been stated above, it is clear that the Subordinate Judge has rejected the grounds on which the plaintiff attacked the two certificates in question in the plaint. He has however declared them to be illegal and void on a ground which was not taken either in the notice under s. 80, Civil P. C., or in the plaint. This ground is that the certificate officer of Lalbagh had no jurisdiction to file the certificate inasmuch as the Ijara Mahal was outside the district of Murshidabad. Under s. 5, Public Demands Recovery

Act, when any public demand payable to a person other than the Collector is due, such person may send to the certificate officer a written requisition in the prescribed form. The form prescribed shows that the person who makes the requisition is to state the name of the certificate debtor, the address of the certificate debtor, the amount of public demand for which the requisition is made and the nature of the public demand for which the requisition is made. Section 5 evidently contemplates that the demand must be a public demand within the meaning of the Public Demands Recovery Act and must be due to that person. The manager of the Murshidabad Estate appointed under s. 3, Murshidadad Estate Administration Act, is entitled under s. 6 of the Act to receive and recover all rents, issues and profits due in respect of the immovable properties of the estate. Section 6 therefore gives power to the manager to realise the arrears of rent as well. The arrears of rent for the Ijara therefore were due to the manager. Under s. 19 (1) of the Act, the manager shall have for the purpose of realising and recovering the rents, issues and profits of the immovable properties of the estate, the same powers as the Nawab Bahadur would have had for such purpose had the Secretary of State not entered into the said properties and all arrears of rent and all demands recoverable as rent, and, all interest due on such arrears or demands shall together with all costs incurred for realising the same be recoverable as public demands.

It was contended on behalf of the plaintiff-respondent that the word 'Arrears' in s. 19 (1) contemplates 'arrears' which would become due after the Act come into operation. I am unable to accept this interpretation. Section 6 of the Act gives right to the manager to realise arrears of rent as well. After the Secretary of State for India in Council entered into possession in pursuance of the Act, the Nawab Bahadur had no right to realise the arrears. Section 19 (1) lays down the procedure which the manager can adopt for realising the current as well as the arrears of rent. In addition to the ordinary procedure, *viz*, by suit in the Civil Court, the manager can adopt the summary procedure under the Public Demands Recovery Act. The arrears of rent for which the certificates were filed were therefore due to the manager within the meaning of s. 5, Public Demands Recovery Act. The next question is before which certificate officer the requisition is to be made. The Act itself does not give any express indication as regards the matter. But, on general principles, the certificate officer within whose jurisdiction the cause of action arises will have jurisdiction to entertain the requisition. For a suit in the Civil Court the cause of action for such a suit is to be, deemed under s. 144, Ben. Ten. Act, to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for possession of tenure or holding in connexion with which the suit is brought. Admittedly s. 144, Ben. Ten. Act, is no bar. The certificate officer of Lalbagh would therefore have jurisdiction to entertain the requisition and to file the certificates, if the cause of action for filing such certificates arose within Lalbagh From the Ijara lease as has already been stated, it is clear that the Ijara rent was payable by the lessee (certificate-debtor) at the Sadar Kachery of the Nawab Bahadur of Murshidabad in Lalbagh. The manager was therefore entitled to demand payment in Lalbagh and the debt not having been paid in Lalbagh, the manager's cause of action for making the requisition under s. 5 arose within the jurisdiction of the Lalbagh certificate officer.

Our attention was not drawn to any statutory bar which would deprive the certificate officer of Lalbagh of his jurisdiction to entertain requisitions for realizations of public demands payable within Lalbagh sub-division. If the money is payable to the Collector of a District under s. 4, the certificate officer of that District will have jurisdiction to file the certificate. The jurisdiction of a certificate officer under the Public Demands Recovery Act depends upon the place where the public demand is payable. I therefore hold that the certificate officer of Lalbagh had jurisdiction to file the certificates in question. The learned Advocate for the plaintiff-respondent made an attempt to support the decree of the trial Judge on the following grounds: (1) That the certificates were void as plaintiff was not at all liable for the rents of the Ijara Mahal for the years 1338, 1339 and 1340 *B. C.*, as the Nawab Bahadur of Murshidabad did not put him in possession of one of the Ijara properties, namely, Khord Joyrampur. (2) That the possession of the plaintiff was substantially interfered with by the manager of the Murshidabad Estate during this period.

Admittedly, the plaintiff did not obtain possession of Khord Joyrampur. The evidence in this case shows that before the

Ijara the Nawab Bahadur himself was not in possession of this property and the plaintiff was aware of this fact. The rent reserved by the Ijara was assessed on the gross assets of the Ijara properties after making certain deductions. The evidence in this case shows that in calculating the assets of the entire Ijara properties the assets of Khord Joyrampur were not taken into consideration. The plaintiff is not therefore entitled to claim either suspension of rent or abatement of rent. As regards the complaint of the plaintiff that his possession was interfered with during the period in question, namely, 1338 to 1340 *B. S.*, it appears that no such complaint was made either in the notice under s. 80 or in the plaint itself. There is no satisfactory evidence also in this case to show that the plaintiff's possession during this period was interfered with by the defendant's officers. For the reasons given above, the plaintiff's prayer for a declaration that the two certificates in question were illegal and void must be rejected. As regards the plaintiff's claim for declaration that the proceedings in execution of the two certificates were illegal, the plaintiff's case is, as has already been stated, that there was an adjustment of the certificate debts by agreement between the plaintiff and the manager of the defendant on September 19, 1934 and that in view of this adjustment defendant had no right to execute the certificates so long as the plaintiff was performing and was willing to perform his part of the contract.

The learned Subordinate Judge has found that there has been no contract but only an arrangement in the nature of a trial. From the evidence in this case, I am not prepared to say that the Subordinate Judge was wrong. Assuming however that there was any such contract, it cannot be binding on the defendant as under s. 21, Murshidabad Estate Administration Act, the manager cannot enter into any such contract without obtaining the previous sanction of the Board of Revenue. The evidence in this case does not show that previous sanction of the Board of Revenue was taken by the manager before he accepted the proposals of the plaintiff. The Board of Revenue while disposing of the plaintiff's appeal simply asked the manager to help the plaintiff to recover his arrears and to give him another trial. But the subsequent arrangement proposed by the plaintiff and accepted by the manager was never sanctioned by the Board of Revenue. Again under s. 37, Public Demands Recovery Act, every question arising between the certificate-holder and the certificate debtor relating to the execution, discharge or satisfaction of a certificate is to be determined by the certificate officer and not by a suit. If the arrangement between the manager and the plaintiff amounted to an adjustment of the certificate-debt, such question is to be determined by the certificate officer and not by the Civil Court in a suit. The agreement pleaded by the plaintiff therefore cannot operate as a bar to the execution of the certificates by the certificate officer.

It was contended on behalf of the plaintiff-respondent that the order of the certificate officer prohibiting the tenants of the Ijara Mahal from paying their rents to the plaintiff and the order for sale of the Ijara properties were without jurisdiction as the properties affected by these two orders were outside the District of Murshidabad. It appears from s. 8 (*b*), Punjab Demands Recovery Act, that after the service of notice of any certificate under s. 7, upon the certificate-debtor, the certificate-debt becomes a charge upon the immovable property of the certificate-debtor wherever situated. Rule 23 of Sch. II of the Public Demands Recovery Act lays down that where the properties are immovable, no attachment need be made before the sale. No prohibitory order issued by the certificate officer in this case was the attachment of certain debts due to the certificate-debtor and there is nothing to show why the debts outside the jurisdiction of the attaching Court cannot be attached by a prohibitory order. Further, these are matters which relate to the execution of the certificates and are to be determined by the certificate officer under s. 37, Public Demands Recovery Act. If the plaintiff's contention is correct, the certificate officer would have jurisdiction to set aside these proceedings. Sufficient ground for perpetual injunction has not therefore been made out. For the reasons given above, I allow this appeal and dismiss the cross-objection. The suit is dismissed. The defendant appellant will get his full costs in the trial Court and six gold *mohurs* as hearing fee in this Court with half of the other costs incurred in this Court.

Narsing Rau, J.—I agree that this appeal should be allowed. The main issue in the appeal is whether the certificates were filed or made without jurisdiction. This was Issue No. 5 raised before the Subordinate Judge. A preliminary ques-

tion connected with this issue is whether it can be raised at all in the Civil Court. Section 35, Ben. Public Demands Recovery Act, is undoubtedly no bar, for its opening words are, 'no certificate duly filed under this Act shall be cancelled by a Civil Court except etc.', so that cancellation on the ground that the certificate has not been "duly filed" is not beyond the jurisdiction of the Civil Court under this section. Section 37 appears at first sight to be more comprehensive, because, it states that except as otherwise expressly provided in the Act every question arising between the certificate-holder and the certificate-debtor or their representatives relating to the making, execution, discharge or satisfaction of a certificate duly filed under the Act, etc., shall be determined not by suit but by order of the certificate officer before whom such question arises. Although the section thus enacts a general bar extending to all questions relating to the making of certificates, it immediately qualifies the effect by using the words "duly filed under the Act", so that once again, the question whether the certificate has been duly filed under the Act is not excluded from the purview of the Civil Court. I am, therefore, of opinion that the Civil Court can go into this question by virtue of the general provision in s. 9 Civil P. C.

The grounds upon which the learned Subordinate Judge has held in favour of the plaintiff upon this issue are: (*a*) that the jurisdiction of the Sub-Divisional Officer, Lalbagh who made the first certificate and of the special certificate officer who made the second certificate were both confined to the sub-division of Lalbagh in the District of Murshidabad, and (*b*) that Mahal Sambalpur being partly in the District of Malda and partly in the District of Purnea, neither of these officers had territorial jurisdiction to entertain a requisition for, or to file, a certificate in respect of demands relating to the Mahal. As to ground (*a*), I am inclined to think although the point is not very material in the present case, that the jurisdiction of each of the officers extended to the entire District of Murshidabad and was not limited to Lalbagh sub division. The provisions of the Ben. Public Demands Recovery Act, 1913, are not as explicit on this point as they might have been; but the position seems to be reasonably plain from the terms of s. 15 and from the headings of Forms Nos. 1 and 2 in the Appendix to the Act, which it may be noted, is part of r. 84, in Sch. II, which, in its turn, has effect as if enacted in the body of the Act by virtue of s. 38. Section 15, provides that where a revenue-paying estate or any share therein is liable to sale in execution of a certificate, such sale may be held either, (*a*) by the certificate officer exercising jurisdiction in the District to the revenue-roll of which the estate or share appertains, or (*b*) by the certificate officer exercising jurisdiction in the District in which such estate or share is situated.

The Forms 1 and 2 in the Appendix are headed respectively "Filed in the office of the certificate officer of (name of District)" and "To the certificate officer of the District of....." It seems reasonably clear from these indications that whether certificate officer is a Collector or a Sub-Divisional Officer or some officer appointed by the Collector under s. 3 (3) of the Act, he is a certificate officer of the district (as stated in the Forms) and not of any local area in the district; and he exercises jurisdiction in the district as implied in s. 15 and not merely in some local area in the district. This, however, does not solve the real problem. To appreciate the real difficulty in this case, we must turn to the provisions of s. 5, Ben. Public Demands Recovery Act, 1913, sub-s. (1) of which enacts that when any public demand payable to any person other than the Collector is due, such person may send to the certificate officer a written requisition in the prescribed form. This certificate officer may thereupon make a certificate under s. 6.

Let us take the extreme case where the person (other than the Collector to whom the public demand is to be paid resides in district A; the person from whom it is due resides in district B and most of his property is in district C; the payment is due to be made in district D and it is on account of property situate in district E. Which of these districts is the one whose certificate officer has jurisdiction to make the necessary certificate? It cannot be that unless all these districts are identical, the provisions of the Act are inapplicable; for s. 12, makes specific provisions for transfer of certificates for execution form one certificate officer to another, a provision which would be wholly unnecessary if all the districts were identical. How then is the jurisdiction to be determined if all the districts are not identical? The only reasonable interpretation of s. 5 seems to me to be that the certificate officer referred to therein is the certificate officer of the place where the public demand is payable;

for it is there that it is a demand at all. The jurisdiction of the certificate officer under s 5 does not therefore depend upon the situation of the property in respect of which the demand arises, but upon the place where the money is demandable or payable. If this place is within the district where the certificate officer holds office, the certificate officer has jurisdiction to receive the requisition and to make a certificate. In this connection, it is relevant to refer to the provisions of the Revenue Recovery Act, 1890 (Central Act I of 1890), which is a statute still in force throughout British India and is closely allied to the Ben. Public Demands Recovery Act, 1913. Sections 3 5, Revenue Recovery Act, 1890, run :

"3. (1) Where an arrear of land revenue, or a sum recoverable as an arrear of land revenue, is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum is payable, the Collector may send to the Collector of that other district a certificate in the form as nearly as may be of the schedule stating, (*a*) the name of the defaulter and such other particulars as may be necessary for his identification, and (*b*) the amount payable by him and the account on which it is due.

(2) The certificate shall be signed by the Collector making it or by any officer to whom such Collector may, by order in writing, delegate this duty, and, save as otherwise provided by this Act, shall be conclusive proof of the matters therein stated.

(3) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land revenue which had accrued in his own district.

... ...

(5) Where any sum is recoverable as an arrear of land revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority, is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to himself,"

It will be seen from s. 5 that in the case of sums due to officers other than the Collector, it is the Collector of the district in which the office of that officer is situate who can make the certificate; in other words, it is the Collector of the district in which the sums are payable who has jurisdiction to receive the requisition for, and to make, the necessary certificate. The Ben. Public Demands Recovery Act, 1913, is in force throughout Bengal, but not outside; if there is a public demand due in Bengal from a defaulter who resides or has property outside Bengal, the assistance of ss. 3 and 5, Revenue Recovery Act, 1890, (which is a Central Act in force throughout British India) may have to be invoked. The two Acts are in *pari materia*, though differing in local extent. In the present instance it is clear that the Ijara rent was payable under the terms of the Ijara lease at the Sardar Mahalat Kutchery of the Nawab Bahadur of Murshidabad which is within the Lalbagh sub-divison of the Murshidabad district. Therefore the Sub-Divisional Officer of Lalbagh and the special certificate officer had jurisdiction to make the certificates in question. What territorial limitations there may be on their powers in execution is a different question upon which it is not necessary to express any opinion in the present case. On this issue, therefore, I think the Subordinate Judge's finding cannot be upheld.

The other points raised in the appeal can be disposed of briefly. It has been contended on behalf of the respondent that the certificates ought to be cancelled under s. 35 (1) *b*), Ben. Public Demands Recovery Act, because there was no liability to pay the Ijara rent and there was not this liability, because (*i*) he was not given possession of Mouza Khord Joyrampur although the Mouza was included within his lease, and (*ii*) his possession of the Mahal as a whole was disturbed by the lessor. As to (*i*), the Subordinate Judge's finding is that the plaintiff took the lease including the Mouza with the knowledge that the Mouza was not in the possession of the lessor and that possession could not be delivered to him in respect of it. Indeed in para. 5 of the notice served on the defendant under s. 80, Civil P. C., the plaintiff admits that he could not obtain possession of this Mouza from the date of the lease because the Nawab Bahadur of Murshidabad was out of possession at that time. As to ground (*ii*), there is no satisfactory evidence and hardly any allegation that there was any disturbance of such possession during the period covered by the certificate. Some sort of disturbance has been alleged in connection with certain suits of 1929 and 1930 instituted by the Nawab Bahadur but the suits ended in a petition of compromise filed in Court on April 24, 1931. The certificates are for the Bengali years 1338-40, that is to say, for the three years beginning from about the middle of April 1931. The position after the compromise has been set out by the plaintiff himself in para. 8 of the plaint in the following terms :

"Although all opposition to the actual possession of the Ijara Mahal was withdrawn by the said Nawab Bahadur in pursuance of the said compro-

mise decree yet he failed to give possession of the Mahal Khord Joyrampur as comprised in the said Ijara."

Thus, the plaintiff's grievance after the compromise was confined to the Nawab Bahadur's failure to give him possession of Joyrampur Mouza, a point which I have already dealt with. The next disturbance of possession alleged was after April 30, 1934 the date on which the manager cancelled the lease under s. 12, Murshidabad Estate Administration Act of 1933. But this was after the period covered by the certificates. The net result on this branch of the case, is that the plaintiff was in undisturbed possession of the Mahal during the relevant period except as regards Mauza Khord Joyrampur and so far as this Mouza was concerned, the plaintiff took the lease with full knowledge that his lessor could not give him possession. Therefore the plaintiff was liable in full for the amounts claimed in the certificates and the certificates cannot be cancelled or modified under s. 35, Ben. Public Demands Recovery Act. Whether execution of the certificates was or was not barred by reason of the manager's decision of September 19, 1934 and whether particular orders passed in executions were or were not bad are all questions relating to the execution, discharge or satisfaction of the certificates. As such, they are not questions, which can be raised in this suit, s. 37, Ben. Public Demands Recovery Act, being an express bar. No fraud has been proved in the present case and I have already found that the certificates were duly filed under the Act.

Finally, it was sought to be argued on behalf of the respondent that the terms "arrears of rent" in s. 19, Murshidabad Estate Administration Act, 1933, must be held to mean rent which falls due after the commencement of the Act (September 21, 1933), and remains in arrear and that the terms does not include rent which fell due before the Act came into force. If this interpretation of the term "arrears of rent" is adopted in s. 19 then, on the same principle, a similar interpretation will have to be placed on the term "rent" which occurs both in s. 19 and s. 6 of the Act, "rent" being construed as rent falling due after the commencement of the Act. The result would be that there would be no provision in the Act enabling the manager to recover at all, whether by suit or by certificate procedure, any rent which has remained due to the estate since before the commencement of the Act. I do not think that the Legislature intended any such limited interpretation of the term "arrears of rent." In the result, I agree that the appeal must be allowed with costs as directed in the judgment just delivered by my learned brother.

D. *Appeal allowed.*

MADRAS HIGH COURT

Referred Trial No. 25 and
Criminal Appeal No. 121 of 1940
April 1, 1940

BURN AND LAKSHMANA RAO, JJ.

In re ABDUL BASHA SAHIB—

ACCUSED

Evidence Act (I of 1872), ss. 27 and 30—Only those portions of information given by accused which relate to facts discovered thereby are admissible—Statement of accused involving other accused but not relating to aforesaid facts — Admissibility of statement against other accused—Penal Code (Act XLV of 1860), ss. 300, 201—First accused found guilty—Accused No. 2 meeting first accused on evening of day of murder and knowing where certain articles belonging to deceased which she carried with her on the evening of murder were to be found—Facts, if sufficient to warrant conviction of accused No. 2 either under s 300 or s. 201.

It is necessary to observe strictly the provisions of s. 27, Evi. Act, by which the only portions of the information given by accused which are admissible are those which relate distinctly to the facts discovered thereby. Hence, statements by an accused which do not relate to aforesaid facts but involve other accused are inadmissible under s. 27 against the latter.

Where an accused is found guilty of the offence of murder, the facts that 2nd accused met the first on the evening of the date of murder and knew the place where certain articles belonging to the deceased which she had carried with her on that fateful evening were to be found, lead to grave suspicion against accused No. 2 but are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence.

R. T. and A. referred by the Court of the Session, Chingleput Division, dated January 27, 1940.

Mr. *R Narasimham*, for the Accused.

The Public Prosecutor, for the Crown.

Burn, J.—On the morning of October 13, 1939, an Adi Dravida named Mandan (P. W. No. 9) who lives in Poonamallee found a corpse floating in a well called Mangadu Mudaliar's well. He saw a crowd of people searching in a neighbouring well and he told them what he had seen. Amongst that crowd was Mahadeva Chettiar (P W. No. 8). He and the other people with him were looking for his mother Kanniammal who had left home the previous

evening at abont 6-30 to deliver some oil at the house of one Abdul Wahab Sahib and had not returned. P. W. No. 8 had reported the disappearance of his mother at the Police Station in Poonamallee at 1-10 A. M. on the 13th (*vide* Ex. F) and had requested the Police to make enquiries about her disappearance. He mentioned there that his mother was in the habit of wearing valuable jewels consisting a gold chain made out of twenty sovereigns, gold bangles and Kammals set with red stones. P. W. No. 8 on hearing what P. W. No. 9 had discovered, went to the well of Madgadu Mudaliar and saw that the corpse in the well was the corpse of his mother. He therefore went again to the Police Station at 7 A. M. and reported this fact. The Police had the body lifted out of the well and held an inquest which showed that the woman had been brutally murdered. No jewels were found upon the body except a nose screw. After the inquest the body was sent to the doctor in charge of the Poonamallee hospital and on the afternoon of October 13, he made a *post mortem* examination. He found that the woman's lower jaw had been fractured, that there was a contused wound on her face, abrasions on her face and neck, that the lobes of both ears had been torn through and that seven ribs on either side of the chest had been fractured. All these injuries had been inflicted before death and were the cause of death. There were no signs of drowning.

The two appellants were tried by the learned Sessions Judge of Chingleput for the murder of Kanniammal. The unanimous opinion of the assessors was that accused No. 1 was guilty of murder and that accused No. 2 was guilty of an offence under s. 201, I P. C. The learned Sessions Judge agreed with the assessors and convicted accused No. 1 of murder and sentenced him to death. He convicted accused No. 2 under s. 201, I. P. C. and sentenced him to three years' rigorous imprisonment. Accused No. 1 is the brother-in-law of Abdul Wahab Sahib, and the evidence of P. Ws. Nos. 4 and 5, the granddaughter and grandson of the deceased was that on the evening of October 12, accused No 1 came to their house to tell their grandmother Kanniammal that oil was required at the house of Abdul Wahab. Both these witnesses say that their grandmother picked up the vessel containing oil and the other implements of her trade and went off to deliver oil as requested. The Police in their investigation found that she had actually delivered oil at the house of Abdul Wahab that evening. A *dhobi* (P. W. No. 6) said that he had seen the deceased going in the direction of Abdul Wahab's house followed by both the accused. Narasamma (P. W. No. 7) who lives on the way between the house of the deceased and the house of Abdul Wahab also said that she had seen the deceased going in the direction of Abdul Wahab's house followed by the two accused.

The most important evidence is connected with the discovery of Kanniammal's gold chain, gold bangles and ear ornaments. Accused No. 1 was arrested after the inquest and on the morning of October 14, he made a confession to the Circle Inspector P. W. No. 14. The portions of this confession admissible under s. 27, Evi. Act, relate to M Os Nos 1, 6, 7 and 8. He alleged that Kanniammal had been beaten with a brick by accused No. 2 and offered to show the place where the murder had taken place. He showed in the backyard of Abdul Wahab's house a piece of brick M. O. No. 1 upon which stains of blood were found. These stains were afterwards proved to be stains of human blood. Accused No. 1 further said that after Kanniammal had been murdered he and accused No. 2 had robbed her of her bangles, Kammals and chain and had concealed them in a place which he offered to show. He took the Police Inspector and Sub-Inspector and three other witnesses P. Ws. Nos. 11 and 12 to a piece of waste ground in front of the Dharmaraja Koil and there dug up a spot which he had marked. He produced a piece of rag M. O. No. 19 which when untied was found to contain a gold chain necklace, a pair of gold bangles a and a pair of Kammals M. Os. Nos. 6, 8 and 7. These have been identified as the jewels of Kanniammal which she was in the habit of wearing and which she was wearing on the evening of October 12, when she went out. Moreover, on the Kammals the Chemical Examiner found blood though the stains were so far disintegrated by the time the Kammals reached the Imperial Serologist that it was not possible to say for certain that the blood was human blood.

Accused No. 2 was arrested on October 15, after the confession made by accused No. 1 in which he was involved. He is then said to have made a statement which led to the discovery of the oil vessel, the funnel, the ollock measure and the ladle that Kanniammal was in the habit of using. These are M. Os. Nos. 2, 3, 4 and 5 and they were found in consequence of

information given by accused No. 2 in two ruined wells about half a mile away from the well in which Kanniammal's corpse was found. Some evidence also was let in about some articles of clothing which it was said had been left by accused No. 1 in the house of his brother Ismail. Blood was found on one of these garments but this item of evidence cannot be taken into consideration against accused No. 1 because no one has been examined as a witness to prove that they were left in the house of Ismail by accused No. 1.

Both the accused denied that they had anything to do with the murder. Accused No. 2 pleaded alibi and examined eight witnesses in support of his plea. Accused No. 1 alleged that on the evening of the 12th he had been engaged in his shop until 8-30 or 8-45 P. M. and that after that had gone home and gone to bed. He said that the Chettis, namely the relations of Kanniammal, had been to his house during the night to enquire about her and that he had joined them in the search. He did not examine any witnesses to prove that he was engaged in his shop till 8-30, and when P. W. No. 8 was in the witness box no suggestion was put to him that accused No. 1 had joined in the search. The alibi of accused No. 1 was therefore clearly not established. The alibi of accused No. 2 need not be discussed in detail since we are of opinion that he must be acquitted on the evidence adduced for the prosecution.

Learned Counsel for appellant No. 1 has contended that the evidence of the witnesses who say they saw accused No. 1 come to fetch Kanniammal on the evening of October 12, is unreliable, and that the confession said to have been made by accused No. 1 to the Police is admissible in evidence. We can find no reason whatever for rejecting the evidence of P. Ws. Nos. 4, 5, 6 and 7. No facts were elicited from them in cross-examination from which it could be inferred that they had any reason to give false evidence against either of the accused. Narasammal P. W. No. 7 was mentioned by P. W. No. 8 in his first complaint to the Police Ex. F which was made at 1-10 A. M. several hours before the corpse of Kanniammal was found. With regard to the statement made by accused No. 1 to the Police learned Counsel's argument is based upon an assumption that before accused No. 1 made any statement to the Inspector on the morning of October 14, he had already disclosed to the Police what he knew. This argument is an attempt to apply the principle of decisions recently given to the effect that if the Police got incriminating information from an accused person and then called upon him to repeat that information in the presence of witnesses, the statements made in the presence of witnesses would not be admissible under s. 27, Evi. Act. In the present case, however, there is no foundation for that argument because the Inspector has said quite clearly that the information given by accused No 1 which led to the discovery of the jewels was disclosed to him only on the morning of the 14th in the presence of the Village Munsif P. W. No. 10 and two other witnesses P. Ws. Nos. 11 and 12. We cannot find any reason to suspect the Inspector of telling falsehood in this matter. The jewels undoubtedly belonged to the deceased woman; she was wearing them when she went out to her death; the ear-rings had blood on them; they were found in consequence of what accused No. 1 said. Accused No. 1's statement, so far as it relates to the discovery of these jewels, is therefore admissible under s. 27, Evi. Act. There can be no doubt that accused No. 1 is guilty and has been properly convicted of the murder of Kanniammal. We confirm his conviction for murder and the sentence of death passed upon him by the learned Sessions Judge.

The case of accused No. 2 is very different. He did not make any confession involving him in the murder. All that he said was that he had met accused No. 1 at about 7-30 on the night of October 12, and that accused No. 1 had given him M. Os. Nos. 2, 3, 4 and 5 and had asked him to throw them away in any well tha might be on his path. The learned Sessions Judge considers that accused No. 2 must have known that Kanniammal had been murdered and must have disposed of these articles in order to screen accused No. 1 from punishment. It cannot be said that this conclusion follows from the mere fact of accused No. 2 complying with the request made by accused No. 1. Accused No. 2 can only be convicted if the statement of accused No. 1 is taken into consideration as against him. The learned Public Prosecutor suggested that this could be done under s. 30, Evi. Act. One great difficulty in accepting this contention is that if the statement of accused No. 1 is taken into consideration as against accused No. 2 and if it is believed, accused No. 2 also should be convicted for the murder of Kanniammal. In fact, if accused No. 1 was telling the truth to

the Police, it was accused No. 2 who inflicted on Kanniammal the injuries that caused her death. Accused No. 1 says that it was accused No. 2 who sat upon the old woman's chest and beat her on face and neck with a brick. We are of opinion that it is not possible to take the statement of accused No. 1 into consideration as against accused No. 2. It is necessary to observe strictly the provisions of s. 27 by which the only portions of the information given by accused No. 1 which are admissible are those which relate distinctly to the fact discovered thereby. The facts discovered thereby, as we have already said, are the jewels of the murdered woman and the bloodstained brick (M. O. No. 1) which was used to beat her about the face. It cannot be said that statements made by accused No. 1 involving accused No. 2 relate in any way to these facts. All that is established as against accused No. 2 therefore is that he met accused No. 1 on the evening of October 12, and that he knew where M. Os. Nos. 2, 3, 4 and 5 were to be found. These facts lead to grave suspicion against accused No. 2 but they are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. Accused No. 2 must therefore be acquitted. We set aside his conviction under s. 201, I. P. C. and the sentence of three years' rigorous imprisonment and direct that he be set at liberty forthwith.

N.-S. *Order accordingly.*

ALLAHABAD HIGH COURT

Criminal Revision Application No. 579 of 1940

November 8, 1940

HAMILTON, J.

RAM DIHAL—APPLICANT

versus

BADRI—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 517, 520—Order of acquittal and order under s 517 passed by First Class Magistrate—Appeal—Forum.

An appeal from an order of acquittal and an order under s. 517, Criminal P. C., for disposal of property regarding which the offence had been committed, passed by a First Class Magistrate, lies to the Sessions Judge. Cr. Revn. No 695 of 1932, followed, 81 Ind. Cas. 992 (1), held Overruled.

Cr. R. App. from an order of the Sessions Judge, Mirzapur, dated July 6, 1940.

Messrs. *Kumuda Prasad* and *S. N. Verma*, for the Applicant.

Mr. *B. B. Chanara*, for the Opposite Party.

The Deputy Govt. Advocate, for the Crown.

Order.—This is an application in revision by one Ram Dihal against the order of the Sessions Judge, Mirzapur, who maintained the order of a Magistrate, first class, directing that a certain lorry be handed over to Badri opposite party. This lorry was apparently purchased in Calcutta and Badri was the person who went there to effect the purchase and to take delivery of the lorry. He purchased it in his name but had it registered in the name of Bishnath as owner, he himself being entered as transferee. Bishnath remonstrated with the result that Bishnath himself was entered as transferee, so that ostensibly the owner of the lorry was Bishnath. This last entry was made on June 20, 1936. On August 25, 1938, Bishnath sold the lorry to the present applicant Ram Dihal and Ram Dihal was accordingly entered as the owner on the registration certificate on August 31, 1939; so Ram Dihal was the ostensible owner of the lorry. In 1939 Badri brought a suit against Bishnath for dissolution of partnership and damages and it was decreed as regards the prayer for dissolution of partnership but dismissed as regards damages. On September 30, 1939 Ram Dihal had gone with his family in the lorry to bathe and while the party were bathing three brothers of Badri with their servant came and took away the lorry and locked it in the garage of Badri. A criminal case was brought against those persons and it was after decision of that case that this lorry which had been taken over by the Police was ordered to be returned to Badri. Ram Dihal who was complainant in that case appealed against the order of the original Court that the lorry be handed over to Badri.

The learned Sessions Judge held on the basis of *Debi Ram* v. *Emperor* (1), that no appeal lay in this case for although there were decisions of the Bombay High Court taking a different view he felt himself bound to follow the decision of this Court. He then stated that an appeal can be treated as an application for revision, and had he not been satisfied that the order of the Court below was correct on the facts he would have treated it as a revision and referred the matter to this Court As it stands however he held that an appeal had been brought before him, that he saw no reason to treat it as a revision and the appeal could not be maintained and was accordingly dismissed. Since that decision in *Debi Ram* v. *Emperor* (1), which was a single Judge decision, the same question

(1) A I R 1924 All. 675; 81 Ind. Cas. 992; 25 Cr. L J 1168; 46 A 623; 22 A L J 505; L R 5 A 91 Cr.

came up before a learned Single Judge of this Court in Cr. Revn. No. 695 of 1932 *Nabi ban Tauaf* v. *Shyam Lal* and as he was doubtful as to the correctness of that earlier decision, reviewing the authorities, he directed that the case be laid before a Bench of two Judges. This was done and it was held that an appeal lies. The learned Juges who composed that Bench held that on a plain reading of s 520 Criminal P. C, it would appear that any Court of Appeal, confirmation, reference or revision may direct any order under s. 517 passed by a Court subordinate thereto to be stayed and that Court of Appeal may modify, alter or annul such order. The case before the Bench was one where an Assistant Sessions Judge had passed an order of acquittal and under s. 517, Criminal P. C., had passed an order for disposal of property regarding which an offence had been committed. The learned Judges of the Bench went on to say that an Assistant Sessions Judge was subordinate to the Sessions Judge and appeals from the decisions of an Assistant Sessions Judge ordinarily lay to the Sessions Judge. In the present case the original order was passed by a first class Magistrate who acquitted the accused. The appeal from the Court of a first class Magistrate is to the Sessions Judge. The learned Sessions Judge through no fault of his followed a Single Judge's decision of this Court which was directly overruled after consideration by a Bench of this Court and of course the Bench decision must prevail. In the circumstances therefore I set aside the order of the learned Sessions Judge refusing to hear the appeal on the ground that no appeal lies and order him to hear the appeal and to decide it on the merits.

S. *Order set aside.*

MADRAS HIGH COURT

Appeal No. 46 of 1939

August 22, 1940

LEACH, C. J. AND HORWILL, J.

R. C. BHIDE—APPELLANT

versus

TRAVANCORE NATIONAL AND QUILON BANK LTD., (IN LIQUIDATION) —RESPONDENT

Companies Act (VII of 1913), ss. 230-A, 229—Winding-up of insolvent company—General law of insolvency, if applies—Application by customer of Bank after passing of compulsory winding up order, for rescinding contract with Bank and for damages—Applicant, if entitled to be heard.

The general law of insolvency applies to the winding-up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the Official Assignee. If he claims to be a crediter he must file a proof of his debt with the Official Assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the Official Assignee's decision. Hence a customer of a Bank who has filed an application under s. 230-A, Companies Act, for an order rescinding the contract with the Bank and awarding him damages, subsequent to an order of compulsory winding-up of the Bank is passed, is entitled to be heard. If the Court then came to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application and the appellant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding-up The applicant cannot be relegated to the procedure of filing a suit unless he is heard.

A. from judgment and order of Venkataramana Rao, J., datad September 1, 1939.

Mr. *C. V. Nilakantan*, for the Appellant.

Messrs. *King* and *Partridge*, for the Respondents.

Leach, C. J.—The appellant claims to be a creditor of the Travancore National and Quilon Bank Ltd.. which is now in liquidation under an order passed by this Court for its compulsory winding up. In February 1938 the appellant entered into an agreement with the Bank under which the Bank was to allow him on certain conditions to overdraw his account upto the sum of Rs. 75,000 for the purpose of financing a contract which he had entered into with the Travancore Govt. The Bank suspended payment on June 20, 1938. The petition for winding-up was filed on June 21, 1938, and the order for compulsory winding-up was passed on September 4, 1938. On the date of suspension of payment by the Bank the appellant had overdrawn his account to the extent of Rs. 56,000. After suspension of payment he was, of course, not allowed to draw further on his account and he says that in consequence the Bank has committed a breach of contract. He also alleges that the contract is a continuing one. On this basis he filed an application under s. 230-A, Companies Act, for an order rescinding the contract and awarding him damages. Other reliefs were also asked for, but the learned Judge refused to consider the application and directed the appellant to file a regular suit. The appellant contends that the learned Judge erred in so doing. In the first place he says that the learned Judge had no power to relegate him to a regular suit and in the second

place that he should have heard the application and passed such order thereon as the circumstances demanded. If the appellant was not entitled to an order under s. 230-A, he would be entitled to prove in the ordinary way for any loss suffered by him. Section 230 5) says :

"The Court may, on the application of any person, who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up"

The discretion here given to the Court is a discretion to make an order rescinding the contract. Of course if a contract has already been rescinded an application under this section will not lie, and it is the case of the liquidators that this contract has been terminated by a notice calling in the amount due on the overdraft. It is said that the liquidators had a right to do this because the contract between the appellant and the Bank provided that the amount was to be repayable on demand. Section 229, Companies Act, states that in the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force under the law of insolvency and that all persons who in such a case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they are entitled to by virtue of the section. Therefore the general law of insolvency applies to the winding-up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the Official Assignee. If he claims to be a creditor he must file a proof of his debt with the Official Assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the Official Assignee's decision. The Presidency Towns Insol. Act contains a section similar to s. 230-A, Companies Act, namely s 65. When it is not a question of rescinding a contract and assessing damages under s. 65 a person who has contracted with an insolvent may file a proof of the damages suffered by him by virtue of the provisions of s. 46, Presidency Towns Insol. Act. The position then is this. The appellant was entitled to have his application heard. If the Court then came to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application and the appellant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding-up. The learned Counsel for the liquidators has been unable to point to any authority, either in England or in India, which lends support for the course taken by the learned Judge in this case.

The appeal must be allowed and the case will be remanded to the learned Judge to hear and decide according to law. The appellant is entitled to his costs. The liquidators will be entitled to their costs out of the estate. The court fee paid on the memorandum of appeal will be refunded to the appellant. It follows from this order that Application No. 1-63 of 1939 which the appellant has filed asking that leave be granted to the liquidators to compromise the appellant's claim will also be remanded to the learned Judge for disposal. His order under appeal apparently applied to this application as well.

N. S. *Appeal allowed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 3 /22 of 1940

December 2, 1940

ALMOND, J. C. AND MIR AHMED, J.

Mst. RAMESHRI w/o S. MANMOHAN SINGH AND OTHERS—APPELLANTS

versus

Mst. VAISHNO DITTI d/o B. GURMUKH SINGH—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 35 (2)—Proceedings under—Failure to affix warrant or to proclaim by beat of drum whether fatal—Co-sharers—Decree for possession not executed—Decree-holder does not become co-sharer with judgment-debtor is not entitled to share profits.

The conditions precedent for effecting delivery of possession under O. XXI r. 35 (2), Civil P. C., are the affixing of the warrant to the property and the beat of drum. The omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law.

Without executing a decree for possession a decree-holder cannot become a share-holder with the judgment-debtors and cannot consequently ask for a share in the profits of the property.

A. from an order of the Additional Judge, Peshawar District, dated January 24, 1940.

S. B. Sardar *Raja Singh* and S. *Anup Singh*, for the Appellants.

S. *Beant Singh*, for the Respondent.

Mir Ahmed, J.—On July 20, 1928, *Mst.* Vaisno Ditti obtained a decree from their Lordships of the Privy Council* for possession of one-fourth of the movable and immovable property left by one Bal Mokand. That decree was executed in Peshawar. Amongst other properties the executing Judge ordered that joint possession should be given to her of a cinema which has burnt down subsequently. The report of the bailiff dated November 19, 1931 shows that he handed over joint possession of the property to the decree-holder by beat of drum.

The present suit was instituted by *Mst.* Vaisno Ditti on July 15, 1937 for mesne profits for a period of three years. She claimed Rs. 1,800. *Inter alia*, the defence was taken that the decree-holder had not taken possession according to law and was therefore not entitled to the income of the property. Evidence was led. The bailiff said that his report was correct and no one else was questioned as to the procedure adopted by the bailiff for delivering possession. The decree-holder took up the attitude that even if possession was not delivered according to law she was entitled to a share in the income of the property as damages or compensation for the use of it by the other co-sharers.

That trial Judge found that possession was delivered by beat of drum only and the warrant of possession was not affixed to the property as required by O. XXI, r. 35 (2), Civil P. C. He held that the faiure to affix the warrant vitiated the proceeding, and that consequently joint possession was never taken by the decree-holder. As regards the contention that the decree-holder was entitled to a share in the profits of the property independently of the execution proceedings he was of the opinion that the decree-holder had no such independent right. He therefore dismissed the suit.

The decree-holder presented an appeal to the District Court at Peshawar against that order. The learned Additional Judge agreed with the trial Judge that the possession was not delivered according to law and that the delivery of possession should therefore be ignored. He however held that the plaintiff had an independent right of recovering her share in the profits from the judgment-debtors. He calculated her share of income at Rs. 14 a month and gave a decree for Rs. 504 He also gave interest on that amount at 8 per cent. per annum for three years. The judgment debtors have come up on further appeal to this Court. Order XXI, r. 35 (2), Civil P. C., runs thus :

"(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode at some convenient place, the substance of the decree."

It is obvious that the conditions precedent for effecting delivery of possession under O XXI, r. 35 (2), Civil P. C., are the affixing of the warrant to the property and the beat of drum. The weight of authority is clearly in favour of the proposition that the omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. Counsel for the parties have not denied the correctness of this view. We therefore maintain the concurrent findings of the two Courts below that possession was not handed over to the decree-holder under the decree.

The argument of the learned Counsel for the respondent that his client is entitled to a share in the income of the property independently of the decree, is void of all force. No doubt parties put forward their respective claims during the litigation and make an attempt to substantiate them. But when once those claims have been adjudicated upon, the decree represents the rights and liabilities possessed by them and it is the decree which has to be consulted for the purpose of ascertaining as to how they stand in the matter. They cannot fall back on the rights which they alleged they possessed before the decree was passed even though those rights may have been confirmed by the decree. Again, an executory decree has to be enforced in order that it should be effective. A successful suitor cannot say that he has become a share-holder by merely obtaining a decree for possession. In fact if the decree is not executed there is a likelihood of the original right to possess which had merged into the decree being lost by the efflux of time. It follows therefore that without executing a decree for possession a decree holder cannot become a share-holder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. As a result we find that the view of the lower Appellate Court is wrong. We accept the appeal, set aside the order of the lower Appellate Judge and restore that of the trial Court with costs throughout.

D. *Appeal accepted.*

*See 113 Ind. Cas. 1.—[Ed.]

MADRAS HIGH COURT

Original Appeal No. 35 of 1939
August 21, 1940
LEACH, C. J. AND HORWILL, J.

MANAGING DIRECTOR NAYAR MODERN BANK LTD.—APPELLANT
versus
OFFICIAL LIQUIDATORS OF THE TRAVANCORE NATIONAL AND QUILON BANK LTD. (IN LIQUIDATION)—RESPONDENTS

Banker and customer — Money deposited with Bank by company as statutory obligation imposed by s. 282-B Companies Act (VII of 1913 — Liquidation of Bank — Company, if entitled to priority over ordinary creditors.

The mere fact that the depositor is the trustee and the money deposited is trust money, does not affect the relation which the law creates between a Bank and an ordinary customer, namely, the relation of debtor and creditor. The legal effect of the notice to the Bank that the moneys deposited were trust moneys is only to cast a duty on the Bank not to participate in a breach of trust by the trustee Consequently where money is deposited with the Bank by a company, as the result of the statutory obligation imposed upon the company by s. 282-B (1), Companies Act, the company is not entitled to rank in the liquidation of the Bank in priority to the ordinary creditors.

O. A. from an order of Venkataramana Rao, J., reported in 159 Ind. Cas. 824.

Mr. *K. Kuttikrishna Menon*, for the Appellant.

Messrs. *King* and *Partridge*, for the Respondents.

Leach C. J.—The appellant is a company registered under the Companies Act and carries on a banking business at Palghat in Malabar. The appellant requires certain employees to deposit sums of money with it as security for the due fulfilment of their duties. Section 282-B (1), Companies Act, states that all moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be deposited by it in a special account to be opened for the purpose in a scheduled bank as defined in cl. (e) of s. 2, Reserve Bank of India Act, 1934, and that no portion of the money shall be utilized by the company except for the purposes agreed to in the contract of service. The Travancore National and Quilon Bank Ltd. (I will refer to it for brevity as "the Bank") was a scheduled bank as defined in the Reserve Bank of India Act, but it is now in liquidation as the result of an order for compulsory winding up passed by this Court on September 4, 1933. On July 30, 1937 the appellant deposited with the Bank a sum of Rs. 1,000 received as security from an employee. On January 15, 1938 and on February 21, 1938 it deposited with the Bank Rs. 5,000 and Rs. 500 respectively, these sums also representing security received from employees. These moneys were credited to the appellant in an account headed "employees' cash security." They were, of course, deposited with the Bank as the result of the statutory obligation imposed upon the appellant by s. 282-B (1), Companies Act. The question involved in this appeal is whether the appellant is entitled to rank in the liquidation of the Bank in priority to the ordinary creditors. The question was decided against the appellant by Venkataramana Rao, J. and this appeal is from his order.

The learned Counsel for the appellant frankly and rightly concedes that the Bank did not hold the moneys as a trustee for the employees of the appellant, but he says that his client is entitled to prior payment because it is recognized that property which has been delivered to a bankrupt for a specific purpose does not pass to his trustee in bankruptcy, and quotes a passage from Halsbury's Laws of England where it is stated that property of this nature is clothed with a species of trust and is subject to the same principle as trust property: Vol. 2, p. 228, Hailsham Edition. The learned Judge rejected this contention. He recognized that in such a case as the present one the depositor is the trustee and the money deposited is trust money, but he held that this does not affect the relation which the law creates between a bank and an ordinary customer, namely, the relation of debtor and creditor. The learned Judge pointed out that the legal effect of the notice to the Bank that the moneys deposited were trust moneys was only to cast a duty on the Bank not to participate in a breach of trust by the trustee. We agree with the opinion of the learned Judge. The appellant would be entitled to succeed only if the Bank was in the position of a trustee or if the money had been deposited for a specific purpose. The appellant has conceded that the Bank was not a trustee; and we think it is equally clear that these moneys were not deposited with it for a special purpose so far as the Bank was concerned. The appellant held the moneys for a special purpose and was required by statute to deposit them in a Bank, but the section makes no difference in the position of the Bank. Its poition was still that of a banker keeping an account for a customer. The Bank, having notice of the trust, could not be a party to a breach of trust but that does not help the appellant. There has

been no breach of trust. The appeal fails and will be dismissed with costs.

N. S. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 5[illegible] of 1939
November 11 1940
THOM, C. J., AND GANGA NATH J.
Mst. BADRUNNISSA AND OTHERS—
DEFENDANTS—APPELLANTS
versus
MUNICIPAL BOARD, AGRA, THROUGH EXECUTIVE OFFICER—PLAINTIFF—
RESPONDENT

Municipality—Insufficiency of municipal service, whether ground for tax payers withholding payment of tax—U. P. Municipalities Act (II of 1916), ss 166, 177—Liability of tax payer to pay tax, it depends upon municipality presenting a bill to tax-payer—Liability, when arises.

The insufficiency of municipal service is no ground for the tax-payers withholding the payment of tax. If they are dissatisfied with the service provided by the Municipal Board they may complain to the District Magistrate and have their grievances remedied. The High Court, however, has no jurisdiction to reduce or disallow taxes on the ground that the Municipality has been inefficient in the discharge of its municipal duties.

The liability of the tax-payer to pay municipal tax is not made to depend upon the Board presenting a bill to the tax-payer. The liability arises the moment the tax-payer has been assessed and the money becomes due upon the date on which the Municipality have declared by their rules that the tax is payable. There is nothing in the U. P. Municipalities Act disentitling the Municipality from executing its charge because it has failed to present a bill for the tax to the tax-payer.

L. P. A. from the judgment of Bennet, J.

Messrs. *B. S. Darbari* and *Gopal Behari*, for the Appellants.

Mr. *Din Dayal*, for the Respondent.

Thom, C. J.—This is a defendants' appeal arising out of a suit by the Municipal Board of Agra. The Board sued the defendants to recover the sum of Rs. 288 alleged to be due by the defendants in respect of arrears of taxes for the years 1922 to 1934. The prayer in the plaint is for the payment of this sum by the sale of property in respect of which the taxes are due. The learned Munsif granted a decree in respect of Rs. 238. The Appellate Court however has granted a decree in respect of the full amount claimed, Rs. 288.

The decision of the Court below is challenged upon the ground that the failure of the Municipal Board to present a bill to the defendants for the taxes due, in accordance with the provisions of s. 166, Municipalities Act, disentitles the Board from recovering any of the arrears of taxes from the defendants. Section 166 directs that after the assessment is passed with all convenient speed the Municipalities should send a bill to the tax-payer. This, according to the finding of the Court below, the Municipality failed to do. It does not follow however that because the Municipality neglected to carry out its statutory duty the arrears of taxes due by the defendants cannot be recovered in the present suit. Sub-section (2) of s. 166, Municipalities Act, directs that

"a person shall be deemed to become liable for the payment of every tax and license fee upon the commencement of the period in respect of which such tax or fee is payable."

Now under the rules framed in virtue of the powers conferred upon it by the Act, the Municipality of Agra has declared that the amount to which a tax-paver is liable shall be payable on April, and on October 1, of the each year. The tax therefore became due and payable to the Municipality by the tax-payer on April 1, and October 1, of every year from 1922 to 1934. The liability of the tax-paver to pay this tax is not made to depend upon the Board presenting a bill to the tax-paper. The liability arises the moment the tax-payer has been assessed and the money becomes due upon the date on which the Municipality have declared by their rules that the tax is payable. Under s. 177, Municipalities Act:

"All sums due on account of a tax imposed on the annual value of buildings or lands or of both shall, subject to the prior payment of the land revenue (if any) due to His Majesty thereupon, be a first charge upon such buildings or lands."

This section constitutes a charge in favour of the Municipal Board in respect of all arrears of sums due on account of tax. As already indicated the amounts in respect of tax for which the appellants were liable fell due upon April 1, and October 1 of each year. Upon these dates in respect of the amounts due a charge is created by s. 177, Municipalities Act. There is nothing in the Act disentitling the Municipality from executing its charge because it has failed to present a bill for the tax to the appellants No doubt the Municipal Board ought to have presented a bill each year to the defendants and no explanation is forthcoming as to why the annual bill for

tax was not presented. Be that as it may, the property belonging to the defendants having been duly assessed in accordance with the provisions of the Municipalities Act, the defendants became liable to pay the tax on April 1 and October 1, each year and in respect of the amounts due a charge has been created in favour of the Municipal Board. In our judgment the Board is entitled to sue on its charge for the recovery of the arrears due by the defendants.

The suit was instituted in the first instance against the defendant, Hafiz Nizamuddin. The other defendants Nos. 2 to 7 were added upon an application made by the plaintiff. This application however was made in 1935. The claim, so far as they are concerned therefore, in view of the provisions of s. 22, Lim. Act, is barred in respect of their share of the tax from the year 1922 to 1934. It was contended for the defendants that they were not liable for the water-tax since the supply of water to their property was insufficient. The insufficiency of municipal service is no ground for the tax-payers withholding the payment of tax. If they are dissatisfied with the service provided by the Municipal Board they may complain to the District Magistrate and have their grievances remedied. This Court however has no jurisdiction to reduce or disallow taxes on the ground that the Municipality has been inefficient in the discharge of its municipal duties. In the result the appeal is allowed in part and the order of the learned single Judge is modified to this extent that the share in the property of defendants Nos. 2 to 7 shall be liable to the extent of Rs 252 only *quod ultra* the appeal is dismissed. Parties will bear their own costs throughout.

S. *Appeal partly allowed.*

MADRAS HIGH COURT

Civil Revision Petition No. 562 of 1937

July 24, 1940

PATANJALI SASTRI, J.

S. P. RM. M. MEYAPPA CHETTIAR—PETITIONER

versus

S. P. RM. RM. RAMASWAMI CHETTIAR—RESPONDENT

Limitation Act (IX of 1908), Arts. 120, 61—Joint purchase of property by plaintiff and defendant—Stamps for sale certificate purchased by plaintiff—Suit for contribution—Article applicable—Cause of action when arises.

A claim for contribution in respect of a share of the amount spent by the plaintiff for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by him and the defendant is governed by Art. 120, Lim. Act and not by Art 61. The cause of action in such a case does not arise when the stamps are purchased but when they are actually utilized for the purpose in question. 70 Ind. Cas. 405 (1), relied on.

C. R. P. to revise the decree of the District Munsif, Sivaganga, dated November 30, 1936.

Mr. *V. Ramaswami Ayyar*, for the Petitioner,

Mr. *A. C. Sampath Ayyangar*, for the Respondent.

Order.—The only point for determination in this revision petition relates to the applicability of Art. 61, Lim Act to the petitioner's claim for contribution in respect of a half share of the amount spent by him for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by the petitioner and the respondent. The stamps were purchased on February 13, 1933. The sale certificate, Ex. A was issued by the Court on February 20, 1933. The suit was brought on February 18, 1936. The Court below applied Art. 61, Lim. Act, and reckoning three years from February 13, 1933 when the petitioner actually paid the money for the purchase of the stamps held the suit barred by limitation. I cannot agree with this view. Even assuming that Art. 61 is applicable to certain classes of suits for contribution, I am clearly of opinion that it cannot apply to a suit of this description. For it is obvious that the petitioner could not have a cause of action against the defendant as soon as he purchased the stamps though he might have intended such purchase to enure to the benefit of the defendant also by the stamps being utilized for the purpose of engrossing the sale certificate to be issued jointly in the name of both the parties. Until the stamps were actually utilized for the purpose the petitioner could not as it seems to me, claim to recover any part of the purchase money from the respondent. To a case of this kind Art. 61 which presupposes the accruing of a cause of action when the payment is made cannot be applicable: *cf. Sundara Iyer* v. *Ananthapadmanabha Iyer* (1). It is not disputed that if Art. 61 does not

(1) 43 M L J 271; 70 Ind. Cas 405; A I R 1923 Mad. 64; 16 L W 231; 31 M L T 164; (1922) M W N 608.

apply; the proper Article applicable is 120, and the suit was filed in time. The civil revision petition succeeds and the petitioner's suit will be decreed with costs here and in the Court below.

N. S. *Petition allowed.*

ALLAHABAD HIGH COURT

Second Appeal No. 1846 of 1937
January 22, 1940
ALLSOP, J.

RAMAI CHAUBEY—PLAINTIFF—APPELLANT
versus
RAM DATTA SONAR—DEFENDANT—RESPONDENT

Landlord and tenant—Haq-i-chaharum—*Liability of lessee or vendee of building site to pay, on transfer of building—Question is not of custom having force of law.*

The question whether the vendee or lessee of building sites would be liable to pay *haq-i-chaharum* to the *zemindar* on transfer of the buildings, is not a question of a custom having the force of law. The question really is one of contract between the *zemindar* and the person in occupation of the site.

S. A. from the decision of the Additional District Judge, Basti, dated August 5, 1937.

Mr. *A. P. Pandey*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

Judgment.—This second appeal arises out of a suit in which the plaintiff-appellant sought to recover *haq-i-chacharum* from the defendant-respondent on account of a sale which took place on November 27, 1930. The plaintiff alleged that there was a custom under which he was entitled to make this claim. The defendant denied the existence of the custom. The learned Judge of the lower Appellate Court has found that no custom has been proved. The only evidence consisted of some *kabuliats* dating from not earlier than the year 1922 and two or three deeds of sale executed about the year 1931. The *kabuliats* were documents executed by the vendees or lessees of certain building sites agreeing that they would pay *haq-i-chacharum* if they transferred the buildings which they erected. The learned Judge has said that the evidence is quite insufficient to establish a custom. In my judgment, his finding is right, if this is strictly speaking a question of custom at all. I know that it appears always to have been assumed at the bar that this is a question of a custom having the force of law, but if the matter is strictly examined I doubt whether it is such a question Nobody, I suppose would assert that the *zamindar*, if he was making a grant of a building site to-day would be compelled by any rule of law to lease it or grant it on any particular terms. There would be no custom having the force of law which would debar him from making it a condition in his grant that he would get one-half of the materials if the building was sold or making it a condition that the materials might be sold and not the right to occupy the land.

The question really is one of contract between the *zamindar* and the person in occupation of the site. If the grant was made a long time ago and its nature is not known, it may be inferred from the prevailing practice that a grant was made in a certain form. If it can be shown over a long period of years that the assumption has always been made and acted upon that grants included the conditions that a vendor or a vendee would pay one-fourth the purchase price to the *zamindar*, then it might fairly be assumed that forgotten grant was in the same form unless the contrary was shown. In the present case, as far as we know, the grant to the vendors of the defendant respondent was made a very long time ago and the nature of it is unknown. It has not been shown that at any period when this grant could have been made, there was any practice of exacting *haq-i-chacharum*. The mere fact that the *zamindar* began about the year 1922 to make grants of such a nature could hardly justify the conclusion that grants of that nature had always been made. I am satisfied that the plaintiff-appellant has failed to prove that he had any right to recover *haq-i-chacharum* from the present defendant-respondent. Even if the question is one of custom having the force of law the finding of the lower Appellate Court is justified. I therefore dismiss the appeal with costs. Leave to appeal under the Letters Patent is refused.

S. *Appeal dismissed.*

MADRAS HIGH COURT

Letters Patent Appeals Nos. 97 and 98 of 1938

December 12, 1939

LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.

REDDI KRISHNAN NAIDU AND OTHERS —APPELLANTS

versus

CHINTALA SOMI NAIDU AND OTHERS —RESPONDENTS

Hindu Law—Suit on promissory note executed by father—Sons joined as defendants but subsequently dismissed from suit—Decree against father alone —Interest of sons in family property, if liable in execution.

Where in a suit on a promissory note executed by father alone, the sons are impleaded on the ground that the debt was incurred for family necessity but the sons are subsequently dismissed from the suit and a decree is passed against the father alone, the decree-holder can proceed to execute the decree against the son's interests in the family property *Periasami Mudaliar* v. *Seetharama Chettiar* (2), relied on, 172 Ind. Cas. 5 (1), explained.

L. P. A from judgment of King J., in A. A. A. O. No. 39 of 1936 dated October 28, 1938.

Mr. *V. Govindarajachari*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondants.

Leach, C. J.—These two appeals arise out of the same suit and they can be disposed of here in one judgment. The appellants obtained a money decree against respondent No. 3 in the Court of the District Munsif of Parvatipur. The appellants made respondent No. 3's sons parties to the suit and they are respondents Nos. 1, 2 and 4. The suit was on a promissory note executed by the father alone. The sons were joined as defendants on the ground that the debt was incurred for family necessities. The District Munsif dismissed the suit, as he was not satisfied that the promissory note was genuine, but on the appeal to the District Judge a decree was passed against the father. In the District Court the appellants decided not to ask for a decree against the sons who were dismissed from the suit. In due course the appellants instituted execution proceedings and asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debt. The District Munsif upheld their objection, but on appeal the Subordinate Judge held that they could be held liable in execution proceedings. The sons then appealed to this Court. The appeal was heard by King. J. who allowed it, but granted leave to appeal under cl. 15, Letters Patent.

The Subordinate Judge found that there was no intention on the part of the appellants in allowing the sons to be dismissed from the suit to exonerate them altogether. King, J. reversed the Subordinate Judge's decision because he considered that the authorities which support the Subordinate Judge's decision had in effect been overruled by the decision of the Privy Council in *Raja Ram* v. *Rajah Bakhsh Singh* (1). The appellants contend that the learned Judge has misconceived the effect of this decision. They say that it has not in any way altered the law as stated in the decisions of this Court. It is not necessary to examine all the judgments of this Court which have a bearing on the question; it is sufficient to refer to the Full Bench decision in *Periasami Mulaliar* v. *Seetharama Chettiar* (2) and to *Periasami* v. *Vaithiling Pillai* (3) and *Doraisami Nadan* v. *Nagasami Naicken* (4) which were decided by Division Benches. In *Periasami Mudaliar* v. *Seetharama Chettiar* (2) Benson, Bhashyam Ayyangar and Russell, JJ. held, that independently of the debt arising from the original transaction entered into by a father, a decree passed against him in respect of the transaction by its own force creates a debt as against him which his sons are, under the Hindu Law, under an obligation to discharge, unless they can show that the debt is illegal or immoral. Bhashyam Ayyangar, J said :

"But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him..... The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought"

In *Periasami Mudaliar* v. *Vaithilinga Pillai* (3), Varadachariar and Pandrang Row, JJ., considered a case in which the suit

(1) 13 Luck. 61; 172 Ind. Cas. 5; A I R 1938 P C 7; 32 S L R 221; 1937 O W N 1199; 10 R P C 119; 1937 O L R 614; 1937 A L R 982; 4 B R 169; 42 C W N 200; 19 P L T 1; 47 L W 1; (1938) M W N 1; (1938) 1 M L J 41; 40 Bom. L R 277; 66 C L J 422 (P C).

(2) 27 M 243; 14 M L J 84 (F B).

(3) 47 L W 60; 175 Ind. Cas. 359; A I R 1937 Mad. 718; (1937) M W N 313; 47 L W 60; 11 R M 73.

(4) A I R 1929 Mad. 898; 121 Ind. Cas. 863; Ind. Rul. (1930) Mad. 271.

was filed against the father and his sons, but before judgment was passed this suit was withdrawn as against the sons. The question was whether the sons were liable inasmuch as the debt was a debt binding upon them under the rule of Hindu Law. The learned Judges held that the withdrawal of the suit as against the sons did not exonerate them. The result of the withdrawal was not to bring into operation the rule of *res judicata* embodied in s. 11, Civil P. C., but only to entail the statutory penalty enacted in O. XXIII, r. 1, which was that no fresh suit could be instituted against the sons on the same cause of action Therefore it could not be said that what had happened in the suit amounted to an adjudication that the sons were not liable in respect of the decree debt. *Doraisami Nadan* v. *Nagasami Naicken* (4) was decided by Courtts. Trotter C. J., and Walsh J., who also held that a decree passed against a father personally after the sons had been exonerated could be executed against the sons' interests in the family property in respect of a decree debt passed against the father.

The facts in *Raja Ram* v. *Rajah Baksh Singh* (1) on which King, J. based his decision were these. After the death of a Hindu, the sons and grandsons were made defendants in a suit filed by a creditor of the deceased to recover the amount of the debt from their interest in the family properties. Before judgment the grandsons were dismissed from the suit, but it was sought to realize their interests in the property in execution proceedings. The Privy Council held that they were not liable inasmuch as they had been dismissed from the suit. The question of their liability was directly raised and as they had been dismissed from the suit they could not be made liable under the decree passed in it. That case differs from the case now before us in that there the suit was brought against the grandsons after the death of the grandfather against whom no decree had been obtained. The dismissal of the grandsons from the suit amounted to a decision in their favour, of the question of their liability. That is not the position here. A decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-holders a new right, which they could enforce against the sons. We do not consider that *Raja Ram* v. *Rajah Bakhsh Singh* (1) has overruled the decision of the Full Bench in *Periasami* v. *Mualiar Setharama Chettiar* (2). In our opinion the decision of the Full Bench remains unaffected and a decree-holder in circumstances like we have here may proceed to execute the decree against the sons' interests in the family property. The appeals will be allowed with costs in this Court and in the second appeals but the Advocate's fee will be allowed only in Appeal No. 97 of 1938 of this Court and in the corresponding second appeal. The result is that the decrees of the Subordinate Judge will be restored.

N. D *Appeals allowed.*

ALLAHABAD HIGH COURT

Civil Revision No. 117 of 1940
December 4, 1940
COLLISTER, J.

AHMAD SAYEED—JUDGMENT-DEBTOR—APPLICANT

versus

KANIZAK ZOHRA—DECREE-HOLDER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 60 (1) (b) —Sewing machines in tailor's shop whether tools of artisan

A tailor who uses a sewing machine is an artisan and the sewing machine is an artisan's tool. Section 60 (1) (b), Civil P. C., does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. Hence all the machines which were in use in the tailors shop at the time of the attachment are artisan's tools within the meaning of s. 60 (1) (b) and exempt from attachment. The fact that only one machine is sufficient for the tailor's maintenance or that he is working in another man's shop subsequent to attachment is no ground for refusing to release the machines from attachment. 65 Ind. Cas. 416 (1), relied on.

C. R. against the order of the Small Cause Court, Cawnpore, dated December 16, 1939.

Mr. *S. Zakir Ali*, for the Applicant.

Mr. *S. M. Salman*, for the Opposite Party.

Order.—This is a judgment-debtor's application under s. 25, Small Cause Courts Act. The opposite party in execution of her decree against the applicant attached, among other things, six sewing machines which were in the applicant's tailoring shop. It appears from the judgment of the Court below that two of these machines were released from attachment and that the applicant thereafter sold them. The applicant claimed the release of the remaining four machines under s. 60 (1) (b), Civil P. C., but his claim has been disallowed. The learned Judge says:

"He is now working elsewhere. One machine was enough for his livelihood and he had no business to sell the released machines."

Section 60 (1) (*b*), Civil P. C., enacts that "tools of artisans" shall not be liable to attachment; it does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. An artisan is defined in Webster's New International Dictionary, Edn. 2 as "one trained to manual dexterity in some mechanical art or trade; a handicraftsman; a mechanic." There can be no doubt that a tailor who uses a sewing machine is an artisan and that the sewing machine is an artisan's tool. This view was taken in *Vitkoba* v. *Babulal* (1), where the learned Judge says :

"I can find no guidance on the point in reported rulings, but I consider that a sewing machine is a tool, It can hardly be denied that a simple machine such as a simple form of loom is a tool. I do not see how a line can be drawn shutting out a more complicated form of loom from the definition. A complicated loom or a sewing machine is certainly an instrument used by a craftsman or labourer at his work Section 60, Civil P. C., speaks of the tools of artisans and the implements of husbandry of an agriculturist. Implement of husbandry may be specialised and costly. I see no reason why a tool should be confined to primitive implements. I hold then that a sewing machine is a tool."

With the above observations I am in agreement. The applicant stated that he used to do the cutting out of materials at his shop and that he also used to do the sewing along with some employees. The learned Judge says that the applicant is now working elsewhere and I find from the applicant's deposition that he is working on commission at a shop belonging to another person; but I do not think that this circumstance and the fact of his having sold two machines will in any way affect his claim. The criterion in such matters is the position of affairs at the time of execution. At the date of execution the applicant was working at his own shop with half a dozen machines. He was an artisan and was employing an artisan's tools, and in my opinion the six machines which were in use in his shop were artisan's tools within the meaning of s. 60 (1) (*b*), Civil P. C. I accordingly allow this application with costs in both Courts. The order of the Court below is set aside and the objection is allowed.

S. *Application allowed.*

(1) A I R 1923 Nag. 289; 65 Ind. Cas. 416; 19 N L R 22.

MADRAS HIGH COURT

Appeal No. 164 of 1939
July 30, 1940
KING J.

NARASIMHULU NAIDU—APPELLANT

versus

PEMMATI NAGA REDDY—RESPONDENT

Madras Abkari Act (I of 1886)—A, bidder at auction of toddy shop entering into partnership agreement with R after date of auction but before issue of license—Agreement held illegal.

A, a bidder at an auction of a toddy shop entered into an agreement with *R* after the date of the bid at auction but before the date of the issue of license, the terms of which were that, *A*, should bear one-half of the expenses of running the business and that the sale proceeds should be divided between *A* and *R*. The duties of *R* were confined to the supervision of the procuring of toddy from the trees :

Held, that by the constitution of this partnership there was transfer to *R* of the privilege of selling toddy and such an agreement being illegal could not be enforced. 155 Ind. Cas. 544 (1), relied on, 162 Ind. Cas. 266 (3), dissented from.

A. against the order of the Sub-Judge, Chittoor, dated February 11, 1939.

Messrs. *A. Viswanatha Ayyar* and *K. Sundaresan*, for the Appellant.

Mr. *S. A. Seshadri Ayyangar*, for the Respondent.

Judgment.—The appellant in this appeal was the licensee of the toddy shop at Minnal for the year beginning October 1, 1932. The auction at which defendant's bid was accepted was on August 8, 1932. On August 31, appellant entered into an agreement with the respondent which is embodied in Ex. A. This is a brief document called a "partition" and apart from a penalty clause with which I am not now concerned, its terms are that appellant should bear one-half of the expenses of running the business and that the sale proceeds should be divided between appellant and respondent every month. Respondent alleging that appellant had not paid him his half share of the profits, filed a suit for accounts. Appellant contended, amongst other things, that the agreement was illegal and could not therefore be enforced. The District Munsif of Sholinghur accepted this contention ; the Subordinate Judge of Chittoor rejected it and remanded the suit for disposal after taking accounts. Against that order of remand the present appeal has been filed.

The decision of the appeal depends upon the determination of the question whether the privilege of the supply and sale of toddy has or has not been transferred by the appellant. Such a transfer is admittedly prohibited by the terms of the license.

The learned Subordinate Judge holds that there is no such transfer on two grounds : (*i*) because appellant and respondent did not enter into any partnership : and (*ii*) because their agreement was anterior to the actual issue of the license. It is difficult to understand how the Subordinate Judge arrived at the first of these conclusions. The issues framed by the District Munsif assume that the relation between appellant and respondent was a partnership. They certainly agreed in the words of the definition (Contract Act, s. 239) to "combine their property, labour or skill" in the business and to "share its profits." I find that the agreement constituted appellant and respondent partners.

The question then arises whether by the constitution of this partnership there was any transfer of the privilege of selling toddy in this particular shop. The Subordinate Judge holds in effect that that privilege comes into existence only with the grant of the license and therefore on the date of the agreement there was nothing to transfer. It is argued for the appellant on the other hand that the privilege was acquired as soon as appellant's bid was accepted. If that be so, it is clear that appellant has transferred that privilege to the partnership. Though the issue was not perhaps raised in this direct form it seems to me that the decision of the Full Bench in *Ramanaidu* v. *Seetharamayya* (1), is conclusive on this point in favour of the appellant. That was a case of a partnership constituted after the date of the auction and before the date of the issue of license. The judgment sets out these dates on p. 733* and states :

"The money was therefore lent to the partnership after defendant No 1 had become the successful bidder at the auction and was the person in whose name the license would be issued"

Again on page 734* it is stated :

"The partnership was formed after defendant No. 1 had become the successful bidder. The license would therefore be issued in his name."

These passages seem to me to show that the learned Judges in that case took it for granted that the issue of a license was something following automatically upon the acceptance of a bid and that it is the acceptance of the bid which confers the privilege. The decision, I think, can be explained on no other ground. The learned Subordinate Judge, however, has preferred to rely upon two later decisions each that of a Single Judge. The first of these, *Satyala Sanyasi* v. *Bhogavalli Sanyasi* (2), is obviously of no assistance to the respondent. That is a clear case of a partnership formed before the auction and in giving his decision Venkatasubba Rao J., expressly distinguishes the Full Bench ruling by quoting the words, "the partnership was formed after defendant No 1 had become the successful bidder." The second case is reported in *Rangasami Pillai* v. *Narayanasami Naicken* (3), and this certainly does support the Subordinate Judge's judgment. But this is only because in my opinion, and with all respect to him, the learned Judge who decided it has not correctly stated what the Full Bench decided. In *Rangasami Pillai* v. *Narayanasami Naicken* (3), no dates are given, but it is stated that the partnership was formed "at least a month before the actual grant of license." On p. 692* the learned Judge says :

"If a case is authority for what it decides, the Full Bench decision is only an authority for the proposition that where a partnership is entered into subsequent to the grant of license it would be illegal....."

I am entirely unable to see how such an appreciation of the Full Bench decision can be formed when the Full Bench after setting out the dates, declares to be illegal a partnership formed before the grant of a license. I am accordingly of opinion that the facts of this case are covered by the Full Bench decision and that the formation of the partnership was a transfer. One final argument is however urged for the respondent and that is that what was transferred was not the privilege of supply and sale of toddy because respondent's duties in the partnership were confined to the supervision of the procuring of toddy from the trees and had nothing to do with the actual process of selling it. I am unable to accept any such narrow interpretation of the words "privilege of supply and sale." The privilege or right which was conferred upon appellant by the Govt. was that of carrying on the whole business of selling toddy, and in that business the procuring of toddy from trees is obviously a necessary part. The agreement contains no clause to the effect that respondent was prohibited from controlling in any way

(1) 58 M 727; 155 Ind. Cas. 544; A I R 1935 Mad. 440; 68 M L J 570; (1935) M W N 343; 41 L W 521; 7 R M 583 (S B).

(2) 69 M L J 490; 158 Ind. Cas. 1055; 69 M L J 490; A I R 1935 Mad. 895; (1935) M W N 935; 8 R M 417; 42 L W 840

(3) 70 M L J 691; 162 Ind. Cas. 866; A I R 1936 Mad. 557; (1936) M W N 397; 8 R M 971; 44 L W 271.

*Pages of 56 Mad.—[*Ed.*]

*Page of 70 M L J—[*Ed.*]

the operation and methods of sale—and from the legal point of view, appellant, his partner, is also his agent in the business which he personally carries on on behalf of the partnership. It is argued further that the reasons for the prohibition of transfer are in no way affected by the agreement in this case. It is not for me to speculate upon those reasons. It is enough to recognize that transfer is in fact prohibited, and to hold, as I do hold, that the partnership in this case amounts to such a transfer. This appeal must therefore be allowed, and the decree of the District Munsif restored and respondent's suit be dismissed with costs throughout. Leave refused.

N.-S. *Appeal allowed.*

LAHORE HIGH COURT

First Appeal No. 368 of 1938
February 14, 1940

DALIP SINGH AND SALE, JJ.

Mst QAISAR JAHAN BEGAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEPUTY COMMISSIONER DELHI PROVINCE AND OTHERS—DEFENDANTS—RESPONDENTS

Punjab Court of Wards Act (II of 1903), s. 13—Joint proprietor, if can sue Court of Wards for partition of his share in joint property—Contract Act (IX of 1872), s. 69—Court of Wards paying off creditors of deceased Muhammadan from his pensions and jagirs—Partition suit by some of deceased's heirs not entitled to pensions and jagirs—Heirs if bound to re-imburse Court of Wards to the extent of amount paid

The Punjab Court of Wards Act does not expressly bar the right of a joint proprietor to bring a suit for partition of his share in joint property. It may be that the Court of Wards is entitled to take possession of the property of a joint proprietor along with a ward of the Court of Wards; it may be that they can execute leases of such property, but there is nothing in the Act which specifically bars the right of the co-proprietor to bring a suit for partition which is a statutory right conferred on him by the Partition Act and there is no reason either in law or in equity, that the Court of Wards Act contemplated that the joint proprietor should not bring such a suit to partition his share and thereby avoid the need of superintendence of his property by the Court of Wards. [p. 831, col. 2.]

The Court of Wards assumed superintendence of the deceased Muhammadan's property and paid off his creditors from out of his pensions and *jagirs*. The heirs who instituted the suit for partition of their shares were held not entitled to the pensions and *jagirs*:

Held, that the payments made by the Court of Wards could not be taken advantage of by the heirs who were bound to recoup the Court of Wards to the extent of the payments made by it and the fact that the pensions and the *jagirs* did not belong to the Court of Wards was a question entirely between it and the head of the deceased's family appointed by the Govt. *Dakhina Mohun* v. *Saraday Mohan* (2), relied on.

Messrs *Mohammad Din Jan* and *M. A. Majid Khan*, for the Appellant.

Messrs. *M. Sleem*, Advocate-General, *Suraj Narain* and *Bishen Narain*, for Respondents Nos. 1 to 4

Dalip Singh, J—Mirza Suraya Jah was the admitted head of the family claiming descent from the old Moghul Emperors of Delhi He was possessed of considerable movable and immovable property and in addition had various kinds of pension, called political and compensatory respectively amounting to Rs. 15,508 annually. He owed a debt of Rs. 70,000 to the Secretary of State for India and to discharge this debt he had executed a mortgage deed which is printed in Regular First Appeal No. 109 of 1936 *Aloni Parshad* v. *Court of Wards* (1) at pp. 126 to 129 of the printed paper book. In that mortgage deed there was a clause that the Secretary of State would not bring the property to sale so long as the mortgagor allowed the Secretary of State to deduct a certain amount from the pensions that were payable to the said mortgagor. Mirza Suraya Jah died on February 8, 1913, and left behind him five heirs; (1) his widow Shams-ul-Zamani Begam who died in 1919, (2) another widow Munir-ul Zamani Begam who is defendant No. 3 in the present suit, (3 and 4) two daughters by Begam Munir-ul Zamani Begam, namely Malka Jahan Begam who died in 1918 and Badshah Jahan Begam who is defendant No. 2 in the present suit and (5) a son Mirza Saleem Mohammad Shah through another wife Rifaqat Begam. The legitimacy of Mirza Saleem Mohammad Shah was challenged on the death of his father Mirza Suraya Jah. The Local Govt. ordered him to establish his claim in a Civil Court. During the interval a compassionate allowance of Rs. 100 was to be paid to him. The Court of Wards was instructed to take over the estate of Mirza Suraya Jah and the usual notification followed which is dated May 5, 1913, and printed at p. 70 of Vol. 1. In Ex. D-3, a letter of the Chief Commissioner of Delhi, printed at pp. 70-71 of the same volume, it was directed that the question of appointing a head of the family should remain in abeyance until

(1) A I R 1938 Lah. 23; 181 Ind. Cas. 728; 11 R L. 873.

the Civil Courts had pronounced as to the claims of Mirza Saleem Mohammad Shah to be the legitimate son of Mirza Suraya Jah The letter went on to state that:

"The whole pension and *jagir* left by Mirza Suraya Jha should in the meanwhile remain at the disposal of the Court of Wards in order to pay off the debts incurred by the deceased grantee".

Mirza Saleem Mohammad Shah brought a suit on January 26, 1920 for possession by partition of his share of the property left by Mirza Suraya Jah of which he claimed 14/32 or 7/16 and also to the pensions and *jagirs* of Mirza Suraya Jah. This suit was decided on May 10, 1925, and it was held that Mirza Saleem Mohammad Shah was the legitimate son of Mirza Suraya Jha. As regards the pensions and *jagirs* the Court held it had no jurisdiction to decide the point but *qua* the property, movable and immovable, left by Mirza Suraya Jha, the Court declared the share of Mirza Saleem Mohammad Shah to be 14/32 as claimed by him. The Court of Wards assumed superintendence of the share of Mirza Saleem Mohammad Shah on May 5, 1913, as appears from Ex D-5 at p. 72 of the printed paper book. Mirza Saleem Mohammad Shah died on September 17, 1925 Various execution applications of the partition decree appear to have been made by Begam Qaisar Jahan Begam, the widow of Mirza Saleem Mohammad Shah, and his daughter Begam Nemur Jahan Begam, plaintiffs Nos. 1 and 2 in the present suit. The execution applications were resisted on various grounds, one being that as the Court of Wards had assumed superintendence of the share of Mirza Saleem Mohammad Shah as a joint proprietor along with the other wards, there was nothing left to execute. The trial Court upheld this plea of the Court of Wards but, in the High Court, it was decided against the Court of Wards and it was held that the statutory right of partition vesting in the co-sharer of joint property was not abrogated by the property coming under the superintendence of the Court of Wards: see pp. 65 to 67 of the printed paper book. It was, therefore, held on December 10, 1929, that the present plaintiffs were entitled to apply for execution of their decree. It is not very clear what happened afterwards but probably the explanation furnished by the learned Counsel for the respondents is correct that, in order to finance his suit, Mirza Saleem Mohammad Shah had entered into an agreement with some person named Alopi Parshad to give him 3/16ths of the property to which he was entitled if his claim to be the legitimate son succeeded. After the death of Mirza Saleem Mohammad Shah, this person had brought a suit which went up to the Privy Council and which was finally decreed in Alopi Parshad's favour. By reason of the pendency of this suit, it appears that the plaintiffs were not over anxious to execute this decree for partition which they had obtained as they were to partition 3/16ths of the property with Alopi Parshad.

The present suit was instituted by the plaintiffs and called itself a suit for administration, partition and rendition of accounts. The suit was brought on October 28, 1937. The written statement of the defendant Court of Wards, the main contesting defendant, is at pp. 9 and 10 of the printed paper book. Various pleas were raised in that which do not now concern us, but finally the trial Court granted a preliminary decree for partition of the property left by Mirza Suraya Jah and Mirza Saleem Mohammad Shah to the present plaintiffs. As held in previous litigations, the Court decided that it could not go into the question of accounts so far as the pensions and *jagirs* were concerned. It granted the right to administration and separation of the share of Mirza Saleem Mohammad Shah and the right to take accounts of the property left by Mirza Suraya Jah in the same manner in which it would have been done if a suit had been brought for the administration of Mirza Suraya Jha's estate. The Court however, noted that the heirs of Mirza Saleem Mohammad Shah could not take any advantage of any payment made by the Court of Wards out of the pensions and *jagirs* as these heirs of Mirza Saleem Mohammad Shah were held not to be entitled to the pensions and *jagirs*. A preliminary decree was ordered to be drawn up in the terms of form No. 17, Appx. D, for administration by next of kin. The plaintiffs have brought the present appeal from that decision. They have raised various points but these were not pressed and finally only two points remain for decision by this Court. The contention of the learned Counsel for the appellants was that by reason of the directions of the Govt. embodied in Ex. D 3 to which reference has already been made, the pension payable after the death of Mirza Suraya Jah, *i. e.*, from 1913 onwards, was to be used for discharging the debts of

Mirza Suraya Jah. Those debts had been discharged and therefore the present plaintiffs were entitled to get the property left by Mirza Suraya Jah without any reference to the incumbrances created by Mirza Suraya Jah which had been discharged by the payments made out of the pensions and *jagirs*.

On the other hand, the learned Counsel for the respondents contended that the present plaintiffs had no right to those pensions and *jagirs* and that the moment the Govt. had appointed a head of the family which they did in 1931 appointing Mirza Khair-ud-Din Khurshid Jah to be the head of the family, the pensions and *jagirs* vested in him, the claim of Mirza Saleem Mohammad Shah and of his heirs having been rejected by the Govt. Therefore, if the Court of Wards had paid any moneys from 1914 onwards to discharge the debts of Mirza Suraya Jah, including the mortgage created in favour of the Secretary of State, they had done so in order to preserve the property for the benefit of the heirs. Therefore if the heirs of Mirza Saleem Mohammad Shah required partition of the property they could not do so unless they recouped the Court of Wards for the money spent in preserving the property on their behalf from the attack of other creditors, including the Secretary of State for India. For this proposition, the learned Advocate-General has relied on *Dakhina Mohun* v. *Saroday Mohan* (2) at p. 148, and there is no doubt that, as a general proposition, the proposition of law which he contends is correct. For instance, if *A* sues *B* for partition and *B* claims that he has discharged the mortgage debt of the entire estate, *B* is entitled to demand from *A* that, before *A* gets partition, *A* should recoup *B* for the proportionate share of the mortgage which had been paid off by *B* alone.

The only point that the learned Counsel for the appellant could urge in reply was that this money did not belong to the Court of Wards at all but, as rightly pointed out by the Advocate-General, that is a question entirely between the Court of Wards and Mirza Khair ud Din Khurshid Jah, now the admitted head of the family, and as between the appellants and the Court of Wards, the Court of Wards is entitled to say that partition should be subject to their rights of recoupment and therefore the trial Court was right in holding that the heirs of Mirza Saleem Mohammad Shah cannot take any advantage of payments made by the Court of Wards out of the pensions and *jagirs*. What the effect of that finding may be would be left to the final decree and the taking of accounts, but it will be subject to the remarks made above.

The next point that arose was on the cross-objections of the respondents who claimed that no suit for partition lay at all. The learned Advocate-General contended that the decision of the High Court in the previous case was not *res judicata* because that was only as to the right to execute a decree for partition already obtained. The present partition suit was obviously based on a different cause of action and the decision being one purely on a point of law could not be *res judicata* in a subsequent suit. The learned Counsel for the appellant on the other hand contended that the decision was *res judicata* for, though the cause of action might be different, the subject-matter was the same, namely the right to partition the same property between the same parties or their legal representatives and therefore the decision was *res judicata*. It is unnecessary to decide this point because it seems to me on the merits that the contention of the learned Advocate-General is not correct. The learned Advocate-General relied on s 13, Court of Wards Act, for the purpose of contending that when superintendence of the property of a joint proprietor or any person had been assumed by the Court of Wards then the property of that person vested in the Court of Wards and had continued to be so vested until there was a divestiture by reason of the provisions of the Act or as otherwise provided in due course of law. It appears to me however that the reasoning in the previous judgment is correct that the Court of Wards Act does not expressly bar the right of a joint proprietor to bring a suit for partition of his share in joint property. It may be that the Court of Wards is entitled to take possession of the property of a joint proprietor along with a ward of the Court of Wards; it may be that they can execute leases of such property, but there is nothing in the Act which specifically bars the right of the co-proprietor to bring a suit for partition which is a statutory right conferred on him by the Partition Act and I see no reason, either in law or in equity, that the Court of Wards Act contemplated that the joint proprietor should not bring such a

(2) 21 C. 142, (148); 20 I A 160; 6 Sar. 366 (P C.).

suit to partition his share and thereby avoid the need of superintendence of his property by the Court of Wards. I would therefore hold that this contention fails. The result is that the appeal of the plaintiffs fails and is dismissed with costs. Similarly, the cross-objections fail and are dismissed with costs.

Sale, J.—I agree.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Appeal No. 150 of 1939
August 14, 1940
KING, J.

RAJU MUDALI—APPELLANT
versus
CHINNARAJU NAIDU AND OTHERS
—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 9, O XLIII, r. 1 (k)—Appeal, if lies from order refusing to set aside abatement of appeal.

The use of the word "suit" in cl. (*k*) of r 1, O. XLIII, Civil P C, does not exclude the word "appeal." The expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of O. XXII, r. 9. An appeal, therefore, lies from an order under O. XXII, r. 9 refusing to set aside abatement of appeal. 121 Ind. Cas. 564 (1), dissented from.

A. against an order of the District Court, North Arcot, dated September 12, 1938.

Mr. *A. C. Sampath Ayyangar*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondents.

Judgment.—This is an appeal filed under O. XLIII, r. 1, cl. (*k*), Civil P. C., against an order of the learned District Judge of North Arcot refusing to set aside the abatement of A. S. No. 214 of 1936. The appellant is the legal representative of the appellant who was on record in A. S. No. 214 of 1936. He applied to be impleaded and to be allowed to continue the appeal at a time when more than 90 days had elapsed since the death of his predecessor in interest. The reasons for his application were that he was a sepoy undergoing service at Jubbulpore, that he attempted to obtain leave from his commanding officer for the purpose of coming to Vellore and attending to this question of coming on record in the appeal, that the commanding officer refused to grant him leave and that when he eventually granted him leave on receipt of a letter from the Village Munsif, 90 days had expired. The learned District Judge refused to allow the petition on the ground that it was not necessary for the appellant to have obtained the attestation of his commanding officer in Jubbulpore to his affidavit and that he could easily have attended to this matter in the ordinary course of the post. There is no other material available, no affidavit from the commanding officer himself which in the circumstances of the case could hardly be expected, nor any affidavit from the Advocate who represented the appellant or the appellant's predecessor-in-interest.

The learned Advocate for the respondents takes the preliminary objection before me that no appeal lies under O. XLIII, r. (1) (*k*) and in support of that position cites the case reported in *Akkas Mia* v. *Abdul Aziz* (1). That authority certainly supports his view, but on the other hand there are cases in which the Patna High Court has interpreted the clause in O. XLIII, in a different way. It seems to me quite clear on an examination of both O. XXII and O. XLIII, that I should follow the view of the Patna High Court. Order XXII, r. 9 in terms relates only to a suit. It begins: "Where a suit abates,.....no fresh suit shall be brought on the same cause of action." But r. 11 of O. XXII runs as follows: "In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant,...and the word 'suit' an appeal," and there is no dispute before me that an order that an appeal has abated can be set aside under O. XXII, r. 9 as interpreted by r. 11. Order XLIII, r. 1 (*k*) reads as follows "an appeal shall lie from an order under s. 9 or O XXII, refusing to set aside the abatement or dismissal of a suit." It is argued in support of the preliminary objection that the use of the word "suit" in cl. (*k*) must necessarily exclude the word "appeal." I am unable to accept that argument. It seems to me that the expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of r. 9. As already stated, r. 11 of O. XXII, makes r. 9 applicable to appeals. It would be contrary to all rules of logical interpretation, it seems to me, if the word "suit" in cl. (*k*) of O. XLIII, r. 1 is to bear a different meaning to what it bears in O. XXII, r. 9. I accordingly overrule the preliminary objection and hold that this appeal does lie.

(1) A I R 1929 Cal. 532; 121 Ind. Cas. 564; 49 C L J 538; 33 C W N 881; Ind. Rul. (1930) Cal. 148.

On the merits of the appeal I think the order of the learned District Judge was not one in which he has rightly exercised his discretion. It may well be that if the appellant had been more familiar with legal procedure or if it were shown that he had been in correspondence with his Advocate during this period, he might have taken other steps to bring himself on record in time. But what he states in his affidavit seems to me to show that he has conducted himself with reasonable diligence in this matter. He has done what one might normally have expected a soldier serving in a foreign province to do. He states that he has prepared an affidavit and that his commanding officer would not sign it. This matter of course has not actually been proved, but it seems to me that it would never have been stated if it were not true, and once the commanding officer had refused to sign the affidavit, one could hardly have expected the appellant to have sought out any other public official in a distant place like Jubbulpore. Although the appellant does not state explicitly that in his mind the only practicable way of bringing himself on record was to come to Vellore and there prepare the necessary affidavit and take the necessary steps, I think it is a reasonable inference from a perusal of the affidavit as a whole that that was the impression which existed in his mind, an impression which in my opinion is not in all the circumstances of this case an unreasonable one. I would, therefore, set aside the order of the learned District Judge and the abatement of the appeal and allow the appellant to be brought on record as the legal representative of the appellant in that appeal and order that the appeal be duly heard and disposed of according to law. In the circumstances of this case I think the fairest order in regard to costs is that each party should bear his own costs throughout.

N.-S. *Order accordingly.*

CALCUTTA HIGH COURT

Election Petition

April 29 1940

McNAIR, J.

MOHAMAD HOSSAIN—PETITIONER

versus

MD. RAFFIQUE AND OTHERS—RESPONDENTS.

Calcutta Municipal Act (III of 1923 as amended in 1939), ss. 27 (2), 30, 46, 47—Rules under s. 30, r. 14 (1) (iii)—More than one election agent is not permissible—In first nomination paper candidate appointing F as his agent — In subsequent nomination paper he appointing himself as election agent—Previous appointment not revoked—Rejection of all nomination papers held justified—Grounds set up in s. 47 not established—Court, if can declare election void — Petition under ss. 46 and 47 —Returning Officer, if necessary party.

The Calcutta Municipal Act, contemplates a single election agent. More than one election agent is not permissible.

The candidate delivered to the returning officer two nomination papers each accompanied by a declaration in writing stating that he had appointed *F* as his election agent. On a subsequent date he delivered to the returning officer six more nomination papers each accompanied by a declaration in which he appointed himself as his election agent without making any attempt to revoke the previous nomination of *F* as his election agent. There was a scrutiny by the returning officer and he then rejected all the nomination papers on the ground that they contained declarations of more than one election agent. On the construction of r. 14, it was argued that the nomination papers or each of them were valid and that there was no justification for rejecting a valid nomination paper because on comparison with another nomination paper the returning officer discovered that more than one election agent had been appointed It was argued that the returning officer was bound to take each nomination paper as a separate entity and come to his decision on that paper

Held, that the returning officer had no power to decide which was the election agent whom the candidate wanted to appoint, but the candidate had power under s 33 to revoke either of the appointments and had he done so no fault would apparently have been found with the nomination But the nomination and the declaration are both contained in Form I and they are considered as a single unit and if the returning officer was of opinion that the candidate had in his nomination papers failed to comply with the provision of the Act which provides that only one election agent shall be appointed he was justified in rejecting the nomination papers.

Section 46 sets out the grounds on which an application may be made to the Court and s. 47 sets out the grounds on which the election of the returned candidate may be declared void, and unless the grounds set out in s 47 are established the Court is not empowered to declare the election void.

The returning officer need not be made a party to an application under ss. 46 and 47 for getting an election declared void.

Sir, *A. K. Roy*, (Advocate-General) and Mr. *S. C. Roy*, for the Petitioner.

Messrs. *S. M. Bose* and *H. N. Sanyal*, for the Respondents.

Order.—The petitioner in this application was a candidate from the Muhammad in constituency of Colcotolla No 8 for which there are two seats. The petitioner's nomination was rejected by the returning officer and three other candidates who are made parties to this petition withdrew their candidature, and in the result Mohammad

Raffique and Dr. Sayed Zaffar Ahmad were declared elected and their names were published in the *Calcutta Gazette*. The petitioner contends that the result of the election has been materially affected by the improper rejection of his nomination papers and/or by reason of irregularity in respect of the nomination papers and/or by non-compliance with the provisions of the Act. These submissions which appear in his petition are based on ss. 46 and 47, Cal. Municipal Act, as amended. Two questions arise on this petition: first, as to the validity of the nomination papers which were rejected and secondly, whether the returning officer's decision can be questioned under ss. 46 and 47, Municipal Act. On February 23, 1940 the petitioner delivered to the returning officer two nomination papers each accompanied by a declaration in writing stating that the petitioner had appointed Mr. Fazal Ahmed as his election agent. On February 26, 1940 the petitioner delivered to the returning officer six more nomination papers each accompanied by a declaration in which he appointed himself as his election agent and on February 27, he delivered five more nomination papers again in each appointing himself by a declaration as his election agent.

There is no question that the nomination papers were within time and it is also clear that in the first two nomination papers Mr. Fazal Ahmad was appointed the petitioner's election agent and in the subsequent nomination papers the petitioner appointed himself. It is noteworthy that in the subequent nomination papers in which the petitioner appointed himself as the nomination agent he did not attempt to revoke the previous nomination of Mr. Fazal Ahmad as his election agent. There was a scrutiny on March 4, by the returning officer and he then rejected all the nomination papers. But on one of the nomination papers containing the declaration that Mr. Fazal Ahmad is the petitioner's election agent the endorsement of the returning officer is as follows: "Rejected as the candidate has appointed himself as his election agent in serial Nos. 11, 12, 13 and some other nomination papers." Similarly, in the other nomination papers, an endorsement has been made giving as the reason for the rejection that another election agent had been nominated in other papers.

With regard to the present election the Provincial Govt. under s. 44, Cal. Municipal Act, is empowered by order to authorize any matter or thing to be done which appears to them necessary for the proper preparation or publication of the first electoral rolls or holding of the elections. That order was issued by the Provincial Govt. and published in the *Calcutta Gazette* on August 4, 1939. The order substitutes new rules for the rules which previously existed and were issued under s. 30, Municipal Act, for the conduct of elections. During the argument the provisions of this order have been referred to as rules and I shall so refer to them in this judgment. Turning first to the sections of the Act s. 27 sub-s. (2) provides that on or before the date on which a candidate is nominated the candidate shall make in writing and sign a declaration appointing either himself or some other person who is not disqualified to be his election agent. Section 3, sub-s. (29) of the Act defines election agent as the person appointed under s. 27, sub-s. (2) by a candidate as his agent for an election. Section 33 provides that the appointment of an election agent whether the election agent appointed be the candidate himself or not may only be revoked in writing signed by the candidate and lodged with the officer receiving nominations and shall operate from the date on which it is so lodged. From these sections it is clear that the Act contemplates a single election agent and indeed it has not been seriously argued that more than one election agent is permissible. Rule 4 of the Govt. order provides that nominations should be made by means of a nomination paper in Form I annexed to the order and r. 5 provides that each candidate shall deliver to the returning officer a nomination paper completed in Form I. Rule 7 provides that every nomination paper delivered under para. 5 (to which I have referred as r. 5) shall be accompanied by a declaration in writing subscribed by the candidate in the manner laid down in sub-s. (2) of s. 27 of the Act. Sub-s. (2) of s. 27 refers to the declaration appointing an election agent. By r. 10, the returning officer appoints an hour and place for the scrutiny of nomination and r. 14 which is largely relied on by the petitioner refers to the scrutiny of nominations by the returning officer. Rule 14, sub r. (1) provides that the returning officer shall examine nomination papers and decide all objections and empowers him to refuse any nomination on certain grounds. Rule 14 (1) (*iii*) contains the relevant ground *viz.*,

"that there has been any failure to comply with any of the provisions of the Act or of this order relating to the nomination of candidates"

and r. 14, sub-r. (3), so far as it is relevant, provides that nothing contained in clause (*iii*) or r. 14 (*b*) shall be deemed to authorize the refusal of the nomination of any candidate on the ground of any irregularity in respect of the nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed. Rule 15 provides that the returning officer shall endorse on each nomination paper his decision and if the nomination paper be rejected a brief statement of the reason for such rejection. Now it is clear that the returning officer has rejected these nominations on the ground that they contained declarations of more than one election agent. I have already stated that it is not contested that only one election agent is permissible But on the construction of r. 14 it is argued that the nomination papers or each of them were valid and that there was no justification for rejecting a valid nomination paper because on comparison with another nomination paper the returning officer discovered that more than one election agent had been appointed. It is argued that the returning officer is bound to take each nomination paper as separate entity and come to his decision on that paper and it is further argued that this construction is supported by sub-r. (3) of r. 14.

The returning officer was, in my opinion justified in rejecting these nomniation papers. It is admitted on behalf of the successful candidates that the nomination papers were in order. But it is argued and in my opinion rightly that the returning officer was bound to reject them under r. 14 (1) (*iii*) because there has been a failure to comply with the provisions of the Act. Section 27 of the Act provides that in each nomination paper the candidate shall sign a declaration appointing either himself or some other person to be his election agent and on looking at the nomination papers the returning officer was made aware that the candidate had attempted to appoint not either himself or some other person but both himself and some other person. The returning officer had no power to decide which was the election agent whom the candidate wanted to appoint, but the candidate had power under s. 33 to revoke either of the appointments and had he done so no fault would apparently have been found with the nomination. But the nomination and the declaration are both contained in Form I and they are considered as a single unit and if the returning officer is of opinion that the candidate has in his nomination papers failed to comply with the provision of the Act which provides that only one election agent shall be appointed he justifide in rejecting the nomination papers. Rule 14, sub-r. (3), is not applicable if each of the nomination papers was valid, and there was no irregularity as contemplated by that sub-rule. But the rejection was for failure to comply with the Act. In support of this view reference has been made to an earlier case which is to be found in Vol. I of Hammond's Report of Indian Election Cases, 1920. The facts in that case are not very clear but apparently each of the respondents filed documents purporting to appoint in one case 26 persons and in the other 18 persons as election agents. The rule there was similar to the rule which is now under contemplation and it was pointed out that unless the view which was taken by the returning officer in this case prevailed it would be possible for the candidate to appoint a number of persons as his election agents when the Act contemplated only a single election agent.

The next point which arises is whether the decision of the returning officer can be questioned on this motion, I have already pointed out in a previous election petition the difficulty of construing ss. 46 and 47 of the Act, but I held there that s. 46 sets out the grounds on which an application may be made to the Court and s. 47 sets out the grounds on which the election of the returned candidate may be declared void, and unless the grounds set out in s. 47 are established the Court is not empowered to declare the election void. The relevant provision of s. 47 is sub-s. (1) (*c*) on which reliance has been placed here but in my view none of the grounds set out in s. 47 (1) (*c*) have been contravened and for that reason the decision of the returning officer cannot in any event be questioned. The returning officer has been made a party to this application but in my view he is not a party who should have been joined. He is dismissed from the application and the petitioner must pay his costs. The application is dismissed with costs of all parties appearing.

D. *Application dismissed.*

RANGOON HIGH COURT

First Appeal No. 37 of 1940
July 4, 1940
DUNKLEY AND BLAGDEN, JJ.
DR. THA MYA—APPELLANT.
versus
MA KIN PU AND ANOTHER—RESPONDENTS

Burmese Buddhist Law—Maintenance—Suit by wife for—Arrears for period before suit, if can be granted—Law in Burma—Child, if can sue its parents for maintenance—Cause of action—Wife's suit—Husband subsequent to suit taking another wife—This fact, if can form part of wife's cause of action—Difference between English Law and Buddhist Law on wife's right to maintenance—Husband taking second wife—Amount of maintenance to which first wife is entitled—Child's maintenance, if charge on husband's income—Marriage—Dissolution by desertion and a year's absence—Absence of communication—Husband and wife—Cruelty—Onus—Nature of proof—Burma Laws Act (XIII of 1898), s. 13 (3)—Expression, according to justice, equity and good conscience", meaning of

In suit by a Buddhist wife against her husband for maintenance, the Court has no jurisdiction to order payment of arrears of maintenance for the period before suit commenced. 82 Ind. Cas 799 (1), relied on. [p. 837, col 1]

In Burma a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where the circumstances are such that the wife is morally bound to support a child or children that fact may, and should, be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. [p. 838, col 1]

Where subsequent to the wife's suit for maintenance, the husband has taken a second wife, this cannot, whatever its legal effect, form part of the wife's cause of action in the suit, as a premature suit is incurable by subsequent events *Clayton* v. *Le Roy* (6) and 177 Ind Cas 63 (7), referred to.

In Buddhist Law, the spouses are for no purpose one person but of their after-acquired property they are tenants in common The wife's interest in that property is a vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent since this may be affected in various ways It depends for example, on whether the after acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality (unlike that implied by English Law) collateral to the main contract of marriage It is to the effect that the husband shall be the manager of the after-acquired property and shall apply it during the subsistence of the marriage (as to income first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates The Buddhist husband is therefore under a positive legal duty to maintain his wife, but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband. The latter when sued for maintenance has a good defence if he pleads and proves that before action brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not *qua* husband but *qua* manager, and no wrong done to him in the former capacity can benefit him in the latter. [p. 839, cols. 1 & 2.]

It is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses [p. 839, col. 1.]

There can be such a thing as mental cruelty but it should be possible to point to some definite words or actions as constituting it. A charge of matrimonial cruelty is a serious matter none the less serious when it is made against a medical man and it is for the party who makes such a charge to prove it if it is denied. If he or she fails to prove it, a Court of law is bound to presume that it is unfounded, mere failure to control a daughter of 17—often no easy task—cannot either alone or in conjunction with anything else amount to cruelty to her step-mother. [p. 840, cols. 1 & 2]

In Burmese Buddhist Law, the general rule is that wife is entitled by way of maintenance to an amount which is one-third of the income acquired by the exertions of her monogamous husband. But when the husband takes a second wife the amount of maintenance to which the first wife is entitled, is reduced, to one sixth of his income and the costs of maintaining children is first charge on the income.

The phrase "according to justice, equity and good conscience" generally speaking, means English Law if applicable to the society and circumstances of Burma. *Waghela Rajsanji* v. *Shekh Masludin* (2), relied on.

F. A. against the decree of the District Court, Insein, dated February 10, 1940.

Mr. *U E Maung* (1), for the Appellant.

Mr. *N. K. Bhatacharyya*, for the Respondents.

Blagden, J—This is an appeal by the defendant in a suit for maintenance commenced in the District Court of Insein. There is also a cross-objection by each respondent-plaintiff. Respondent-plaintiff No. 1 on April 27, 1939 presented to that Court a petition for leave to sue *in forma pauperis* Her then proposed plaint lodged with the petition prayed for Rs. 200 monthly from the date of the suit for maintenance of herself and Rs 50 for the maintenance and support of her minor son. Pending a decision on the petition, respondent No 1 filed a proposed amended plaint making the infant son a co-plaintiff suing by herself as next friend. Leave was given to sue *in forma pauperis* on July 7, 1939 (on which date, accordingly, the proposed plaint became an effective plaint and the suit must be held to have commenced), and to amend the plaint on October 3, 1939. Judgment was given on February 10, 1940 and an order passed in favour of the adult plaintiff for Rs. 100 a month and of the

infant plaintiff for Rs. 40 a month as from July 6, 1939. The appellant contends (amongst other things) that both sums are excessive and the respondents that neither is adequate. The latter also take a minor point, *viz.*, that the order should have been ante-dated to April 27, 1939. For the reasons already given this contention is erroneous there being no jurisdiction to order payment of arrears of maintenance for the period before suit commenced. *Ma Saw Nwe* v. *U Aung Soe* (1).

The first point argued before us concerned the claim of the infant plaintiff which, it was contended by the appellant, is bad in law. This contention is, in my opinion, well founded. I cannot conceive any reasonable system of law which allows children, as such, to take civil proceedings to compel their parents to maintain them. The logical consequences of such a state of things are palpably absurd. If a child in infancy has a civil right to be maintained in idleness by those responsible for its existence, at what age does it lose that right? No such age has been fixed either by the common law or by statute, and therefore if the right ever exists it is never lost. The whole structure of civilized society depends on (amongst other things) people doing work, which is seldom in itself a pleasure. But in a free country the forces which impel people (other than convicts) to do work are economic and not legal. The existence of any such right would therefore mean that orphans, and only orphans, would have any incentive to do any work. Consequently, all that has to be done would have to be done by the eldest living generation in each family—generally speaking, by middle-aged people themselves made incompetent to do it not only by their age but also by a youth of enervating sloth during which they in their time had battened in blissful indolence on their unfortunate parents. If such had ever been the law, the civilized world would have plunged into chaos long before it in fact did. Nor is authority lacking to disprove the existence of any such right. A suit by a child against its father for maintenance is not mentioned in s. 13 (1), Burma Laws Act. Therefore the question (unlike that of a wife's maintenance, which is a part of the law of marriage) does not fall to be determined by Buddhist Law but, by sub-s. (3) of that section and must be decided "according to justice, equity and good conscience". This, generally speaking, means English Law if applicable to the society and circumstances of this country: *Waghela Rajsanji* v. *Shekh Masludin* (2) at p. 561.

Now, the English Law on the point is perfectly clear. Parents or persons *in loco parentis* who let their infant children starve or who run away leaving them chargeable on the parish are liable to criminal prosecution. The Parish (now the Public Assistance Committee) which relieves the necessities of poor persons may in certain cases recover its expenses from their more affluent relatives (including parents) under what used to be called the Poor Law. But a direct action by a child as such for maintenance against its parent is not only unheard of but contrary to the dicta on the subject of Lawrence, J. in *Cooper* v. *Martin* (3) at p. 84 and of Cockburn, C. J., in *Bagley* v. *Forder* (4) the latter, it is true, formed part of a dissenting judgment but the point of difference between the learned Chief Justice and his brethren does not affect the present question. Neither of these dicta has ever been doubted, and they were recognized as good law by Salter, J., in *Coldingham Parish Council* v. *Smith* (5). Moreover, these three cases are cited in the Hailsham edition of Halsbury's "Laws of England" Vol. 17, Title Infants —Children' para. 1393, in support of the proposition that

"except under the operation of the Poor Law there is no actual legal obligation on a father or mother to maintain a child, unless the neglect to do so would bring the case within the criminal law"

The title 'Infants and Children' has the high authority of Sir Boyd Merriman, now President of the Probate, Divorce and Admiralty Division of the High Court in England. Against the appellant's case, which both in principle and in authority is in my opinion overwhelming, reliance on behalf of the infant respondent is placed on a passage in U E Maung's work and a note in May Oung's leading cases, Edn. 2, p. 53. As to the former, the argument of Counsel who relies on the published opinion of his adversary is always piquant, but if U E Maung did mean to express an opinion inconsistent with his present case he is not irrevocably committed to it and would be the first to admit that the opinion he express-

(1) 1939 Rang. 527; 182 Ind. Cas. 799; A I R 1939 Rang. 223; 12 R Rang. 28.

(2) 11 B 551 (561); 14 I A 89; 11 Ind. Jur. 315; 5 Sar. 16 (P C).

(3) 4 East 76 (84).

(4) (1842-43) 3 Q B 559.

(5) (1918) 2 K B 90; 87 L J K B 816; 118 L T 817; 82 J P 170; 16 L G R 376; 26 Cox. C C 260.

ed may be erroneous. I do not think that Mr. Bhattacharya's ingenious attempt to "hoist him with his own petard" should succeed. As to the later, the passage cited runs thus :

"Under Buddhist Law, it is part of the law of marriage that a man must maintain and support his wife and children. Hence, a civil action to enforce this duty will lie."

No authority is cited for it, and it is not said who is the proper plaintiff. It is unthinkable that both the child and its mother should be entitled to bring the suggested suit. It must be one or the other. A passage a few lines lower down reads :

"Even for future maintenance it is doubtful whether a decree can be given against a man where the wife has sufficient means of her own, though it may be argued that she has every right to expect support from him, since his obligation to maintain her is an essential incident of marriage. But, as regards children, a suit for maintenance by the mother even if she herself be wealthy is reasonable, except where the couple have been divorced and the father has given them up to her."

Given that in the contemplated circumstances the mother can sue, it follows that the child cannot, and this passage is therefore against the infant respondent. In any event, as I have said, Buddhist Law is inapplicable. Therefore, in my opinion, the true view of the law of this country is that a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where, as here, the circumstances are such that the wife is morally bound to support a child or children that fact may, and should be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. The appeal against the judgment in favour of the infant plaintiff must therefore be allowed and his suit dismissed. As to the appeal against the judgment in favour of the adult plaintiff, her plaint, as I have said became effective on July 6, 1939. It set out that the parties were Burmese Buddhists and intermarried on July 21, 1937 when the adult plaintiff was a spinster and the defendant a widower with four children and that there was issue of the marriage one son (the infant plaintiff) born on April 27, 1938 and since June 26, 1938 in the sole custody of the adult plaintiff. All these facts the defendant by his written statement admitted.

The plaint then, with a fine disregard for the rules of pleading, set out, at considerable length, the main evidence which the adult plaintiff proposed to adduce, before alleging (which it did with a remarkable lack of proper particulars) the material facts which the plaintiff hoped thereby to prove, namely, separation of the spouses, justification for it, and neglect to maintain. The matrimonial offences of the defendant relied on as justifying the adult plaintiff's living apart were cruelty and the taking by the defendant of a second wife without the adult plaintiff's consent. The plaint averred the means of the defendant to be in the adult plaintiff's estimate Rs. 1,000 a month, made a wholly unnecessary submission as to what the adult plaintiff's legal rights were; and concluded with formal averments and a prayer which I have already mentioned. The main body of the pleading consisted of a precis of correspondence between the defendant and the plaintiff's father, the former demanding of the latter money by threatening in default of payment to return the adult plaintiff to him, and the latter stoutly refusing either to part with his money or to receive back his daughter. The defendant's lack of affection for the adult plaintiff, avowed in this correspondence, might have been some evidence corroborative of the adult plaintiff if and when she ultimately (as she did) gave evidence of cruelty. In no other way were these letters in the least material to the adult plaintiff's case and why they were all pleaded passes my comprehension. The defendant by his amended written statement filed on October 12, 1939 was almost equally discursive. He rightly demurred to the claim of the infant plaintiff and he admitted the allegations as to the religion and marriage of the parties, their previous status, the birth of their child, their *de facto* separation, and child's subsequent custody.

He admitted, subject to reference, the correspondence pleaded and averred that his letters therein contained were written with the plaintiff's prior approval. He denied the allegations of cruelty, and pleaded his intended evidence about this at considerable length. He also pleaded a divorce by consent on June 26, 1938: alternatively, desertion without just cause by the adult plaintiff on that date, and a consequent divorce (he should have said dissolution of marriage) on June 26, 1939: and in the further alternative he alleged that these parties were at all material times living apart by mutual consent. He admits having taken a wife subsequently to June 26, 1938, though it appeared before us that this event only took place after suit commenced. This may therefore be, and I think it is, a material factor in the

defendant's favour on the question of amount. But as it took place after suit commenced it could not, whatever its legal effect, form part of the adult plaintiff's cause of action in this suit, since a premature suit is incurable by subsequent events: *see Clayton* v. *Le Roy* (6) and *Smith* v. *Mrs. Hextonstall* (7). The defendant further pleads that he offered the adult plaintiff Rs. 20 a month as maintenance for the infant, that it was refused, and that it was adequate. He denies the allegations as to his income and (after following his wife's bad example by inserting a short treatise on the law applicable to the case) concludes with a general traverse. On these pleadings nine issues were framed and after a trial lasting some seven days judgment was delivered on February 10, 1940. As I have already dealt with the question on which I differ from the learned District Judge (that of liability to the infant plaintiff) and as I agree with him (in the result) on the main question (that of liability to the adult plaintiff) I do not think I need deal in detail with those issues or that judgment. As it seems to me, there is, on those facts which are not in dispute, a complete answer to the defendant's case on the main question.

This arises from the difference between the nature of a wife's right to maintenance under the English and under the Buddhist Law. Both, I apprehend arise from a term implied by law in marriage. The English Law implies a term that the husband shall choose the social standard to which the household shall aspire and shall during the subsistence of that marriage maintain his wife, regard being had to her own means of reaching it, at the standard he has selected, out of his own pocket. This implied term goes to the very root of marriage, considered as a contract. The effect of the Buddhist Law is probably in nine cases out of ten much the same, but the principle on which it proceeds is radically different. In Buddhist Law, the spouses are for no purpose one person but of their after-acquired property they are tenants in common. The wife's interest in that property is vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent, since this may be affected in various ways. It depends, for example, on whether the after acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality (unlike that implied by English Law) collateral to the main contract of marriage. It is to the effect that the husband shall be the manager of the after acquired property and shall apply it during the subsistence of the marriage (as to income) first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates. The Buddhist husband is therefore under a positive legal duty to maintain his wife, *Ma Saw Nwe* v. *U Aung Soe* (1), but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband.

The latter when sued for maintenance has a good defence if he pleads and proves that before action was brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root. But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not *qua* husband but *qua* manager, and no wrong done to him in the former capacity can benefit him in the latter. From this it follows that the only valid pleas here pleaded by the appellant are those directed to showing that before suit brought his marriage to the adult respondent had been determined either (*a*) by mutual consent or (*b*) by desertion and a year's absence. As to the former his own evidence as to what took place on June 26, 1938 both as pleaded in para. 5 of his written statement and as deposed at p. 100 reversed is inconsistent with any such consent. As to the latter, it is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses. Here it is common ground that there was such communication. Therefore, the marriage was at the date the suit was commenced, and indeed is still, subsisting. The appellant is therefore liable to pay maintenance to the adult respondent, and the only remaining question is one of amount. But before dealing with that, one thing must be said, in fair-

(6) (1911) 2 K B 1031; 81 L J K B 49; 105 L T 430; 75 J P 521; 27 T L R 479.

(7) 1938 Rang. 6; 177 Ind. Cas. 63; A I R 1938 Rang. 134; 11 R Rang. 95.

ness to the appellant. The adult respondent's case as regards cruelty consisted of three parts. Firstly, there was the pleaded correspondence of December 1937. It is obvious that she was contemporaneously aware of this correspondence. One would have thought, this being so that she would have written entreating her father to relent from the attitude that she would "get into trouble" if she came home, and to receive her back; that is, at least, if in December 1937 her husband's treatment of her amounted to cruelty. The probable explanation of the fact that she did not do so is that the defendant's version of the facts about his correspondence is true, and if it be true the adult plaintiff's evidence as a whole comes under grave suspicion. I do not understand why the learned Judge said "I do not think that any serious notice can be taken of the defendant's explanation." Secondly, the adult plaintiff gave a lot of rather nebulous evidence which induced the learned Judge to find that the defedent

"adopted such an offensive and bitter attitude towards the plaintiff that made it impossible for the plaintiff to continue to live with him and at the same time to enjoy peace of mind."

That there can be such a thing as mental cruelty no one will deny, but it should be possible to point to some definite words or actions as constituting it, and if there were such conduct by the defendant as to have the effect found by the learned Judge it must surely have been conduct capable of being described a little more precisely than as "an offensive and bitter attitude." How, I ask, could any man meet a charge so vaguely expressed? It does seem that the learned Judge has (without any clear evidence that the appellant took the side of his daughter, his mother, or his sister, or instigated them or any of them to be unpleasant to his wife) saddled the defendant with responsibility for the quarrels which undoubtedly did take place between these ladies and the adult respondent. Consequently, he has, I think, regarded those quarrels as being an ingredient in the defendant's alleged cruelty. This is, of course, quite wrong. I have little doubt that the real source of the trouble in this case was too many women in one house, especially as the adult plaintiff was quite young enough to be the defendant's eldest daughter's sister. But whatever the rights and wrong of the resulting and almost inevitable squabbles mere failure to control a daughter of 17—often no easy task—cannot either alone or in conjunction with anything else amount to cruelty to her step-mother. Thirdly, the adult respondent deposed to three acts of physical violence about which her evidence was almost wholly uncorroborated and which she never pleaded or, it seems, mentioned to a living soul before she entered the witness-box. The learned Judge did not accept her evidence as satisfactory proof of these assaults, and, for my part, I go a step further and say flatly that I do not believe it. But the learned Judge said this:

"It does not necessarily follow that the plaintiff's allegations are not true though they may be said not to have been proved."

In my opinion this was a most unjudicial and improper observation. A charge of matrimonial cruelty is a serious matter none the less serious when it is made against a medical man and it is for the party who makes such a charge to prove it if it is denied. If he or she fails to prove it, a Court of law is bound to presume that it is unfounded, and I cannot too strongly deprecate an observation from the Bench which casts an unpleasant innuendo at a party merely for failure to discharge a burden which does not rest on him. In my considered opinion, the issue of cruelty in this suit should have been answered in favour of the appellant, and I think it unfortunate that for the reasons already given it is not strictly necessary for us to decide this question. With regard to amount a wife in England is as a general rule allowed by way of maintenance the amount necessary to bring her own income up to one-third of the parties' combined incomes. By a pure, but curious, coincidence one-third is the quantum of her interest in Burmese Buddhist Law in property acquired by the exertions of a monogamous husband. In the present case, there is no property not so acquired, the only income out of which the adult respondent can be paid being the professional earnings of the appellant. The only evidence as to their amount is that of the appellant himself who says that he earns Rs. 740 a month in salary etc, plus a negligible sum in private practice. If it were shown that a particular couple either did in fact live well below their income, or should reasonably have done so, one would be inclined to give the wife less than one-third of such income, leaving a balance to accumulate as capital and to be accounted for at the determination of the marriage. But in the circumstances of this case, if there were no other wife, I think

it would be reasonable to give the respondent about one-third. By her cross-objection the adult respondent limits the amount she claims to Rs. 150. Apart from the appellant's having now taken another wife the claim to Rs. 150 would have been very moderate indeed since one-third of Rs. 740 is Rs. 246-10-8, and in English Law the new wife would, I think, have been regarded as a mere encumbrancer subsequent to the adult respondent. But as, in Burmese Buddhist Law, the appellant was within his rights in taking her to wife provided he maintains the adult respondent, her marriage to the appellant reduces the expectant share of the adult respondent from one-third to one-sixth and U E Maung contends that we should not give the wife any more than one-sixth of the income or she will in effect have overdrawn her capital account when her marriage is dissolved.

This argument however ignores the costs of maintaining the infant respondent. The costs of maintaining children must, I think, be a first charge on income in this sense that if a married couple do not acquire any accretions of capital but succeed in saving out of income, so that there is something to divide when their marriage is dissolved, that divisible surplus is the residue left not after starving but after feeding the issue of the marriage. Rupees 20 is, I think, rather too little to allow as the cost of maintaining the child and Rs. 40 too much. I would propose to split the difference and call it Rs. 30, and deduct this sum from the appellant's income which leaves Rs. 710. One-sixth of this is Rs. 118-5-4. I would then propose (as the adult plaintiff has the child to provide for(to add to this figure Rs. 30 which I first deducted which gives Rs. 148-5-4. As the child grows older he will cost more than he now does and, therefore, I should feel justified in giving the adult respondent the round sum claimed by her cross-objection, *viz.*, Rs. 150, though it is a little more than that to which I think she is mathematically entitled as matters now stand. Respondent No. 1 has succeeded on her cross-objection while the appellant has succeeded as against the infant respondent. Strictly speaking he has failed on the main point, but that which I suppose was an important object in his appeal—namely to rid himself of the stigma of cruelty—he has obtained. That charge in my view should never have been made.

The appeal against respondent No. 2 is therefore allowed and the suit of respondent No. 2 is dismissed. The appeal as against respondent No. 1 fails, and is dismissed. The cross-objection of respondent No. 2 is dismissed. The cross-objection of respondent No. 1 is allowed, and the appellant is ordered to pay maintenance to her at the rate of Rs. 150 per month from July 6, 1939, and the decree of the District Court will be varied accordingly. As regards costs, the decree of the District Court in regard to the costs of the suit, including the order that the defendant-appellant shall pay the court-fees which would have been paid if respondent No. 1 had not been permitted to sue *in forma pauperis* will stand. The parties will respectively bear their own costs of this appeal and the cross-objections, but respondent No. 1 is ordered to pay the court-fees on the cross-objection, both in regard to her own cross-objection and also to the cross-objection on behalf of the infant respondent, which would have been paid if the cross-objections had not been permitted to be filed *in forma pauperis*.

Dunkley, J—A claim by a wife for maintenance is clearly a question regarding marriage, and therefore when the parties are Buddhists the Buddhist Law must form the rule of decision by reason of the provisions of s. 13 (1), Burma Laws Act, and it is for this reason that the suit of respondent No. 1 against the appellant for her maintenance is sustainable, as I have held in *Ma Saw Nwe* v. *U Aung Soe* (1). But a claim by a child against its father for maintenances is not a question regarding either succession, inheritance, marriage, caste or any religious usage or institution, and therefore sub-s. (1) of s. 13, Burma Laws Act, has no application to such a suit; but in accordance with sub-s. (3), if there is no statutory law dealing with the matter, the decision must be according to justice, equity and good conscience. The only statutory provision dealing with the matter is s. 488, Criminal P. C., which provides for an order by a Magistrate after a summary enquiry and does not give a right of suit. As my learned brother has pointed out, the phrase "justice, equity and good consicence" means the English Common Law, so far as it can be applicable in this country, and under the English Common Law a child cannot bring an action against its parents for its maintenance, and on this ground the suit of respondent No. 2 was bound to fail. I agree with my learned brother that the charges of cruelty by respondent No. 1 against the appellant ought never to have been made and I am in entire agreement with his observations in regard thereto. I also agree that the rate of maintenance

allowance to be granted to respondent No. 1 should be enhanced to Rs. 150 per mensem. I agree with his order as to the costs of the suit and this appeal.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Appeals Nos. 203 of 1938 and 5 of 1939

November 24, 1939

R. C. MITTER AND LODGE, JJ.

RAJENDRA KISHORE BASU ROY AND OTHERS—DECREE HOLDERS—APPELLANTS

versus

Kumar PROMOTHA NATH ROY AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 151—Ambiguous decree of first Court affirmed by High Court—Subsequent removal of ambiguity by reviewing its own judgment—Decree not embodying directions in final judgment passed on review—Decree, if can be brought into conformity with final judgment—High Court, power of, to order necessary amendment.

High Court affirmed an ambiguous decree of the Court of first instance but by reviewing its own judgment, subsequently removed the ambiguity. But the judgment which was final between the parties passed on review contained the directions which had not been embodied in the decree;

Held, that there was no bar in subsequently bringing the decree into conformity with the final judgment where the rights of third parties had not been intervened. The High Court could, if necessary, itself order the aforesaid amendment of the decree.

As. from the appellate orders of the Additional District Judge Second Court, Dacca, dated August 23, 1938.

Dr. *Basak*, Messrs. *H. K. Das, Radhikaranjan Guha, Satyendra Kishore Ghose* and *Ramendra Chandra Roy* (in No. 203), and *A. C. Gupta* and *Priya Nath Dutt* (in No. 5), for the Appellants.

Messrs. *A. C. Gupta* and *Priya Nath Dutt* (in No. 203) and Dr. *Basak*, Messrs. *H. K. Das, Radhikaranjan Guha, Satyendra Kishore Ghose* and *Mihir Mohan Chatterjee*, (in No. 5), for the Respondents.

Judgment.—Appeal No. 203 has been preferred by the decree-holders and No. 5 by the judgment-debtors. They relate to the execution of a decree passed in Suit No. 65 of 1911 which was subsequently numbered as 40 of 1912. The question involved in these appeals relates to the extent of land to which the decree-holders are entitled to get joint possession. There were many proceedings between the parties since the decree had been passed some of these have bearing on the contentions raised before us by the learned Advocates of the parties. It is therefore necessary to recite some facts. The Behar *zamindars* are many in number. In 1911 they instituted five suits in respect of the self-same land. All the Behar *zamindars* were not plaintiffs in the same suit, but some of them were plaintiffs and the rest *pro forma* defendants. The principal defendants were many in number. We are concerned in this appeal only with defendants Nos. 112 to 114 and with the decree passed in Suit No. 40 of 1912. For brevity's sake the said defendants are called Raja brothers in these appeals. The other suits filed by the other Behar *zamindars* in 1911 were Nos. 198, 199, 91 and 90 of 1911 which were subsequently numbered Nos. 9, 52, 42 and 45 respectively. Some time after the institution of these five suits which were tried analogously, a Commissioner was appointed for local investigation. At the time of the local investigation the plaintiffs in these suits pointed out to him the disputed land. The Commissioner in his map has shown the disputed land as shown to him as bounded by the yellow lines. A good portion of the land so pointed out to the Commissioner was outside the plaint as originally filed. A portion of it which was not in the original plaint, was found in the possession of the Raja brothers who were not parties defendants to the suit as originally filed. They were later on added as parties defendants, being defendants Nos. 112 to 114, and by two petitions filed in Court by the plaintiffs dated September 13, and December 9, 1915 this additional land which was shown to the Commissioner at the time of the local investigation, as being part of the disputed land, was asked to be included in the plaint. The amendments were allowed on December 17, 1915 and on December 23, 1915 the Court of first instance pronounced its judgment.

At the time of the local investigation, the Commissioner was asked to rely on the case map plot No. 1 (*pratham khanda*) of a map which has been marked Ex. 101. He has indicated the first plot of the said map by red lines. He has also indicated certain *Mouzas* in plot No. 1 of the said map, Ex. 101, with the dotted lines. This map, Ex. 101, in which two plots are indicated as *pratham khanda* and *dwitiya*

khanda is a part of Ex. 108, a compromise decree passed in the year 1892 in a suit between the predecessors-in-interest of the plaintiffs in the said five suits, and the predecessors-in-interest of the Raja brothers who were added as defendants, not only in Suit No. 40 but also in the remaining four suits. From the judgment of the first Court, it appears that the plaintiffs based their claim to the portion of the disputed land which is the subject-matter of the appeals which we have to deal with, on the title given to them by the compromise decree of 1892, namely Ex. 108 of which the map Ex. 101 is a part. The judgment of the first Court in favour of the plaintiffs proceeds upon Ex. 108, so far as this part of the case is concerned. By Ex. 108 the plaintiffs' predecessors were not given title to the whole of the *pratham khanda* of the map Ex. 101, but only to portions thereof. Plot No. 1 of the said map Ex. 101 covers the following *Mouzas*, namely, Naogaon, Karpara, Birlapur, Hatarbhog and Duttogaon. The plaintiffs' predecessors were given title to the whole of Hatarbhog, and Dattagaon, and a portion, nearly one-half of Karpara and Birlapur which are within the red line indicated in the said map: and the predecessors of the Raja brothers, sixteen anna of Naogaon and the rest of Karpara and Birlapur outside the said line. In the decree, however, which was drawn by the Court of first instance the plaintiffs of suit No. 40 were given possession of :

"the lands to the south of plot No. 4 of Suit No. 9 of 1912, that is to the south of the attached *char* lands within plot No 2 according to the amended plaint of the suit, which fall within the ambit of the map Ex. 101."

Similar decrees were passed in favour of the plaintiffs of the remaining four suits which we have mentioned above. As three of the other suits were valued at over Rs. 5,000 the Raja brothers preferred three first appeals to this Court, namely No. 282 of 1916, No. 5 of 1917 and No. 23 of 1917. As Suit No. 40 of 1912 was valued at less than Rs. 5,000 an appeal was preferred by the Raja brothers against the decree of the trial Court to the District Judge. The learned Judge allowed the said appeal and dismissed that suit. Two second appeals were preferred to this Court against the decree of the learned District Judge. We are concered with the second Appeal No. 164 of 1919 which was an appeal preferred to this Court by the plaintiffs in the said suit. The said second appeals and the three first appeals were heard analogously by a Division Bench of this Court and the judgment was pronounced on September 1, 1920. The effect of the judgment, in so far as it is material for our present purpose, is that the Raja brothers were given three months' time to file an additional written statement, apparently on the ground, that the Court of first instance had allowed amendment of the plaint after the hearing and shortly before the delivery of judgment. It was said that if the Raja brothers availed of the opportunity of filing an additional written statement, a supplementary decree would be passed by the Court of first instance. But if they did not, in that case the decree passed by the Court of first instance would stand. No additional written statement was filed by the Raja brothers, with the result that the decree as passed by the Court of first instance stood confirmed. That is the final decree passed in the suit between the parties. Some time afterwards, applications for Receiver were filed by the Raja brothers in this Court, in the three first appeals and also in Second Appeal No. 164 of 1919, and four review rules were issued, namely, 2-F to 4-F and 2-S of 1921. The first three rules related to the three first appeals and the last mentioned rule to the second appeal. The three rules 2-F to 4-F were heard together and were made absolute. The order passed in the rules is dated April 11, 1922. The material portion of the said order is as follows :

"And further that subject to the defence we have mentioned, the plaintiffs are further entitled to all lands within their estate or decreed to them by the consent decree of 1892, up to the southern red line in the Commissioner's map which represents the corresponding line in the map connected with the consent decree of 1892."

This Court directed that the decrees in the first appeals should be prepared by including the aforesaid direction. In the review rule No. 2-S of 1921, it was stated that it was not necessary to amend the judgment pronounced in the second appeal inasmuch as in the said judgment it was stated that the judgment in the second appeal would follow the judgment passed in the first appeals, and inasmuch as the judgment of the first appeals would now embody what was stated in the order passed in the review rules in connection with the first appeals, the portion which was added to the judgment, as a result of the review applications, would necessarily be incorporated in the judgment of the second appeal. In the decree, however,

of the second appeal which was signed on July 3, 1922, that portion of the review order which we have quoted above, and which was incorporated in the judgment of the second appeal was not recited but the decree drawn up by this Court simply said that if the Raja brothers did not avail of the opportunity given to them, of filing an additional written statement, the decree of the first Court as passed in Suit No. 40 would stand. After the final judgment and the decree passed by this Court execution proceedings for enforcing the decree passed in Suit No. 40 were started. It is not necessary for us to detail the whole course of the execution proceedings; but there are three orders, one passed by the Court of first instance and two by this Court, which are relevant. The order passed by the Court of first instance is Order No. 130 dated January 24, 1927, and the two orders passed by this Court are dated August 20, 1935 and January 13, 1937 passed respectively in Appeals from Appellate Orders Nos. 224 of 1935 and 319 of 1936. We shall have to deal with the effect of these orders later on because one part of the argument of Dr. Basak who appears for the decree-holders, is based on these three orders.

As we have stated above, the present appeal relate to the question as to what land the decree-holders are entitled to take joint possession of in execution of the decree passed in suit No. 40. We have stated before that the map Ex. 101 consists of two portions described as *pratham khanda* and *dwitiya khanda*. The decree-holders' contention is that they are entitled to joint possession in respect of their share, of all the lands south of plot No. 4 in suit No. 9 which are included in both the *khandas* of map, Ex. 101. That is the extreme contention of the decree-holders. Alternatively, they say that they are entitled to joint possession in their share, of all the lands included in the *pratham khanda* of Ex. 101, that is to say, they are not only entitled to joint possession of all the lands of Hatarbhog and Dattagaon, but also of all the lands of Karpara, Birlapur and Naogaon.

The contentions of the judgment-debtors, the Raja brothers, are: (1) that the decree-holders cannot go beyond the southern yellow line depicted by the Commissioner in the case map, and (2) that they are not entitled to all the lands up to the sourthern yellow line, but only of such portions thereof as fall within the *pratham khanda* of map, Ex. 101, and even then they are not entitled to the whole of the said portion, but only to so much as was decreed to their predecessor-in-interest in 1892 by the compromise decree, Ex. 108, of which the map Ex. 101 is a part. The contention therefore of the judgment-debtors in effect is that the decree-holders can only get joint possession of so much of the lands which were decreed in favour of their predecessors in 1892 by Ex. 108 which fall within the yellow lines of the case map, the lands within the yellow line of the case map being the subject-matter of the dispute according to the final amendment of the plaint. The Court of first instance did not accept in full either the contention of the decree-holders or of the judgment-debtors. It held that the decree-holders could not get possession of any land to the south of the southern yellow line of the case map, but they were entitled to the whole of the lands which fall within the red line in the case map prepared by the *amin*, so far as they are covered by the lands included within the yellow line. There were appeals filed both by the decree holders and the judgment-debtors in the Court of the District Judge. The learned District Judge held that the decree holders' claim to possession was not limited by the southern yellow line of the case map, but they could get possession of lands which fell within the red line depicted in the case map. In this respect the learned District Judge accepted the decree-holders' contention. Against this portion of the order, the judgment-debtors have preferred appeal No. 5 of 1939. The learned District Judge further held that the decree-holders were not entitled to all the lands which fall within the said red line but only to such portions of the same which fell within the red dotted lines which had been decreed to their predecessors-in-interest by the compromise decree of 1892, that is to say, the decree-holders were entitled to get the whole of Hatarbhog and Dattagaon and only half of Karpara and Birlapur which fall within the red unbroken lines. From this part of the order the decree-holders preferred Appeal No. 203 of 1938.

We shall deal with both these appeals together. Dr. Basak who appears for the decree-holders says: (1) that his clients are entitled to get joint possession of all the lands which fell within the ambit of map Ex. 101, that is to say all the lands to the south of plot No. 4 of suit No. 9 of 1912, which are covered by both the *khandas* of

map Ex. 101 ; and (2) that at any rate his clients are entitled to joint possession of all the lands to the south of the said plot No. 4 which are covered by the red lines depicted in the case map by the Commissioner ; by the case map we mean the map prepared in the suit, that is to say, his clients are entitled to joint possession not only of what has been given to them by the learned District Judge, but also of *Mouza* Naogaon and the rest of Karpara and Birlapur. Mr. Gupta who appears for the judgment-debtors contends that in this respect the learned District Judge is right, that is to say, the decree-holders are entiled to joint possession of so much of the first plot (*pratham khanda*) which had been decreed to them in 1892 by Ex. 108. In support of his appeal he contends further that any portion covered by the red line which goes beyond and are to the south of the southern yellow line in the case map must be excluded from these proceedings, because those portions of the land were not the subject-matter of the suit. We shall now deal with the merits of the respective contentions. Dr. Basak bases his contention on two grounds. He says, firstly, that the question cannot now be re-opened because the matter had been settled between the parties at a previous stage of the execution proceedings by order No. 130, dated January 24, 1927, and the two orders passed by this Court on August 20, 1935 and January 13, 1937. He further contends that at any rate that is the meaning of the decree which was passed in the suit. We shall first of all examine Dr. Basak's contentions.

It appears from the record that objections were preferred to the execution of the decree by the Raja brothers before the Subordinate Judge. Some of those objections were dealt with by the learned Subordinate Judge by order No. 130, dated January 24, 1927. One of those objections related to the question as to whether the decree-holders were entitled to joint possession after evicting the Raja brothers, or they were entitled to joint possession with the Raja brothers. The final decree directed eviction of the Raja brothers; but the contention of the Raja brothers was that by reason of subsequent events they could not be evicted from the land inasmuch as after the decree they had purchased the shares of some of the decree holders. This question has been dealt with in order No. 130. The Court gave effect to the contention of the Raja brothers and held that in spite of the directions in the decree, the decree-holders were only entitled to joint possession with the Raja brothers, that is to say they could not get joint possession with their other co-sharers after evicting the Raja brothers. In this order there is the following passage :

"As regards the other objections I find that the decree-holders have got a decree for joint possession in the lands to the south of plot No. 4 of suit No. 9, and covered by map Ex. 101, *i. e.*, to the second portion of the decretal lands after evicting the judgment-debtors 112 to 114."

The first portion of the decretal land was the land which had been attached by the Collector under s. 146, Criminal P. C. In this land the Raja brothers are not at all interested, and in respect of this land the decree-holders only got a declaration of title, their claim for possession being dismissed. The learned Judge again went on to say as follows : "But the order about evicting the said judgment debtors is incapable of execution." After discussing the matter, he came to the conclusion that the decree-holders could only get joint possession and they could not evict the Raja brothers. In the order passed in Miscellaneous Appeal No. 224 of 1935, this Court directed the Subordinate Judge to appoint a Commissioner to ascertain at the locality the decretal land as determined by the executing Court by order No. 130, dated January 24, 1927, and to deliver possession of the said land to the decree-holders in accordance with the provisions of O. XXI, r. 35 (2), Civil P. C. After this order was passed by this Court, the learned Subordinate Judge before appointing a Commissioner wanted to interpret order No. 130. Against the order of the learned Subordinate Judge which had been affirmed by the learned District Judge on appeal, Miscellaneous Appeal No. 319 of 1936 was filed, and there was an alternative application in revision.

After dealing with the preliminary question, as to whether an appeal lay, or not, this Court said that it could, at any rate, interfere in revision and it went on to deal with the merits of the controversy. This Court directed the learned Subordinate Judge to appoint a Commissioner at once to demarcate the decretal land in the locality without at that stage interpreting order No. 130. Then there was a direction, that if there was any dispute in course of demarcation between the parties as regards the extent and position of the decretal land, the learned Subordinate Judge was to determine those questions, after the

Commissioner had submitted his map and report. In our judgment the combined effect of order No. 130 and of the two orders of this Court which we have recited above is this: that the question as to whether the decree holders were entitled to get possession of any portion of the land which fell within the red line of the case map but was beyond the southern yellow line thereof, was final between the parties, that is to say, it is not open to the judgment-debtors now to say that the decree-holders can only get possession of such land which falls within the southern yellow line. But the question as to whether the decree-holders are entitled to the whole of the said block of land which falls within the red line or only to a portion thereof was left for determination by the learned Subordinate Judge after the Commissioner had submitted his map and report. That, in our judgment, is the effect of the last order of this Court dated January 13, 1937 passed in Miscellaneous Appeal No. 319 of 1936. That is indicated by directing the learned Subordinate Judge, not only to determine the dispute as to the position of the decretal land but also the dispute as regards the extent of the disputed land. We cannot therefore give effect to Dr. Basak's contention that his clients are entitled to the whole of the block of land which falls within the red line, on the ground that the matter had been finally adjudicated between the parties at a previous stage of the execution proceedings. The reasons which we have given for disposing of Dr. Basak's contention also dispose of the point raised by Mr. Gupta in his Miscellaneous Appeal No. 5 of 1939.

It is therefore open to us to enter into the merits of the question, and for the purpose of seeing whether the contention raised by Dr. Basak is correct or not, we have to look into the decree. The decree-holders cannot claim any portion of the land which falls to the south of plot No. 4 but which falls within the *dwitiya khanda* of Ex. 101. At the time when the *amin* went to the locality for local investigation before the trial he was asked to plot only the *prathama khanda* of Ex. 101 in the locality which he did. The plaintiffs never attempted to have the second *khanda* of Ex. 101 located on the case map. These facts have been pointed out by both the Courts below and they indicate clearly that the second *khanda* of Ex. 101 was never the subject-matter of the dispute. The two amendment petitions of the plaintiffs filed on September 13, 1915 and December 9, 1915 which had been allowed by the Court on December 17, 1915 indicate clearly that the plaintiffs claimed title to and possession of only that portion which they had pointed out to the *amin* at the time of the local investigation, namely the land which was enclosed by the *amin* in the case map, by the yellow lines. The land so enclosed by the yellow lines covers a good portion of the first *khanda* or portion of the map, Ex. 101. It does not cover any portion of the second *khanda* of Ex. 101 which is to the south of the first *khanda*. We cannot therefore give effect to the first contention of Dr. Basak, namely that his clients are entitled to the lands to the south of plot No. 4, which are also covered by the second *khanda* of Ex. 101.

There remains the question as to whether the decree-holders are entitled to joint possession of all the lands included in the first *khanda* of Ex. 101 as ploted on the case map. To us it seems that the decree as drawn up by the Court of first instance and which was affirmed by this Court is ambiguous The words, 'within the ambit of the map, Ex. 101' used in the decree raise the ambiguity. It is therefore necessary to look to the terms of the judgment of the Court of first instance. Even if there had not been any proceeding in review in this Court, the meaning of the decree as made by the Court of first instance which was affirmed by this Court, read along with the judgment is clear. It is this: that the plaintiffs were given a decree only to such portion of the first *khanda* of Ex. 101, in respect of which their predecessors were given a decree in 1892 by Ex. 103, because the whole judgment on the basis of which the decree was passed proceeds on the footing, so far as this part of the case was concerned, that the plaintiffs were entitled to that portion of the land in suit because of the title acquired by their predecessors-in-interest by the compromise decree, Ex. 103. Whatever ambiguity there was in this decree (which was confirmed by this Court) has been removed by the order passed on review by this Court on April 11, 1922. That order clearly states that the decree-holders would be entitled to possession up to the southern red line plotted in the Commissioner's map, that is to say, in the case map prepared by the *amin* at the time of the

suit which had been decreed to their predecessors-in-interest by the consent decree of 1892. Even if it was not possible to hold that the decree by itself was not ambiguous, and a reference to the judgment was not legitimate, the order passed on review on April 11, 1922 which is the final judgment between the parties, defines exactly the rights of the decree-holders, and even if the directions contained in the said judgment passed on review, had not been embodied in the decree, there would have been no bar in bringing the decree into conformity with the final judgment, inasmuch as the rights of third parties have not been intervened. If it were necessary, we would have directed an amendment of the final decree passed by this Court so as to bring it in conformity with the judgment passed on review. But as we have already said, that even without this amendment, the view we have taken follows from the construction of the decree taken along with the judgment. The result is that we dismiss both the appeals. As both sides have failed to substantiate their contentions we make no order as to costs.

D. *Appeals dismissed.*

SIND CHIEF COURT

Suit No. 188 of 1939
May 22, 1940
TYABJI, J.

ASMABAI D/o *Haji* AHMAD MIRZA—PLAINTIFF
versus
UMER MAHOMED SIDIK MIRZA—DEFENDANT

Muslim Dissolution of Marriages Act (VIII of 1939), s. 2 (viii) (*f*), (a), (ii) — ***Grounds for dissolution of marriage—Wife separating from husband due to ill treatment—No effort on husbands part to treat wife as wife or according to injunctions of Quran — Case falls under s 2*** (viii) (*f*) — ***Wife forced to live with parents for 12 years due to husband's ill treatment—No society of husband—Husband's conduct, whether cruelty — Payment of maintenance on Magistrate's order for some months during two years prior to suit —Wife, if debarred from relying on s. 2*** (ii) ***in respect of earlier period of ten years.***

It is of course only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution. But where there has never after the separation been any real intention on the part of the husband or positive effort made by him to treat his wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which having regard to human imperfections and to the circumstances of the husband could be condoned as an honest effort in that direction, the case falls within the purview of s. 2 (*viii*) (*f*), Muslim Dissolution of Marriage Act [p. 851, col. 1.]

The wife was forced to live away from her husband for about 12 years on account of his ill treatment. The return to husband meant submission to conditions impossible to a self-respecting woman. Her life thus was made miserable. She was compelled to do without the society of her husband and she could not marry any other person. She was forced to live with her parents, a degrading position, and be a burden upon her parents. In pursuance of the Magistrates' order, however, the husband had been paying maintenance allowance to her for some months during two years preceding the suit by the wife for the dissolution of the marriage :

Held, that the payment of maintenance during two years preceding the suit did not debar the wife from relying on s 2 (*ii*) of the Act in respect of the earlier period of ten years as a good ground for the dissolution of her marriage. [p. 849, col. 1.]

Held, further that it was reasonable in the circumstances of the case to say that the husband was making her life miserable by cruelty of conduct within the meaning of s. 2 *viii*) (*a*). The fact that she could by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month—a sum wholly insufficient for maintaining her in any comfort was not enough to relieve her of her misery. [p. 849, col. 2.]

Mr. *Jethanand L. Nain*, for the Plaintiff.
Mr. *Pribhdas* for Mr. *K. H. Nagrani*, for the Respondent.

Judgment.—The plaintiff Asmabai was married to the defendant Umar about 15 years ago, in 1925. Her suit is for a dissolution of her marriage with the defendant, on the grounds, first, that the defendant had neglected or failed to provide for her maintenance for a period of two years, secondly that the defendant had made her life miserable by cruelty of conduct, and thirdly that having more than one wife the defendant did not treat the plaintiff equitably in accordance with the injunctions of the Quran. It is claimed that these are valid grounds for a dissolution of a Mulsim marriage under the Dissolution of Muslim Marriages Act, VIII of 1939: *cf* s. 2, subcls. (*ii*), (*viii*) *a*) and (*viii*) (*f*) of the Act. The plaintiff, the defendant Umar, and one Ramzan have given evidence in this case. There can be no doubt with regard to the principal facts in this case. The plaintiff was married somewhere about 1925 when she was about 18 years of age. The defendant is a first cousin of the plaintiff. After the marriage the defendant and the plaintiff lived together for about one month, after which the plaintiff left the defendant's house and went back to her parents. It is quite clear from the evidence in the case, although the defendant Umar and his witness Ramzan do not admit it, that the plaintiff's father and the defendant's father who are brothers, have not been

on good terms and were not on good terms at the time of the marriage. The plaintiff states that while she was living with her husband there were constant quarrels between her and her husband and her husband's relations. She states that the defendant and others in her husband's house used to speak disparagingly of her father and when she intervened on behalf of her father there were quarrels, that she was frequently beaten, and that it was after a period of such continued ill-treatment that she was one day driven out of the house by her husband and her husband's relations. She was on that account unwilling to go back to her husband. Efforts were then made by other parties to bring about a reconciliation, and the plaintiff was induced to live again with the defendant. But she had to leave him again after a few days. Thereafter the plaintiff has continued to live with her parents and according to the plaintiff the defendant did not ever wish or seek to take her back again. Admittedly nothing was paid to the plaintiff by way of maintenance or otherwise by the defendant who soon married a second wife.

In 1928 the plaintiff filed a suit in this Court, being suit No. 58 of 1928, against the defendant for maintenance. A certified copy of the judgment in that case dated September 20, 1929 has been filed and is Ex. 6. One of the issues in that case was: "Did the defendant desert the plaintiff and neglect to maintain her?" and the finding on this issue was that he had neglected to maintain her. The learned Judge in that case (Barlee, A. J. C) held that the plaintiff had been ill-treated; to some extent as he said, and stated that he would, if he could have done so under the law, have ordered past maintenance to be paid to the plaintiff, but he held that the law did not permit him to do so. He however did not consider that under the circumstances of the case the plaintiff was entitled to get a decree for future maintenance. Some six years later (at the end of 1935 or in 1936) an application was made by the plaintiff in the Court of the Additional City Magistrate of Karachi for an order against the defendant for payment of a monthly allowance under s. 488, Criminal P. C. The Magistrate had to consider the question whether the plaintiff was entitled to any order under s. 488 as the plaintiff admittedly was not living with the defendant, and it became necessary for him to consider whether the plaintiff had just or sufficient grounds for refusing to live with the defendant. After a lengthy inquiry, he held it to be clearly proved that the defendant had neglected to maintain the applicant for many years, and accepting the plaintiff's allegations of ill-treatment to be true he held that the plaintiff had sufficient grounds for refusing to live with the defendant, and on February 28, 1936 passed an order ordering the defendant to pay Rs 10 every month to the plaintiff by way of a monthly allowance.

This order was challenged by the defendant who filed a revision application against it which was rejected by this Court in its High Court jurisdiction on May 5, 1936. Ex. 8 is a certified copy of the High Court's order from which it is clear that the High Court did not accept the defendant's contention that the plaintiff ought to go back to the defendant and was of the opinion that it would be wrong to interfere with the order of the Magistrate and force the plaintiff back to conditions to which no self-respecting woman should be compelled to submit. The plaintiff states, and I have no doubt truly, that even after these orders the defendant has not been regularly paying the sum ordered to be paid under s. 488, Criminal P. C, and that on no less than twelve occasions the plaintiff had been forced to apply to the Magistrate for a distress warrant, and it was only after such distress warrants had been issued that she was able to obtain the payments. It is also clear that the defendant has been making applications for a reduction of the amount ordered to be paid by him, which has since been reduced to Rs. 7-8-0, for this of course he cannot in any way be blamed.

Having regard to these circumstances, and to the attitude of the parties and the allegations made by them in the proceedings above referred to, and the evidence given by the three witnesses who have been examined before me in this suit, I have no doubt that the plaintiff's allegation that she was ill-treated by the defendant and that it was on that account that she could not live with the defendant is true. It appears that this ill-treatment had a good deal to do with the fact that the father of the plaintiff and the father of the defendant were on very bad terms. It is quite impossible to accept the evidence of the defendant and of his witness Ramzan who have now stated that there was no ill-feeling of any kind between the two families, that there was never any question at all

of any ill-treatment of the plaintiff by the defendant, that the defendant and plaintiff in fact lived very happily together after their marriage, and that even the parents of the defendant and the plaintiff had always been on very good terms, but that after the plaintiff, about a month after her marriage, left the defendant's house with the permission of the defendant in order to spend the Idd with her parents, the plaintiff's parents without any reason whatever which these witnesses knew of or could assign therefor refused to allow the plaintiff to go back to the defendant and insisted very perversely, that the defendant should instead go and live with them. It is perfectly clear that this is a false story put up for the purposes of this case, which is wholly absurd under the circumstances of this case.

Now with regard to the first ground urged by the plaintiff, it has been admitted by the defendant that nothing by way of maintenance or otherwise was paid by him to the plaintiff after the plaintiff left him, admittedly some time in or about 1925, until after February 28, 1936, when the order was made by the Magistrate. It is therefore clear that during this period of about 10 years the defendant did wholly neglect and fail to provide for the plaintiff's maintenance. It is true that after the order made by the Magistrate in 1936, certain payments have been made by the defendant to the plaintiff under the orders of the Court, and it cannot therefore be said that during the two years immediately preceding the suit the defendant had not paid anything towards the plaintiff's maintenance, but I do not think that in the circumstances of this case the plaintiff is thereby debarred from relying on s. 2 (*ii*) of the Act in respect of the earlier period as a good ground for the dissolution of her marriage. I also think that the plaintiff has succeeded on the second ground, that is in showing that the defendant has made her life miserable by cruelty of conduct within the meaning of those words in s. 2 (*viii*) (*a*). The language of s. 2 (*viii*) (*a*) is :

"2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely :

(*viii*) That the husband treats her with cruelty that is to say, (*a*), habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment."

As the plaintiff has now for many years past been living away from the defendant, it is not alleged and it cannot be said that he now habitually assaults her and there is no question of any present physical ill-treatment. But the plaintiff has been forced to live away from her husband on account of his past ill-treatment and her life is undoubtedly being made miserable by reason of the fact that a return to her husband's house is out of the question as it must mean submitting to conditions impossible to a self respecting woman. She is compelled to do without the society of her husband and cannot marry any other person. She is forced to the degrading position of having to live with and be a burden upon her parents. The fact that she can by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month—a sum wholly insufficient for maintaining her in any comfort is not enough to relieve her of her misery. I think it is reasonable in these circumstances to say that the defendant is making her life miserable by cruelty of conduct and as stated before, in my opinion, the plaintiff has also succeeded on this ground.

The third ground relied upon is that mentioned in s. 2 (*viii*) (*f*) of the Act, that is to say the cruelty of the defendant in that having more than one wife he did not treat the plaintiff equitably in accordance with the injunctions of the Quran.

It is admitted that the defendant married a second wife about 10 or 12 years ago, that is soon after the defendant and the plaintiff separated. It does not appear to me that the defendant ever had any intention or made any *bona fide* effort to induce the plaintiff to live with him, or to offer to her a home which she could reasonably be expected to accept, and to render to her the rights which it is incumbent upon a Muslim husband to render to his wife.

According to the Quran and to all Muslim texts, a Muslim wife has rights corresponding to those of her husband and in no way less than those of the husband, in the fulfilment by the husband and the wife of their respective marital duties towards each other. As is stated in verse II, 228 of the Quran : "And they (the wives) have rights similar to those (of their husbands) against them as regards just treatment." As is so often insisted upon in the Quran, it is incumbent upon a Muslim husband to treat his wife or wives with "*husn-e-muashirat*" which means such kindly behaviour as is recognized as good by all. For example in verses IV, 19 it is enjoined : *Wa ashiru*

hunna bil maaroof" which literally means "and behave with them (your wives) in such a manner as is accepted as good and kind by all."

Not only is the Muslim husband bound to treat his wife "*bil maaroof*" with kindness and consideration, but the wife is, by virtue of the very subsistance of the marriage state, entitled as of right to her just share in the society and companionship of her husband. Under Muslim law this right could be enforced by an order from a Judge: *cf.* Baillie I, 190. A man could be directed to be attentive to his wife and to occupy the same apartment with her at times though no exact times have been prescribed: Baillie I, 189. According to Shiah texts every wife is at least entitled to the exclusive companionship of her husband for one out of every four nights: Baillie II, 83. All texts agree that it is incumbent for a husband to spend a reasonable amount of time with each of his wives in an apartment exclusively allotted to her.

Where a husband has more than one wife strict equality "*adl-fil-qismut*" must be observed by the husband among the wives; for, it is only on the condition that the husband will do so that the Quran permits marriage with more than one wife. In verse IV, 3 of the Quran it is said:

"....Then marry such women as seem good to you, two and three and four; but if you fear that you will not act with justice (between them) then marry only one.....Thus it is more likely that you will not deviate into injustice."

The Arabic word which has been rendered by the word "justice" is "*adl*" and all Muslim jurists agree that what is made incumbent upon every Muslim marrying more than one wife by this verse is "*adl-fil-qismut*", that is an equality in the sharing of such things as the time spent with his wives, the expenses incurred by him on his wives, and his outward general behaviour towards his wives. The word "*adl*" in this context is not it is generally agreed, to be construed as meaning "*adl-fil-qul*" or "*adl-fil-qule shain*" that is absolute equality in all respects, and does not include "*adl fil mohabat*" or equality in respect of the inner love of a man for his wives which the Quran itself regards as impossible. For, in verse IV 129 where the word "*aal*" is used in its more complete and absolute sense, meaning "*adl-fil-qul*" and including "*adl fil mohabat*," the Quran says:

"And it is not within your power to act with (complete) justice (*adl*) between wives even though you may most desire it; but be not disinclined (from any one of them) with a total disinclination so that you leave her as it were in suspense".

Muslim commentators of all schools agree that while it is imcumbent on every husband to treat all his wives with strict equality in all matters covered by the term "*adl fil qismut*," which means for example that a husband cannot spend more time with or spend more money upon or show an open preference in his general behaviour in favour of any one of his wives it is sufficient in respect of actual coition if he does not entirely neglect any particular wife. Intentional total neglect in respect of coition which amounts to a suspension of the marriage is clearly prohibited. So Baillie relying on Sunni texts says (Part I 189):

"And when he has two wives who are free women, he must be just and equal in dividing his attentions among them. What is required of him in this respect is justice and equality in matters that are within his power, and living with them for society and acquaintanceship, not in matters that are beyond his control such as love and matrimonial intercourse... . ...

And with regard to wives equality must be observed between the old and the new, the virgin and the *suyyib*, the healthy and the sick, even the paralytic and the insane if not dangerous the woman in her course and one who is purified from them, the pregnant woman, and one in an interval of pregnancy, the young girl unfit for matrimonial converse the pilgrim and the wife under *eela*, or *zihar*."

and relying Shiah on texts says (Part II, 83-85):

Kismut, or a partition of his time amongst his wives is a duty which is incumbent on a husband, whether he be free or a slave, and even though he should be impotent or an eunuch;.....

If a man be married to one wife she has a right to one night out of every four and the other three are at his own disposal to sleep where he pleases. If he has two wives they are entitled to two nights, and if he has three they are entitled to three while he has a right to dispose of the excess in each case up to four, as he pleases. If he has the full cmplement of four wives, each one of them has a right to a night in her turn, and he cannot absent himself from the proper partner of that night without a just pretext or being on a journey, or her permission..... ...

What is incumbent on a man in respect of partition is merely to spend his time with the wife to whom it is due, and does not extend to coition.....

Equality among wives should be observed in respect of maintenance, general behaviour, and coition."

With reference to last extract he adds in a note that in respect of coition equality is proper but not an incumbent duty. How far this "*Husn-e-muashirat*" and "*adl-fi-qismut*" are to be observed, is clear from the fact that even after friction and dissensions have arisen, and a husband has pronounced one or two divorces against a wife, the Quran enjoins in verse II, 229 and again in verse II, 231 that even in such circumstances the wife in question should either

be retained "*be maaroof*" that is in the approved kindly manner or should be generously allowed to go away (*i.e.*, be completely divorced) with kindness "*be maaroof*" and "*be eshan*"), and that she should not be retained to her injury. It is on these verses that in Muslim States the Kazi's powers to insist that a husband should either render to a wife her just rights or divorce her were based. The Hadis, saying of the Prophet are full of exhortations to his people to treat woman kindly and to render to them all their just rights. The position of a wife in her husband's hous is stated in one of his most often quoted sayings:

"Every one of you is a ruler, and every one shall be questioned about his subjects; the Amir (King) is a ruler, and the man is a ruler over the people of his house and the woman is a ruler over the house of her husband and his children, so every one of you is a ruler and every one shall be questioned about his subject.'

In his famous farewell address at the Hajatul Widaa shortly before his death speaking with the knowledge that he would not be able to address his people again the Prophet said:

"Oh my people; You have certain rights over your wives and so have your wives over you. They are the trust of Allah in your hands so you must treat them with all kindness."

This is the position in the Quran and the Shariat and expresses the ideal that has to be aimed at. It is of course only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution. But in this case as is clear from what has been stated before, there has never after the separation in 1925 been any real intention on the part of the defendant or positive effort made by the defendant to treat the plaintiff as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which having regard to human imperfections and to the circumstances of the defendant could be condoned as an honest effort in that direction. The plaintiff therefore succeeds on this ground also. I am therefore of the opinion that this is a case where in the contemplation of Act VIII of 1939 good grounds exist for a dissolution and the plaintiff will accordingly have a decree as prayed with costs.

D. *Suit decreed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 148 of 1940

January 24, 1941

AGARWALA, J.

DHANNA MUNDA AND ANOTHER— APPELLANTS

versus

Mst. KOSILA BANIAN— RESPONDENT

Chota Nagpur Tenancy Act (VI of 1908), ss. 46 (6) (before amendment of 1938), 46 (4) (a) (as amended in 1938)—Plaintiff making transfer to defendant to whom transfer could not validly be made under s. 46 (6)—If estopped subsequently from challenging validity of transfer—S. 46 (4) (a), whether restrospective—Contract Act (IX of 1872), s. 65—Applicability—Essentials

The plaintiff is not estopped from challenging the validity of the transfer by showing that the defendants were not persons to whom a transfer of a part of the holding could be validly made according to the provisions of the Act as they stood at the time of the transfer, even if the plaintiff had obtained sanction of the Deputy Commissioner on making false representation to him. It is especially so when the defendants were aware that they could not accept the transfer. *Dhanu Pathak* v. *Sona Koeri* (1), distinguished [p. 852, col. 1.]

There is nothing in the language of s. 46 (4) (a) Chota Nagpur Tenancy Act to show that it has retrospective effect Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the legislature to validate transfers which under the former law were invalid when they were made. [p. 853, col. 1.]

Section 65 Contract Act cannot be held to apply to a case of a contract void as being contrary to the statute law which the parties must be presumed to have known at the time when they entered into the contract. The section has no application when the object of the agreement is illegal to the knowledge of both parties at the time when it was made. [*ibid.*]

[Case-law discussed.]

A. from a decision of the Additional Subordinate Judge of Hazaribagh, dated December 20, 1939.

Messrs. *S. M. Mullick* and *K. K. Banerji*, for the Appellants.

Mr. *B. C. De*, for the Respondent.

Judgment—This is an appeal by the defendants and arises out of a suit to recover 1.25 acres of land which formed a part of the *raiyati* holding of the plaintiff. The plaintiff executed a sale deed in favour of the defendants in respect of this land on September 21, 1930, for a consideration of Rs. 500. She alleged that the transfer was merely a *benami* one and that the consideration never passed. She also claimed to recover the land on the ground that the transfer offended the provisions of s. 46 of the Chota Nagpur Ten. Act as it stood before its amendment in 1938. The Courts below

have found that the sale was not a *benami* one and that the plaintiff in fact received the consideration for it. The trial Court held that the plaintiff was estopped from challenging the sale. The appellate Court has held that the plaintiff is entitled to recover the property in dispute.

It is necessary to refer to the provisions of the Chota Nagpur Ten. Act as they stood prior to the amendment of 1938. Section 46 (1) declared that no transfer by a *raiyat* of his right in his holding or any portion thereof by sale should be valid to any extent. Sub-section (3) provided that no transfer in contravention of sub-s. (1) should be registered, or should be in any way recognised as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction. In 1920 sub-s. (6) was inserted in s. 46 of the Act. This new sub-section provided;

"The Local Govt. may by rules declare that any specified class or classes of transfer (not being transfer by an aboriginal *raiyat* to a non-aboriginal transferee) in contravention of sub-s. (1) may be validly made by a *raiyat* of such tribe, caste, group or community, or section thereof, of such class, in such area or areas, and subject to such restrictions in respect of the person by whom and the person to whom the transfer may be made, sanction of any officer or other authority, quantity of land or proportion of the holding transferred, as may be specified; and thereupon nothing in sub ss. (1), (3) and (4) shall affect the validity of any such transfer so made by such *raiyat* after the date of publication of the rules in the *Gazette* or such later date as may be prescribed."

In pursuance of this new sub-section the Local Govt. issued notification No. 126-IIT-4C/38-R dated October 7, 1938. Paragraph 2 of that notification is as follows:

"A transfer of his (*i. e. raiyats'*) entire holding, or, with the Deputy Commissioner's consent of part of his holding, may be made by a *raiyat* to another person who is of the same tribe or caste as himself and resides in the same village or an adjoining village belonging to the same landlord, or, with the sanction of the Deputy Commissioner, to any person without limitation of residence, who is closely related to the transferor *raiyat*".

It may be mentioned that the plaintiff is a non-aboriginal *raiyat* and that the defendants are aboriginals. The effect of the notification, therefore, was to validate a transfer of a part of the *raiyat's* holding to a person of the same tribe or caste as the transferor or to a person closely related to the transferor, in either case the sanction of the Deputy Commissioner being essential. In the present case the plaintiff obtained the sanction of the Deputy-Commissioner to the sale to the defendants although the defendants are neither members of the same tribe or caste as the plaintiff, and are not related to her. It has been contended as it was contended in the Courts below, that the plaintiff is estopped from challenging this transfer. It cannot, however, be said that the defendants were misled by any representation made to them by the plaintiff, for, they knew that they were not of that category of persons to whom the Deputy Commissioner was empowered by the notification to sanction the transfer of a part of the holding. It may be presumed that the plaintiff did make a false representation to the Deputy Commissioner and that as a result of that false representation the Deputy Commissioner sanctioned the transfer; but that representation was neither made to the defendants nor, if it had been made, could it have been believed by them as it was within their knowledge that the representation was false. Reference was made to the decision of this Court in *Dhanu Pathak* v. *Sona Koeri* (1). The facts of that case were that a *raiyat* representing himself to be a tenure-holder, granted a permanent lease and subsequently sued to eject the lessee on the ground that the latter was merely an under-*raiyat*. It was held that the plaintiff was estopped from proving that his real status was that of a *raiyat* and not that of a tenure holder. In that case not only did the lessor make a false representation as to his status but the lessee believed that representation and on the strength of that representation entered into the contract with the lessor. The facts of that case are entirely different from the facts of this case. In my opinion the plaintiff is not estopped from challenging the validity of the transfer by shewing that the defendants were not persons to whom a transfer of a part of the holding could be validly made.

In 1938 the Chota Nagpur Ten. Act was amended. The present s. 46 (4) (*a*) permits an occupancy *raiyat*, who is not an aboriginal, to transfer his right in his holding or any portion of it to any person who is resident within the local limits of the Police Station area within which the holding is situate by sale, exchange, gift, will, mortgage or lease. It has been contended that this provision operates retrospectively to validate the transfer in favour of the defendants. In my

(1) 17 P L T 380.

opinion, there is nothing in the language of that sub-section to justify this contention. Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the legislature to validate transfers which under the former law were invalid when they were made.

The next point is with regard to the consideration for the sale. The defendants claim that they are entitled to recover the five hundred rupees which they paid to the plaintiff for the transfer. They base their claim on s. 65 of the Contract Act. That section provides :

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

If this section means what has been contended for on behalf of the defendants-appellant, it is clear that the door will be left wide open for evading the provisions of statutes like the Chota Nagpur Ten. Act which have been enacted to prevent or restrict transfers of *raiyati* land. The scope of s. 65 has been explained in *Ledu Coachman* v. *Hiralal Bose* (2) (at p. 122) where it was said :

"The case before us is however, not that of an agreement 'discovered' to be or 'becoming' void. The agreement is void on the face of it and it was void *ab initio*, while the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement or of an agreement which is afterwards made void by circumstances which supervene".

In this view of the law the section cannot be held to apply to a case of a contract void as being contrary to the statute law which the parties must be presumed to have known at the time when they entered into the contract. In *Nathu Khan* v. *Sewak Koeri* (3) it was held that the section has no application when the object of the agreement is illegal to the knowledge of both parties at the time when it was made. On behalf of the appellants, however, reference was made to the cases which I shall now mention. The first is *Dwijendra Mohan Sarma* v. *Manorama Dasi*, (4). This was a case of a conveyance by the guardian of a minor without the previous sanction of the District Judge as required by the Guardians and Wards Act. Section 30 of the Guardians and Wards Act makes such a transaction voidable and not void and the distinction between the consequences of void and voidable contracts was the basis of the decision in that case as in the case of *The Eastern Mortgage and Agency Co. Ltd.* v. *Rebati Kumar Ray* (5) which was the next case relied on by the appellants. The next case relied on by the appellants is *Barohan Upadhya* v. *Uttamgir* (6). This was a case to which the provisions of the Agra Ten. Act of 1901 applies. Section 21 of that provides :

"Where the interest of a tenant is not transferable, he shall not be competent to transfer his holding or any portion thereof otherwise than by sub-lease as hereinafter provided."

An occupancy *raiyat* mortgaged his holding and put the mortgagee in possession but subsequently sued to recover possession on the ground that the mortgage was void under the provisions of the Agra Ten. Act. It was held that he was not entitled to recover possession unless he restored to the mortgagee the mortgage money received by him. That decision appears to be in conflict with the decisions in *Ladu Coachman* v. *Hiralal Bose* (2) and *Nathu Khan* v. *Sewak Koeri* (3). The case on which the appellants most strongly rely is that of *Harnath Kunwar* v. *Indar Bahadur Singh* (7). There a Hindu who had a mere *spes successionis* purported to transfer his interest for a consideration of Rs. 25,000. After the death of the transferee the latter's widow sued to recover possession of the property. The Privy Council held that the agreement was void from its inception because its subject-matter was incapable of being bound in the manner stipulated. Their Lordships went on to state :

"Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Inder Singh in the villages which he purported to sell by the instrument of January 2, 1880, and that the true nature of these rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted.....".

In the result their Lordships held that

(2) 43 C 115 (122); 29 Ind. Cas. 625; 21 C L J 537; 19 C W N 919.
(3) 15 C W N 408; 9 Ind. Cas. 161.
(4) 49 C 911; 70 Ind. Cas. 990; A I R 1922 Cal 150; 36 C L J 326; 28 C W N 57.
(5) 3 C L J 260.
(6) 33 A 779; 12 Ind Cas 112; 8 A L J 931.
(7) 45 A 179; 71 Ind. Cas. 629 9 O L J 652; A I R 1922 P C 403; 5 P L T 281; 5 P L R 237; 44 M L J 489; 50 I A 69; 37 C L J 346; 27 C W N 949; 26 O C 223; 18 L W 383; 33 M L T 216; 9 O & A L R 270 (P C).

the plaintiff, though not entitled to recover possession of the villages, was entitled to recover compensation and in assessing the compensation their Lordships included the sum of Rs. 25,000 paid to Inder Singh. As I understand this decision, their Lordships held that the contract was based on mutual mistake of the parties as to the true nature of the rights of Inder Singh. It was clearly not a case where both parties were aware of the illegality of the contract at the time of its inception. The case is, therefore, distinguishable from the case of *Nathu Khan* v. *Sewak Koeri* (3) in which it was held that s. 65 does not apply where the object of the agreement was known to be illegal to both the parties at the time it was made. In my opinion, the facts of this case with regard to this matter are indistinguishable from the facts of that case and I would, therefore, dismiss this appeal with costs.

Leave to appeal under the Letters Patent is granted.

S. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Second Appeal No. 23 of 1938
December 5, 1940
BAJPAI AND DAR, JJ.

SITARAM BABURAM—PLAINTIFF—APPELLANT
versus
SITARAM LALMAN THROUGH TULSI RAM—DEFENDANT—RESPONDENT

Limitation Act (IX of 1908), s. 20—Appropriation of payments — Payment without instruction —Appropriation of, to save limitation—Account books maintained on katauti *system—Entry of payment by debtor on credit side—If can be treated as part payment of principal.*

Under s. 20, Lim. Act, in the absence of definite instructions by the debtor the creditor can appropriate payments made by the debtor. In the case of interest, if it is attempted to save limitation, the instructions must be by the debtor and the payment must be of interest as such, but in the case of principal, if the debtor has given no instructions, the creditor can appropriate it, if he so chooses, towards principal and can save limitation provided time has not run out at the time of appropriation, and provided acknowledgment of payment appears in the handwriting of or on a writing signed by the person making the payment. The execution of a *sarkhat* by the debtor in the creditor's books of account maintained on *katauti* system, on the credit side, amounts to a part payment of principal within the meaning of s. 20 167 Ind. Cas. 233 (1), relied on, 159 Ind. Cas. 387 (2), explained.

S. A. from the decision of the Civil Judge, Shahjahanpur, dated September 21, 1937.

Messrs. *N. P. Asthana, B. N. Sahai* and *N. C. Sen*, for the Appellant.

Messrs. *L. N. Gupta* and *S. N. A. Jafri*, for the Respondent.

Bajpai, J.—This is an appeal by the plaintiff firm Sita Ram Babu Ram through Babu Ram. This firm instituted a suit against another firm Sita Ram Lalman through Tulsi Ram for the recovery of a certain sum of money based on a *sarkhat* dated October 19, 1933. The trial Court after giving relief on the question of interest to the defendant under the Agri. Relief Act decreed the plaintiff's suit for Rs. 2,651-8-0. This decree was upset in appeal by the lower Appellate Court on a finding that the plaintiff's suit was barred by time. The *sarkhat* contains the following entries on the debit side :

Rs. 1,958-1-0 : October 19, 1933 ;
Rs. 100-0-0 : October 21, 1933 ;
Rs. 50-0-0 : November 19, 1933 ;
and on the credit side the entries are :
Rs. 100-0-0 : November 21, 1933 ;
Rs. 50-0-0 : June 6, 1934."

The suit was instituted on December 14, 1936, and unless the credit entry of June 6, 1934, can be invoked in aid by the plaintiff the suit would be barred by time. The credit entries, of which mention has been made by us so far, we might make clear, are entries of payments said to have been made by the debtor to the creditor. It is clear that this entry of Rs. 50 must either be towards interest as such or towards part payment of principal, the part payment appearing in the handwriting of the debtor. It is nobody's case, and in any event it has not been proved that this entry is of interest as such. The only question that remains for consideration is whether this payment can be treated as payment of principal. Although there is some doubt in the mind of the lower Court about the last entries in the *sarkhat*, the finding of the learned Munsif has been accepted by the Civil Judge. It is not quite clear as to what the learned Judge meant by saying that he was doubtful about the last entries, whether he doubted their genuineness or what—but the fact remains that in the end he accepts the finding of the learned Munsif who of course had accepted the genuineness of the entire *sarkhat*. The learned Judge observed as follows :

"The creditor wants to save the limitation by arbitrarily treating the payment of Rs. 50 as part payment of principal and the amount of interest is also intact. I am therefore of opinion that the payment of Rs. 50 in this case cannot be treated as part payment of principal."

Learned Counsel for the plaintiff-appellant has argued that the materials on the record were sufficient to come to a definite finding on the question of this last payment as indeed the trial Court had done and the lower Appellate Court has wrongly assumed that the only thing which was on the record was a statement in the plaint that the payment was appropriated towards principal. There can be no doubt that the law is that in the absence of definite instructions by the debtor the creditor can appropriate payments made by the debtor. In the case of interest, if it is attempted to save limitation, the instructions must be by the debtor and the payment must be of interest as such, but in the case of principal, if the debtor has given no instructions, the creditor can appropriate it, if he so chooses, towards principal and can save limitation provided time has not run out at the time of appropriation, and provided acknowledgment of payment appears in the handwriting of or on a writing signed by the person making the payment. Their Lordships of the Privy Council in *Rama Shah* v. *Lal Chand* (1), at p. 647 say :

"While not of opinion that it need be shown that the creditors' appropriation has within the time limited been communicated to the debtor they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient."

The lower Appellate Court relied upon the Full Bench decision of this Court in *Udeyapal Singh* v. *Lakshmi Chand* (2), in which case it was held by the majority that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to apprepriate as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of s. 20, Lim. Act. This case has been approved of by their Lordships of the Privy Council in *Rama Shah* v. *Lal Chand* (1), mentioned just now, but it has been made clear that a creditor has the right to appropriate a payment by the debtor without instructions towards principal if he so likes, but if the creditor wants to save limitation the appropriation must have been made within the period of limitation, and the fact that the appropriation has been made within the period of limitation can appear from the account books of the plaintiff. The learned Munsif has taken great pains to show that the account books of the plaintiff in connection with debts advanced to debtors are maintained on what is called the *katauti* system. In *Rama Shah* v. *Lal Chand* (1), their Lordships of the Privy Council explained the *katauti* system at p. 649*. They say in the *katauti* system,

"interest is calculated on both sides of the account at the same rate so that to any sum paid by the defendant is added interest thereon before deduction is made from the total sum shown to be due for principal and interest upon each loan."

From the judgment of the trial Court, we find that when the *sarkhat* for Rs. 1,958-1-0 was executed, the prior accounts were adjusted on the *katauti* system. The learned Munsif has taken pains to show that year after year interest was calculated both on the credit and on the debit side and a balance struck and the balance was the outstanding due from the debtor. It is true that he has not pursued the matter further after the execution of the *sarkhat*, but, as we pointed out before, after an entry of Rs. 1,958-1-0 on the debit side, there are two more entries on the debit side and there are just two entries on the credit side and the trial Court did not go into the account books of the plaintiff after October 19, 1933, to find out whether the *katauti* system was maintained or not. There is however the evidence of the plaintiff to the effect that such a system was maintained and there is a presumption in favour of continuity of the same system of accounting. Nothing has been shown by the defendant either in the Court below or before us from which we can infer that the *katauti* system was not maintained and the balance was not struck year after year or in any event prior to the expiry of the period of limitation.

We therefore hold the view that the sum of Rs. 50 was appropriated towards principal, before the period of limitation had expired, by the plaintiff and the plaintiff was entitled to invoke it in his aid in order to extend limitation. We agree with the view taken by the trial Court. No other point was argued

(1) (1940) A L J 639 (647); 187 Ind. Cas. 233; 1940 O W N 315; 12 R P C 149; 6 B R 535; 51 L W 578; A I R 1940 P C 63; (1940) 1 M L J 895; 1940 O L R 230; 44 C W N 625; 42 P L R 32c; (1940) Kar. (P C) 134 Sup.; 71 C L J 444; (1940) M W N 620; 4z Bom. L R 640; I L R (1940) Lah. 470; 67 I A 160 (P C).

(2) (1935) A L J 1029; 159 Ind. Cas. 387; A I R 1935 All. 946; 1935 A L R 1107; 58 A 261; 8 R A 428 (F B).

*Page of (1940) A. L. J.—[*Ed.*]

on either side by anybody, and we therefore allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. As regards costs of the lower Appellate Court and of this Court under the peculiar circumstances of this case we direct the parties to bear their own costs. The defendant will be allowed to pay the decretal amount by six monthly instalments of Rs. 300 each. The first instalment will fall due on March 15, 1941.

S. *Appeal allowed.*

PATNA HIGH COURT

Appeal from Original Decree No. 106 of 1938

March 18, 1941

MEREDITH AND SHEARER, JJ.

KASHI NATH SINGH—DEFENDANT —APPELLANT

versus

DULHIN GULZARI KUER—PLAINTIFF —RESPONDENT

Succession Act (XXXIX of 1925), s. 283—Person claiming adversely to testator or disputing his right to deal with property—Whether can be deemed to claim interest in estate of deceased within meaning of s. 283—Application for probate—Probate Court cannot decide whether property dealt with by testator in fact belonged to him.

A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of s. 283 of the Succession Act and he is not, therefore, entitled to oppose the grants of probate or letters of administration. 20 Ind. Cas. 342 (3), relied on, 190 Ind. Cas. 362 (1) and *Nobeen Chunder Sil* v. *Bhobosoonduri Dabee* (2), distinguished. [p. 858, col. 2.]

In an application for probate of a will or for the grant of letters of administration with a copy of the will annexed, the sole question that arises is whether or not the will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact belonged to him. *Birj Nath De* v. *Chandra Mohan Banerji* (4), referred to. [p. 858, col. 2; p. 859, col. 1.]

A. from the decision of the Additional District Judge of Shahabad, dated April 5, 1938.

Messrs. *D. N. Varma* and *Kanhaiyaji*, for the Appellant.

Mr. *M. Rahman*, for the Respondent.

Shearer, J.—This is an appeal against a decree of the Additional District Judge of Shahabad, granting letteres of administration with a copy annexed thereto of the will of one *Mst.* Barta Kuar, who died on or about July 18, 1929. The will, which was an unregistered will, was executed about a week prior to her death. By it *Mst.* Barta Kuar bequeathed the whole of her property to her great-grandson, Ram Chander Singh, who was then a child of two or three. At the time when the will was executed there were other relations of *Mst.* Barta Kuar living, namely, a son, Charitar Singh, a daughter *Mst.* Rajwanti Kuar and her son, Sobhnath Singh and a great grandson, Radha Mohan Singh. The sole legatee, Ram Chander Singh, is the son of Radha Mohan Singh and the respondent, Dulhin Gulzaro Kuar. In the will *Mst.* Barta Kuar explained why she had decided to bequeath her property to the child, Ram Chander Singh, instead of to any of these persons. At the end of the will there was also a specification of the property which the testatrix purported to dispose of. It consisted of a house in the town of Arrah together with an orchard and some *kasht* land and an interest in each of two revenue paying estates. On January 2, 1930, that is, within less than six months of *Mst.* Barta Kuar's death, an application was made to the Collector of Shahabad asking that the name of the sole legatee, Ram Chander Singh, should be entered in register D instead of that *Mst.* Barta Kuar, as a co-proprietor in the two revenue paying estates. This application was successful. Shortly afterwards, on August 4, 1930, an application was made to the Municipality asking that the name of Ram Chander Singh should similarly be entered in the Municipal Registers as the owner of the house. The house was, however, not recorded in the name of *Mst.* Barta Kuar, but in the name of her son, Ram Chariter Singh. The proceedings in the Municipality were for some reason or other unduly protracted, and ultimately the application was rejected. Nothing more was done in the matter of the estate of *Mst.* Barta Kuar until 1935. The appellant, Kashi Nath Singh, in that year instituted a suit against Ram Chariter Singh, and in execution of the decree which he obtained attached the house which, as I have just said, was in the Municipal Registers recorded in his name and not in the name of his mother, *Mst.* Barta Kuar. The attachment was effected on September 20, 1935, and on the same day *Mst.* Gulzaro Kuar, the mother of Ram Chander Singh, applied for the grant of letters of administration. In the interval, it should be said, Ram Chander Singh

had died. The application for the grant of letters of administration was opposed by Kashi Nath Singh, who apparently assumed that he was entitled to oppose it as he had attached the house which was one of the properties which the will purported to bequeath to Ram Chander Singh. The will is a document covering some four or five pages and the thumb impression of *Mst.* Barta Kuar is on the first of these pages only and not on any of the subsequent pages. Moreover, there do not appear on the will the signature or initials of the Deputy Collector who dealt with the application made under the Land Regis. Act or of the Chairman or the Vice-Chairman of the Municipality, nor is there on the back of the will the impression of the seal of any Court or office. It is somewhat curious that the thumb-impression of the testatrix, should not have been taken on each page of the will and that, if it was filed in the Court of the Land Registration Deputy Collector, or in the Municipal office, no seal should ever have been put on it. Relying on these circumstances the contention put forward on behalf of the objector, Kashi Nath Singh, was that the will, which was propounded by *Mst.* Gulzaro Kuar, was not the document which *Mst.* Barta Kuar had executed. The document which *Mst.* Barta Kuar had executed was, it was contended, a deed of gift. The first page of this document had, it was suggested, been retained, and the remaining pages had been removed and other substituted in order to convert the document from a deed of gift into a will. In endeavouring to support this theory reliance was mainly placed on the circumstances to which I have just referred and on the evidence of Babu Bimla Sahai, a Pleader, who was a member of the sub-committee which dealt with the application made to the Municipality. Babu Bimla Sahai expressed the opinion that the document which had been filed in the Municipal office must have been an unregistered deed of gift, and could not have been a will. In saying so Babu Bimla Sahai relied on the reasons which were given by himself and the other two members of the sub-committee for rejecting the application for mutation. The deduction does not, in my opinion, necessarily follow, and it is significant that Babu Bimla Sahai was unable to say positively that the will was not the document with which the sub-committee had had to deal in 1931. Moreover, in cross-examination Babu Bimla Sahai was forced into an admission that he had been briefed to appear in certain litigation by the objector Kashi Nath Singh. Mr. D. N. Varma, for the appellant, has also relied on the language used in the application made to the municipality. It is true that the document was there described as a deed of gift. It was also, however, described as a will. In fact, in one passage in the application there occurs the curious expression "deed of gift—will", the words "*bakhsishnama*" and "*wasiatnama*" both being used. It is also significant that although in the application to the municipality the document was somewhat loosely described, the expression used in the application to the Land Registration Deputy Collector, which had been made some-time previously, was *wasiatnama* or will. Although the will does not bear the impression of any seal, nor the signature of the Chairman or the Vice-Chairman of the Municipality, or of the Deputy Collector, it bears endorsements by the record-keeper and by another clerk of the municipality. Both these gentlemen were put into the witness box by the plaintiff and they said that the endorsements on the back of the will were made by them and that the will was the document with which the sub-committee of the municipality had had to deal. It has not been disputed that the thumb-impression on the will is the thumb-impression of *Mst.* Barta Kuar, and it must, therefore, be assumed that during her last illness *Mst.* Barta Kuar did in fact execute a document, the object of which was to ensure that certain property would devolve on her great-great-grandson, Ramchander Singh, I cannot see any very good reason why the advisers of *Mst.* Barta Kuar, one of whom was Mohammad Zaki, a Pleader's clerk should have wrongly advised her to execute a deed of gift instead of a will. Also having regard to what is contained in the application which was made on January 3, 1930, to the Land Registration Deputy Collector, it is clear that the document then relied on was a will, and not a deed of gift. In my view, there is no good reason to suppose that the suggestion put forward on behalf of the objector that the will which was propounded by *Mst.* Gulzaro Kuar was not the document which *Mst.* Barta Kuar in fact executed, is a tenable one. That being so, the only other question that arises is whether or not the will was validly executed. The will was drawn up by Mohammad Zaki (P. W. No. 1), who, as I have already said, is a Pleader's clerk. It was signed on

behalf of *Mst.* Barta Kuar by her son, Ram Chariter Singh, and was attested by him and by five other persons. Three of these persons, namely, Gharbharan Ram (P. W. No. 3), Kailash Singh (P. W. No. 4) and Ratan Singh (P. W. No. 6) were called to say that Mohammad Zaki wrote the will at the request of *Mst.* Barta Kuar and that at the time when she executed the will *Mst.* Barta Kuar, though suffering from asthma, was otherwise in a perfectly sound state of health and was fully aware of what she was doing. Sobh Nath Singh (P. W. No. 5), who is the grandson of *Mst.* Barta Kuar, also came forward to say that he had been present when the will was executed. The learned Additional District Judge had the advantage of hearing these persons give their evidence, and he was apparently satisfied that they were witnesses of truth. As I have already said, it seems quite certain that this will was in fact the document which *Mst.* Barta Kuar executed. There is thus no good reason to distrust the evidence of the various persons who were called to speak to the circumstances under which it came into existence. The lower Court was, in my opinion, entirely justified in coming to the conclusion that the will was duly executed and in directing that letters of administration should issue to the proponent, *Mst.* Gulzaro Kuar.

As I have already said, the reason why the appellant, Kashi Nath Singh, came to object to the grant of letters of administration was that in execution of a decree which he had obtained against Ram Chariter Singh, the son of the testatrix, *Mst.* Barta Muar, he had attached the house and *kasht* land which was described in the will as the self-acquired property of *Mst.* Barta Kuar. It is a matter of surprise that his right to appear and oppose the grant of letters of administration as a person claiming to have an interest in the estate of the deceased within the meaning of these words as they occur in s. 283 of the Indian Succession Act should have been accepted as it was. Mr. D. N. Varma in attempting to justify the intervention of his client referred to certain observations in a recent decision of this Court in *In the goods of the estate of Mrs. Elsie Augusta Black* (1). The observation in question is this:

"A creditor, who has attached a portion of the estate might possibly be a person who had an interest in the estate but a mere creditor without even a decree can hardly be said to have an interest in the estate".

(1) 7 B R 9; 190 Ind. Cas. 362; 13 R P 186; A I R 1941 Pat. 151; 20 Pat. 75.

Mr. D. N. Varma also referred to Bhobosoonduri Dabee, *Nobeen Chunder Sil* v. *Bhobosoonduri Dabee* (2). In that case two brothers shortly after the death of their father, had borrowed money and by way of security had given a mortgage over certain property which admittedly belonged to their father. Some time after this mortgage bond was executed, a will was propounded by their mother. Under that will their mother was to take a life-interest in the estate of their father, any interest which they themselves were to take was postponed. If the will was a valid will, the result was that the mortgages which they had executed were not valid. In the circumstances it was held that the mortgagees were entitled to intervene and oppose the grant of probate as they were persons interested in the estate of the testator. These decisions, it is obvious, are of no assistance to the present appellant, Kashi Nath Singh. Kashi Nath Singh is not a creditor of the testatrix, but a creditor of her son Ram Chariter Singh. So far from its being admitted that the property disposed of by the will is the property of the testatrix, the contention is that it belongs to her son, Ram Chariter Singh and is therefore liable to be taken in execution of the decree which Kashi Nath Singh has obtained against Ram Chariter Singh. In *Gopal Chandra Bose* v. *Ashutosh Bose*, 20 Ind. Cas. 342 (3) it was pointed not that a person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of s. 283 of the Indian Succession Act. That was a case in which the daughter of a Hindu had executed a will disposing of property which she claimed to have inherited from her father and the contention put forward on behalf of the objector was that she had really taken no more than a life-interest in the estate and was, therefore, not competent to dispose of it by will. The reasoning, it is obvious, applies *a fortiori* to the present case. In the written statement, which was put in by Kashi Nath Singh, there occurs this:

"The properties mentioned in schedule A never belonged to *Mst.* Barta Kuar nor did she ever get possession over them rather the properties belonged to Chariter Singh and they have all along been in his possession."

In an application for probate of a will or for the grant of letters of administra-

(2) 6 C 460.
(3) 20 Ind. Cas. 342.

tion with a copy of the will annexed the sole question that arises is whether or not the will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact belonged to him. In *Birj Nath De* v. *Chandra Mohan Banerji* (4) Sir John Edge said this :

"It has been contended that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not of the testator or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issues A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was not collusion in the case. It is much safer in the interests of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate."

It is true that the learned Additional District Judge realised perfectly well that it would have been improper for him to decide whether or not the house and the orchard and *kasht* land described in the will actually belonged to *Mst.* Barta Kuar and not to her son, Ram Chariter Singh. It is, however, a pity that he did not also recognize that for more or less the same reasons as made this improper Kashi Nath Singh was not a person interested in the estate of the testatrix and as such entitled to oppose the grant. The result of permitting persons in such a position as Kashi Nath Singh was to appear and contest the grant of probate or letters of administration may be very inconvenient and troublesome to the propcnents of a will who are thereby put to the expense of proving it in solemn form when it might otherwise be proved in common form.

I would dismiss this appeal with costs.

Meredith, J.—I agree.

S. *Appeal dismissed.*

(4) 19 A 458; A W N 1897, 106.

BOMBAY HIGH COURT
Full Bench

Third Criminal Sessions, 1939 Case No. 4
November 15, 1940
BEAUMONT, C. J.,
N. J. WADIA AND SEN, JJ.
EMPEROR—PROSECUTOR
versus
DAWOOD HASHAM—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 289, 298, 299—Discretion conferred by s. 289—Judicial exercise of—Duties of Judge and jury—Question whether there is evidence to go before jury is one of law, to be decided by Judge—Evidence if believed by jury leading to conviction—Judge must leave case to jury—Defects in evidence to be brought to attention of jury—Evidence even if believed by jury not sufficient to justify conviction—Judge is bound to hold that there is no evidence to be placed before jury—He must withdraw case from jury and direct them to return verdict of not guilty.

Section 289, Criminal P. C., provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. That section confers in terms a discretion on the Judge, but it is a discretion which must be exercised judicially. Where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or in other words, direct them to return a verdict of not guilty, because all questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence, and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the attention of the jury, but if the evidence is such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty.

Messrs. *P. P. Khambatta* and *N. K. Pettigara* (Public Prosecutor), for the Crown.

Mr. *A. C. Beynon*, for Accused Nos. 2 and 3.

Beaumont, C. J.—This case comes before the Court on a certificate of the Advocate-General given under cl. 26 of the Letters Patent. He considers that the question, whether the learned Judge should have withdrawn the case from the jury on the ground that there was no evidence to go to the jury, is a question of law which requires to be considered by this Court. The case in question was tried by Lokur, J. and a special jury, and in it three accused were charged with murder and abetment of murder. The actual murder was charged against accused No. 1, and abetment of murder against accused Nos. 2 and 3.

The material facts, which the jury accepted, appear sufficiently from the certificate of the Advocate-General. The murdered man, Husain Aiman, and his son Noor Mahemed were living in a house in Bhisti Moholla,

and on January 22, 1939, about 11 P. M., Noor Mahomed was returning to his house, when he was abused by accused Nos 1, 2 and 3 and a man named Hasham who were sitting on the *otla* of a house near to his house. A quarrel ensued and a fight started between Noor Mahomed and accused No. 2, and at that stage Hussein, the father of Noor Mahomed, came up and separated the contestants, and either Hasham or accused No. 3 shouted, "Seize Hussein, do not let him go." Thereupon accused Nos. 2 and 3 caught hold of the deceased Hussein. Hussein when caught, was facing the *otla* and accused No. 3 was facing Hussein. Whilst Hussein was being held by accused Nos. 2 and 3, he shouted to his son Noor Mahomed "Dawood, (that is accused No. 1) has a knife in his hand, run away." Then Noor Mahomed ran away. Thereupon accused No. 1 jumped down from the *otla* and stabbed Hussein through the heart, and killed him. Accused No. 1 was found guilty of murder by the jury and was sentenced to be hanged, and no question about his guilt arises.

Accused Nos. 2 and3 were found guilty of abetment of murder and were sentenced by the learned Judge to transportation for life, and the question before us is whether there was any evidence to go to the jury that they were guilty of abetment. Now, the law, I think, is free from doubt. Section 289, Criminal P. C., provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. That section confers in terms a discretion on the Judge, but it is a discretion which must be exercised judicially, and when one considers the respective functions of the Judge and jury in a trial by jury—functions which are prescribed in ss. 298 and 299—it is quite clear that where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or in other words, direct them to return a verdict of not guilty. That is clear, because all questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence, and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the attention of the jury; but if the evidence is such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty.

Now, the question is, on which side of the line this case comes. Is it a case of no evidence which can justify a conviction, or is it a case of weak evidence which the jury nevertheless would be entitled to accept? Nobody suggests that the evidence against accused Nos. 2 and 3 is of a convincing character. The learned Judge gave a very full and fair summing-up, indeed so full is the summing up that both sides have agreed that it is not necessary to have a transcript of the evidence, because the learned Judge has correctly summarized all the material evidence, The bulk of his charge is, of course, directed to the case against accused No. 1, with which we are not concerned, but in the early part of his summing-up he explains to the jury accurately the nature of abetment. He points out that under s. 107, I. P. C., abetment may be of three characters, either by instigation, or by conspiracy, or by aiding, or assisting and then, at a later stage of his summing up, he deals with the case against accused Nos. 2 and 3 specifically. There was no evidence that accused Nos. 2 and 3 had instigated accused No. 1 to stab Hussein, but the learned Judge discusses the two other aspects of abetment—active assistance, and previous conspiracy. He points out that as against accused Nos. 2 and 3 there is no evidence at all that they took any active part in the actual stabbing. He also points out that the whole incident took place in a few minutes and that it is not alleged that accused No. 1 shouted out that Hussein should be stabbed. He points out further that if accused Nos. 2 and 3 were looking away from the *otla*, they could not expect that accused No. 1 would immediately come down from the *otla* and stab Hussein. He says that abetment requires that the persons abetting must intend to facilitate the commission of the offence. Then he says :

"If accused No. 2 and 3 did not seize Hussein intending that he should be stabbed by accused No. 1, then they cannot be said to have abetted the commis-

sion of the offence by accused No. 1. It was pointed out to you in the course of the arguments that as accused Nos 2 and 3 were holding Hussein, they could not see what accused No. 1 was doing as their backs were turned towards him. If accused Nos.1 had shouted to accused Nos. 2 and 3, 'Seize Hussein, I am coming to stab him,' then they might perhaps have let him go or prevented accused No 1 from stabbing him. There is no evidence to show that accused Nos. 2 and 3 had their attention directed towards accused No. 1. Unless you assume that there must have been a conspiracy beforehand and in pursuance of that conspiracy accused Nos. 2 and 3 caught hold of Hussein you cannot say that accused Nos. 2 and 3 abetted the commission of the crime."

So that the learned Judge seems definitsly to express the view that unless the jury found abetment by means of previous conspiracy, there was no evidence of abetment; there was no evidence, that is to say, of actually aiding in the commission of the murder. Then the learned Judge goes on to discuss the evidence relating to previous conspiracy. He says :

"It is admitted that accused Nos. 2 and 3 did not speak to accused No. 1, nor did accused No. 1 say anything to accused Nos. 2 and 3 or to the deceased before he stabbed the deceased. It was done all of a sudden."

Then he says :

"Accused Nos 2 and 3 themselves did not know why they were called upon to seize the deceased. It may be that Hasham wanted merely to detain Hussein. Hussein had gone there as a peacemaker to settle the quarrel between accused No. 2 and Noor Mahomed. Noor Mahomed ran away and then Hasham or some one from the crowd may have thought of keeping Hussein in order to settle the dispute once for all. In these circumstances unless there was a previous conspiracy that Hussein should be seized and stabbed, it would be difficult for you to hold accused Nos. 2 and 3 guilty of abetment. But the presence of Hussein there was accidental. It is therefore to my mind clear that on the evidence accused Nos. 2 and 3 cannot be held to have conspired with accused No. 1 for stabbing the deceased Hussein."

So that the learned Judge has really held that there was no evidence of abetment by active assistance or previous conspiracy, and there was no suggestion of abetment by instigation. I think therefore that if the learned Judge's attention had been drawn to s. 289, Criminal P. C., he would have held that there was no evidence to go to the jury. Unfortunately, his attention was not directed to that section, and he left the case to the jury, and, no doubt, much to his surprise and regret, the jury brought in a unanimous verdit of guilty against accused Nos. 2 and 3. It is argued by Mr. Khambatta for the Crown that in point of fact there was evidence, weak perhaps, but still evidence fit to be left to the jury. The evidence has not been transcribed, and, as I have said, we are judging from the summing up of the learned Judge. To my mind, the learned Judge has ruled upon the question, which it was for him to rule upon, and he has in fact held in his summing-up that there was no evidence against accused Nos. 2 and 3 of abetment, and is that it so, as a matter of law he was bound to withdraw the case from the jury. There is no material before us which would justify our differing from the learned Judge on his view of the law. The error arises from the fact that, having decided the question of law, and held that there was no evidence to go to the jury, he did not adopt the correct course and direct the jury that in law they were bound to return a verdict of not guilty. I think therefore that we must set aside the verdict of the jury as against accused Nos. 2 and 3. Of course, they might undoubtedly have been held guilty of assault under s. 352. and theref re they have not much to complain of, if they have spent some time in prison. We set aside the verdict and sentence as against accused Nos. 2 and 3 and direct that they be acquitted and set at liberty.

N. J. Wadia, J.—I agree and have nothing to add.

Sen, J.—I agree.

S. *Order accordingly.*

PATNA HIGH COURT
Special Bench
Civil Reference No. 2 of 1940
January 20, 1941
HARRIES, C. J., FAZL ALI AND AGARWALA, JJ.
In re RAMSWARUP LAL, A MUKHTAR
CHAPRA

Legal practitioner—Professional misconduct—Gross negligence—Judgment-debtor filing satisfaction petition with forged signature alleged to be of decree-holder's son, acknowledging satisfaction—Mukhtar *endorsing identification of decree-holder on being told by judgment-debtor that person brought by him was decree-holder—Decree-holder alleged to be illiterate—Judgment-debtor known to* mukhtar *for* 15 *years* -Mukhtar *not making investigation nor taking precaution of obtaining thumb impression of alleged decree-holder but acting merely on judgment-debtor's assurance that he would obtain such thumb-impression*—Mukhtar *not acting for his or judgment-debtor's benefit—Mukhtar's act held, grossly careless and negligent—Serious notice of his conduct without imposing punishment of suspension held sufficient in the circumstances*

In execution case a satisfaction petition was filed purporting to be by the decree-holder. On the petition was a signature alleged to be that of the decree-holder's son, acknowledging satisfaction and also an endorsement of identification of the decree-holder, by the *mukhtar*. Subsequently this petition was found to be a forged one and the judgment-debtor was found guilty of presenting a forged petition of satisfaction. Proceedings were started against the *mukhtar* under the Legal Practitioners

Act. In answer to the charge the *mukhtar* stated that the judgment-debtor a *sadhu*, had been known to him for fifteen years; that the latter came to him and showed him a man who he said was the decree-holder and asked him (the *mukhtar*) to identify him as such; that he was shown the petition of satisfaction which had already been completed, and he identified the person shown to him as the decree-holder. It was said that the decree-holder was illiterate and could not sign and another person signed who purported to be decree-holder's son. The *mukhtar* did not take the precaution of taking the thumb-impression of the person who was said to be the decree-holder on the mere assurance of the judgment-debtor that he would take his thumb-impression :

Held, that the frankness of the *mukhtar* in admitting that he made no further investigation while identifying the decree-holder and that he had acted merely upon the assurance of the judgment-debtor, must be considered as a point in his favour. Although cases of *mukhtars* identifying improperly must be regarded severely ; yet in the present case the Court could take a more lenient view because of the *mukhtar's* past record and because there was no suggestion that the *mukhtar* acted as he did for gain or in order to benefit the judgment-debtor in the case. He did not appear to have had any dishonest motive, though, in the circumstances, he was grossly careless and negligent Although the Court must take serious notice of his conduct yet in the circumstances the Court did not think that it was necessary to impose any punishment by way of suspension.

C. Ref. made by the District Judge Saran, dated April 29, 1940.

The Advocate-General, in support of Reference.

Messrs. *Hareshwar Prasad Sinha* and *R. K. Chaudhuri*, against the Reference.

Harries, C. J.—This is a reference by the learned District Judge of Saran in a matter relating to the conduct of one Ramswarup Lal, a *mukhtar*. It appears that in Execution Case No. 535 of 1939 a satisfaction petition was filed before the learned Munsif on July 7, 1939, purporting to be by the decree-holder, Ramdhari Tiwari. On the petition was a signature alleged to be that of Ramdhari's son, Sheonandan Tiwari, acknowledging satisfaction and also an endorsement of identification of the decree-holder, Ramdhari, Tiwari, by the *mukhtar* Ramswarup Lal. On July 18, 1939, however, the decree-holder, Ramdhari Tiwari, filed a petition in Court alleging that the so-called satisfaction petition with Sheonandan's signature thereon was a forged one and that he had not received payment of any amount in satisfaction of the decree. I may observe that proceedings were commenced and inquiry made, and in due course the judgment-debtor, Dinanath Missir, was found guilty of presenting a forged petition of satisfaction. As a result of the inquiries made by the learned Munsif before the criminal case was instituted, he was satisfied that the *mukhtar*, Ramswarup Lal, had been guilty of conduct which might well be an offence under the Legal Practitioners Act. Notice was served upon Ramswarup Lal to show cause why proceedings under that Act should not be instituted against him and in due course the learned Munsif heard evidence. The matter now comes before us on a reference from the learned District Judge of Saran. In his view the *mukhtar* was guilty of gross negligence, and his conduct in identifying the so-called decree-holder was grossly improper. In the view of the learned District Judge the *mukhtar* is guilty of gross professional misconduct, and the matter has been referred to this Court for orders.

Ramswarup Lal's answer to the charge is this. He says that the judgment-debtor Dinanath Missir, a *sadhu*, had been known to him for fifteen years, The latter came to him and showed him a man who he said was Ramdhari Tiwari and asked the *mukhtar* to identify him as such. He was shown the petition of satisfaction which had already been completed, and the *mukhtar* identified the person shown to him as Ramdhari Tiwari, the decree-holder. It was said that Ramdhari was illiterate and could not sign and another person signed who purported to be Ramdhari Tiwari's son, Sheonandan. The *mukhtar* did not take the precaution of taking the thumb-impression of the person who was said to be Ramdhari Tiwari. As I have stated earlier, the real Ramdhari Tiwari informed the Court on July 18 that the petition of satisfaction was a forgery and that has since been held to be so by the criminal Courts. The question arises whether the part played by the *Mukhtar* Ramswarup Lal in this case amounts to gross professional misconduct deserving of punishment. On the *mukhtar's* own showing he did not know Ramdhari Tiwari, yet he identified a man as Ramdhari Tiwari merely because the judgment-debtor whom he knew said that the man was Ramdhari Tiwari. He made no other inquiry of any kind, and all that can be urged in his favour is that the judgment-debtor was a man known to the *mukhtar* for fifteen years or so. It is urged that the *mukhtar* was justified in accepting Dinanath Missir's statement that the man whom he was to identify was Ramdhari Tiwari ; but in my

judgment a *mukhtar* who is asked to identify has no right to identify a person merely because the party asking him to identify tells him that a particular person is the person whom he is identifying. The very fact that it was the judgment-debtor who told the *mukhtar* the person whom he was asked to identify was the decree-holder should have put the *mukhtar* on his guard. The petition which was about to be filed was a petition of satisfaction, and the *mukhtar* should have taken care to satisfy himself that the person who posed as the decree-holder was in fact the decree-holder. The only information given to the *mukhtar* was given by a highly interested party, namely the judgment-debtor himself. Further, the *mukhtar* did not insist on the person who posed as the decree-holder affixing his thumb-impression on the petition, and his only excuse for this is that the judgment-debtor assured him that he would take Ramdhari Tiwari's thumb-impression.

The *mukhtar* Ramswarup Lal has been in practice for some 23 years, and it is clear from the judgment of the learned Munsif in the criminal case against Dinanath Misser that the *mukhtar* has for many years been regarded as a most respectable member of his profession. Further, the *mukhtar* in this case has not attempted to deny his want of care. In evidence in the criminal case he stated frankly that he had identified the man as Ramdhari Tiwari merely because he was told so by Dinanath Missir. He has in short frankly admitted that he made no further investigation and that he had acted merely upon the assurance of the judgment-debtor. His frankness in the matter must be considered as a point in his favour. Further, there is nothing to suggest that this *mukhtar* is in the habit of identifying all and sundry without taking due precautions. This appears to be an isolated case in which the *mukhtar* acted improperly.

There can be no doubt that in the circumstances of this case the *mukhtar* should never have identified the man shown to him as Ramdhari Tiwari. His doing so without any inquiry and without an information beyond the bare statement of the judment-debtor was conduct which this Court can never countenance. The *mukhtar* made no attempt whatsoever to satisfy himself from any independent source that the man was Ramdhari Tiwari and he ought never to have acted upon the mere statement of the judgment-debtor who was a highly interested party in the filing of the petition of satisfaction. This Court has stated time and again that cases of *mukhtars* identifying improperly must be regarded severely ; but in the present case the Court can take a more lenient view because of the *mukhtar's* past record and because there is no suggestion that the *mukhtar* acted as he did for gain or in order to benefit the judgment-debtor in the case. The *mukhtar* does not appear to have had any dishonest motive, though, in the circumstances, he was grossly careless and negligent. We must take serious notice of his conduct but in the circumstances the Court does not think that it is necessary to impose any punishment by way of suspension. The *mukhtar* must take care in the future that he makes no identification such as the one now in question. In all the circumstances, I would discharge this reference, but I would order the *mukhtar* to pay the costs of these proceedings which I would assess at four gold *mohurs*. This sum must be deposited in Court within three months from to-day failing which the case will be listed before this Bench for orders.

Fazl Ali, J.—I agree.

Agarwala, J.—I agree.

S. *Reference discharged.*

OUDH CHIEF COURT

Civil Revision Application No. 18 of 1938 |
March 7, 1941

BENNETT, J.

RISHI KESH AND ANOTHER—DEFENDANTS—APPLICANTS

versus

BRIJ MOHAN LAL PLAINTIFF—OPPOSITE-PARTY

Negotiable Instruments Act (XXVI of 1881), s. 118 — Presumption under— Promissory note—Distinction, if can be drawn between admission and proof of execution—Execution held proved and presumption under s. 118 applied.

Section 118 of the Negotiable Instruments Act provides that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration. No distinction is drawn in that section between admission of execution and proof of execution, and it is immaterial whether execution is admitted or is proved. In either case the presumption can be made.

Where the suit was between the sons of the parties to the promissory note and the defence was based on ignorance of the execution and not on any definite knowledge that the promissory note had not been executed by the father of the defendants who were minors represented by their real uncle and one of the plaintiff's witnesses deposed that he knew the handwriting and signature of the executant and that the note was executed by the defendant's father

and although the defendants could have produced evidence to disprove execution of the promissory note they did not do so:

Held, that the Court was justified in the circumstances to hold that the evidence of the plaintiff's witness was sufficient to prove the execution of the document, and the presumption provided by s. 118 of the Negotiable Instruments Act, therefore, applied. 146 Ind. Cas. 709 (1), 149 Ind. Cas. 605 (2) and 167 Ind. Cas. 819 (3), distinguished.

C. R App. of the order of the Civil Judge (as Judge of Small Cause Court), Hardoi, dated November 11, 1937.

Mr. *K. N. Tandon*, for the Applicant.

Mr. *B. K. Dhaon*, for the Opposite Party

Order.—This is an application in revision under s. 25 of the Small Cause Courts Act. A suit was brought by a minor named Brij Mohan Lal against two other minors, Rishi Kesh and Brij Behari on the basis of a promissory note which purported to have been executed by one Babu Ram, father of Rishi Kesh and Brij Behari, in favour of Kashi Nath, father of Brij Mohan Lal.

The defence was a denial that the document had been executed by Babu Ram but the defendants made it clear in their additional pleas that this denial was based on ignorance of the execution and not on any definite knowledge that the promissory note had not been executed by Babu Ram. There was no suggestion that the writing or signature had been forged. The minor defendants, it should be noted, were under the guardianship of an uncle named Pirthi Pal, who appears to have been brother of Babu Ram as he is described as their real uncle.

The lower Court considered that the promissory note had been proved by the evidence of a witness named Darbari Lal who deposed that he was in a position to recognise the signature and handwriting of Babu Ram because the latter had written several deeds for him. He further deposed that the promissory note and also the receipt (Exs. 1 and 2) "appear to be scribed by Babu Ram and bear his signature." It would seem from this that the witness intended to say that he thought the writing was Babu Ram's writing and that he was confident that the signatures were those of Babu Ram. It is, however, not quite clear whether he intended to draw any such distinction between the actual writing of the promissory note and the signature.

It is submitted in this application in revision that the evidence of Darbari Lal is insufficient to prove execution and further that the suit should not have been decreed in the absence of evidence to show that there was consideration for the promissory note.

In support of these contentions I have referred to three cases, *Nando* v. *Dulara* (A. I. R. 1933 Oudh, 394 (1)) (1), *Bishambar Das* v. *Ismail* (A. I. R. 1933 Lah. 1029) (2) and *Anumolu Narayana Rao* v. *Ghattaraju Venkatappayya* (A. I. R. 1937 Mad. 182) (3).

In the Oudh case the plaintiff brought a suit on the basis of a promissory note purporting to have been executed by the defendant and the defendant denied having borrowed any money from the plaintiff. It was held by Nanavutty, J. that it was for the plaintiff to prove not only the execution of the promissory note but also the passing of consideration.

It will be observed that in this case the suit was between the alleged principals to the transaction and there was a definite denial by the defendant that he had borrowed the money. In the present case the suit is between the sons of the parties to the promissory note and the defence is based on absence of knowledge.

In the Lahore case the suit appears to have been brought by the party in whose favour the promissory note was alleged to have been executed, and the defendants were the sons of the deceased executant. The sons denied execution by their father. It was not alleged that the document had been written by the deceased executant, but only that it bore his thumb mark. It was held that in these circumstances it was necessary that the plaintiff should prove by clear, cogent and reliable evidence that the thumb impression on the document was really that of the deceased executant.

It is clear, therefore, that the facts in the Lahore case were different from the facts in the present case.

In the Madras case it was said that in a suit on a promissory note purporting to have been executed by the father of the defendant, the burden of proof is not the same in respect of the claim against his sons as that applicable to the claim against the father. The burden of proof was held to

(1) A I R 1933 Oudh 394 (1); 146 Ind. Cas. 709; 1 O W N 839; 6 R O 175 (1); 1934 O L R 24.

(2) A I R 1933 Lah. 1029; 149 Ind. Cas. 605; 6 R L 721.

(3) A I R 1937 Mad. 182; 167 Ind. Cas. 819; (1936) M W N 1167; 44 L W 784; 9 R M 478; (1937) 1 M L J 513; I L R (1937) Mad. 299.

lie on the plaintiff to prove the debt like any other debt.

Another case was referred to, namely *Yankasawmy* v. *Sitaram*, (156 Ind. Cas. 256) (4), in which the Rangoon High Court held that where there was a denial by the defendant that he had promised to pay the sum to the plaintiff, the burden of proof of the loan lay on the latter.

If the evidence of Darbari Lal is accepted as sufficient to prove the execution of the document by Babu Ram, the question remains whether it was also necessary for the plaintiff to prove consideration for its execution. No evidence was produced by either side on this point, presumably because neither party had an knowledge of the alleged transaction. Section 118 of the Negotiable Instruments Act provides that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration. Learned Counsel for the applicant contends, on the basis of the cases cited that where a promissory note is denied, it is not sufficient that it should be proved: it is also necessary that consideration for it should be proved. I find it difficult to accept this contention because it is not supported by s. 118. No distinction is drawn in that section between admission of execution and proof of execution, and I should have thought that it was immaterial whether execution was admitted or was proved. In either case I should have thought that the presumption referred to could be made.

In the present case, although neither party may have had any knowledge of the circumstances of the loan, it would certainly appear that the defendant could have produced evidence to disprove execution of the promissory note by Babu Ram, if actually it was a forgery. Presumably Pirthipal, who represented the minors, was acquainted with Babu Ram's handwriting and signature, and had the document been forged, we might have expected Pirthipal himself to have gone into the witness box and to have said so. He did not do this. There was no express denial of the writing and signature and no request for expert examination of the writing and signature. I do not consider in these circumstances that it would be justifiable to hold that the lower Court was not warranted in accepting the evidence of Darbari Lal as sufficient to prove the execution of the document, and in my opinion once the document is proved the presumption provided by s. 118 of the Negotiable Instruments Act applies.

I find, therefore, no good ground for interference and I dismiss the application with costs.

S. *Application dismissed.*

(4) 156 Ind. Cas. 256; A I R 1935 Rang. 130; 7 R Rang. 388.

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 4901 of 1940

April 11, 1940

LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.

A L. S. P. P. L. SUBRAMANIAN CHETTIAR BY AGENT NARAYANAN CHETTIAR—PETITIONER,

versus

MUTHUSWAMI GOUNDAN—RESPONDENT

Government of India Act, 1935, (25 and 26 Geo. V Ch 42), s 205 (1)—Effect of s. 205 (1) in respect of appeal to Federal Court—Dismissal of revision application by Single Judge of High Court is final order—Such order certifying that matter involves substantial question of law involving interpretation of Government of India Act—Appeal to Federal Court, if competent—S 111-A, Civil Procedure Code (Act V of 1908), whether bar—Civil Procedure Code Act V of 1908), s. 111-A, O. XLV, r. 17 Proviso (a)—Object of s. 111-A—Construction of Proviso (a) to O. XLV r. 17.

The effect of s 205 (1), Govt. of India Act is that where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Code of Civil P C, then the Federal Court is empowered to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case.

An order passed by a Single Judge of the High Court dismissing an application for revision, is a final order of the High Court. Hence when such order certifies that the appeal involved a substantial question of law as to the interpretation of the Govt. of India Act, an appeal to the Federal Court is competent and s. 111-A, Civil P. C., is no bar to such appeal

The object of s. 111-A, Civil P. C, is to bring the Civil P. C., into line with s. 205, Govt of India Act. The two provisos make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-s (1) of s. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Govt. of India Act is involved.

The addition of the words to r. 3 of O. XLV, Civil P. C., effected by proviso (a) to r. 17 makes it quite

clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. XLV, r. 2 the question whether there is a substantial question of law involved as to the interpretation of the Govt. of India Act, 1935.

C. Misc. P. for leave to appeal to Federal Court against the judgment and order of the High Court, in C. R. P. No. 825 of 1939, dated May 2, 1939.

Messrs. *V. V. Srinivasa Iyengar* and *P. S. Sarangapani Iyengar*, for the Petitioner.

Messrs. *B. K. B. Naidu* and *R. Muthialuswami*, for the Respondent.

Leach, C. J.—This is an application for leave to appeal to the Federal Court from an order of Wadsworth, J. which involves a substantial question of law as to the interpretation of the Govt. of India Act, 1935. The application is opposed and it is necessary to set out the course of events preceding the order of the learned Judge and to examine the provisions of the Act and the amendments which have been made to the Civil P. C. by the Govt. of India (Adaptation of Indian Laws) Order, 1937. On November 21, 1934 the petitioner obtained a money decree for Rs. 7,569-0-9 with the interest and costs against the respondent in the Court of the Subordinate Judge, Coimbatore. At that time the Mad. Agri, Relief Act had not been placed on the statute book. It came into force however on March 22, 1938 and in accordance with its provisions the judgment-debtor applied for an order scaling down the decretal amount. His application was granted and as the result of the investigation it was found that taking into account the scaling down provisions the debt had been completely discharged. Consequently, the judgment-debtor applied to the Subordinate Judge for an order directing full satisfaction to be recorded and this application was granted. The petitioner then applied to this Court to revise the Subordinate Judge's order on the ground that the Mad. Agri. Relief Act was *ultra vires* the powers of the Provincial Legislature and to set aside the order for scaling down and the order directing satisfaction to be recorded.

The application for revision came before Wadsworth, J. on May 2, 1939. By that time the question of the validity of the Mad. Ari. Relief Act had been considered by a Full Bench of this Court in *Nagaratnam* v. *Seshayya* (1). The Full Bench held that the Act was *intra vires* the powers of the Provincial Legislature. As he was bound to do in the circumstances Wadsworth, J. dismissed the revision petition, but as it involved an important question as to the interpretation of the Govt. of India Act, 1935, he granted a certificate under s. 205 (1) of the Act. It is in respect of that order of dismissal that the petitioner wishes to appeal to the Federal Court. The respondent says there is no appeal from the order of a single Judge of a High Court and in this connexion relies on the provisions of s. 111 (*a*), Civil P. C. An examination of that section fails to reveal any support for the argument. Section 205 (1), Govt. of India Act, reads as follows:

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any order in Council made thereunder and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

The effect of this section is this. Where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs. 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Civil P. C. then the Federal Court is empowerd to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case. It will be observed that the section also provides that the Federal Court can itself give special leave on other points. By the Govt. of India (Adaptation of Indian Laws) Order, 1937, two additions were made to the Civil P. C. The first is the insertion of s. 111-A which reads as follows:

"Where a certificate has been given under s. 205

(1) I L R (1939) Mad. 151; 180 Ind. Cas. 994; A I R 1939 Mad. 361; (1939) 1 M L J 272; (1939) M W N 192 (2); 49 L W 257; 11 R M 760 (F B).

(1), Govt. of India Act, 1935 the three last preceding sections shall apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:

propvided that

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said act, or any order in Council made thereunder, has been wrongly decided;

(b) in determining under cl. (c) of s. 109 whether the case is a fit one for appeal, and under s. 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said act, or any order in Council made thereunder, shall be left out of account."

The object of this section is to bring the Civil P. C. into line with . 205, Govt. of India Act. The two provisos make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Code under sub-s. (1) of s. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Govt. of India Act is involved. The provisos to s. 111-A have been expressed in very compact language, but when it is followed there is no doubt left as to its effect. The second addition is to O. XLV, Civil P. C. An additional rule has been here inserted, r. 17, and it reads as follows:

"Where a certificate has been given under s. 205 (1), Govt. of India Act, 1935, the provisions of this order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this order to His Majesty in Council and to any order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court. Provided that

(a) Rule 3 of this order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words 'apart from any question of law as to the intepretation of the Govt. of India Act, 1935, or any order in Council made thereunder.'

(b) Where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Govt. of India Act. 1935 or any order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in r. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent."

Rule 3, as it stood before the amendment, provided that every petition for leave to appeal to His Majesty in Council should state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of s. 110, or that it is otherwise a fit one for appeal to His Majesty in Council. The addition of the words to r. 3 effected by proviso (a) makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. XLV, r. 2 the question whether there is a substantial question of law involved as to the interpretaion of the Govt. of India Act, 1935. That matter has already been dealt with under s. 205 (1) by the High Court on the passing of its judgment, decree or final order. Proviso (b) emphasizes that it is unecessary for the petitioner to apply for a certificate or for the Court to grant one. The order of Wadsworth, J. was a final order of this Court. Clause 15, Letters Patent, prohibits an appeal from an order passed by the Court in the exercise of its revisional powers. The learned Judge considered whether the matter involved a substantial question of law as to the interpretation of the Govt. of India Act, 1935, and he has certified that his order does involve such a question. No other question is involved and therefore this appeal must be admitted.

N.-S. *Appeal admitted.*

ALLAHABAD HIGH COURT

First Appeal No. 212 of 1939
December 20, 1940
MOHAMMAD ISMAIL, J.
GANGA KUER—APPELLANT
versus
SUKHJIT SINGH AND OTHERS—RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934), ss. 9, 13—Rejection of written statement filed beyond time prescribed—Court-fee payable on appeal from such order is under Sch. II, Art. 11, Court Fees Act (VII of 1870).

The rejection of a written statement beyond the time prescribed by the Act cannot have the force of a decree of a Civil Court. It is only when an order is passed under s. 14, U. P Encum. Estates Act that the order becomes a decree. The creditor who is aggrieved by an order of the Special Judge rejecting his written statement filed beyond the prescribed time is entitled to appeal on payment of court-fee payable under Art. 11, Sch. II, Court Fees Act. 179 Ind. Cas. 45 (1) (1), relied on; 173 Ind. Cas. 353 (2), distinguished.

F. A. from an order of the District Judge, Farrukhabad, dated August 10, 1939.

Mr. *Shabd Saran*, for the Appellant.

Judgment.—This is an appeal from an order of the learned District Judge, Farrukhabad. The respondent, Sukajit Singh and several other persons made an application under s. 4, Encum. Estates Act, which

was forwarded in due course to the Special Judge. The Special Judge in pursuance of the direction laid down in s. 9 of the Act, called upon all persons having claims in respect of private debts, both decreed and undecreed against the person or the property of the landlord to present to the Special Judge within three months from the date of the publication of the notice, written statements of their claims The appellant presented her claim after the expiry of time allowed by law. The written statement was therefore rejected. The appellant then preferred an appeal to the Court of the District Judge and preliminary objection was raised that the memorandum of appeal was not properly stamped. The learned District Judge upheld the objection and decided that an *ad valorem* court-fee should have been paid The appellant has now come up to this Court in appeal. It is argued by him that the order of the Court below is erroneous and that the order of the Special Judge declining to accept his written statement was only an order which did not have the force of a decree and therefore the court-fee was payable in accordance with Art. 11, Sch. II. Under s 13 of the Act, every claim decreed or undecreed against the landlord unless made within the time and in the manner required by the Act is deemed for all purposes and on all occasions to have been duly discharged. If the order of the Court below is maintained, the claim of the appellant would be deemed to have been satisfied. If however the claim of the appellant had been within time, and had been adjudicated upon, the final order of the Court would have had the force of a decree of a Civil Court of competent jurisdiction: *vide* s. 14 of the Act.

The Encum. Estates Act has laid down a special procedure which has to be followed by all creditors who have any claims against the landlord who has made an application under s. 4 and whose case has been forwarded to the Special Judge under s. 6. The rejection of a written statement beyond the time prescribed by the Act cannot have the force of a decree of a Civil Court. It is only when an order is passed under s. 14 that the order becomes a decree. In my opinion, the creditor who is aggrieved by an order of the Special Judge rejecting his written statement is entitled to appeal on payment of court fee payable under Art. 11, Sch. II. Unless and until the Act specifically declares such an order to have the force of a decree there is no reason why a higher court-fee should be demanded. This view was taken by a Bench of the Oudh Court in *Sukkhu* v. *Nand Bahadur Singh* (1). The decision of the Full Bench in *Jagdish Pratap Bahadur Singh* v. *Udai Pratap Bahadur Singh* (2) had no application to the facts of this case because in that case the Special Judge had passed an order under s. 14 of the Act and the appeal was against that order which had the force of a decree. The attention of the learned District Judge was drawn to the Oudh case but he declined to follow it although he agreed that the facts of that case were similar to those of this case.

The analogy given by the learned District Judge appears to me to be inappropriate. If a claim is filed on the basis of a time-barred debt and an objection is taken about limitation and the trial Court frames a preliminary issue on the point of limitation and dismisses the suit holding the claim to be time-barred, the appeal from the decision of the trial Court no doubt will have to bear full court fee stamp calculated on the valuation of the appeal. But in such a case the decision of the Court will be a decree. The orders of the Special Judge however have been given the force of a decree of a competent Court by virtue of the provisions of the Encum. Estates Act. The order passed under s. 14 therefore is to be treated as a decree. There is no such provision however with regard to an order coming within the purview of s. 13 of the Act. In my opinion, the order of the Court below is erroneous. I accordingly hold that the court-fee paid on the memorandum of appeal is sufficient. For the reasons given above I allow the appeal, set aside the order of the Court below and remand the appeal to the learned District Judge to be registered under its original number and decided according to law. No one appears on behalf of the respondents. I therefore allow no costs.

S. *Appeal allowed.*

(1) 1938 O W N 1221; 179 Ind. Cas. 45 (1); 1938 O L R 552 (1); 11 R O 152 (1); A I R 1939 Oudh 43; 1938 R D 927; 14 Luck 344

(2) (1937) A L J 1373; 173 Ind. Cas. 353; A I R 1938 All. 97; 1938 O W N 88; 1938 R D 142; 1938 A L R 125; 10 R A 478; I L R (1938) All. 230 (F B).

MADRAS HIGH COURT

Letters Patent Appeal No. 94 of 1938
December 11, 1939
LEACH, C. J AND KRISHNASWAMI AYYANGAR, J.
MADHAVI AMMA—APPELLANT
versus
NAGAPPAN NAYAR—RESPONDENT

Marumakkattayam Act (XXII of 1933), ss 43, 38 —Application for registration of tarwad *under s 43, pending*—Tavazhi, *if can file partition suit—Rule of Hindu Law as to partition, whether applies to* tarwad—*Partition suit—Other members, if precluded from applying for registration—Doctrine of* lis pendens, *applicability of.*

Chapters VI and VII of the Act stand apart and there is nothing in any of the sections of these two chapters which suggests that a *tavazhi* is precluded from filing a suit under s 38 for partition because there happens to be pending an application for registration under s. 43. The ordinary rule of Hindu Law that the filing of a partition suit involves the automatic severance of the joint status applies to a *tarwad* and hence the filing of a suit under s. 38 puts an end to the right of other members of the *tarwad* to apply for registration under s. 43. The doctrine of *lis pendens* obviously can have no application here. There is a right to partition given in Chap. VI and there is nothing in Chap. VII which prevents that right being exercised while the *tarwad* remains unregistered. 160 Ind. Cas. 594 (1), referred to.

L. P. A. against the judgment of the High Court, reported in 182 Ind. Cas. 75.

Mr. *B Sitarama Rao*, for the Appellant.

Messrs. *Ch. Raghava Rao* and *M. Chinnappa Nayar*, for the Respondent.

Leach, C. J—The parties are members of a Marumakkattayam *tavazhi*. On August 15, 1933 certain members of the *tarwad*, representing a two-thirds majority, applied to the Collector for the registration of the *tarwad* as impartible under s. 43 of the Marumakkattayam Act, XXII of 1933. As required by the statute, notice of the application was served upon respondent No 1, who on October 23, 1933 filed a suit in the Court of the District Munsif of Alatur for partition of the *tarwad* under the provisions of s. 38 of the Act. Notwithstanding the suit, the registration application was proceeded with and resulted in the Collector passing an order on January 15, 1934 for the registration of the *tarwad* as impartible. The District Munsif held that the registration of the *tarwad* had the effect of defeating the suit and accordingly he dismissed it. The respondent then appealed to the District Court of South Malabar. The District Judge held that the registration of the *tarwad* did not affect the respondent's right to bring the suit and he remanded it to the trial Court to be dealt with on the merits. The defendants then appealed to this Court. This appeal was heard by King, J., who concurred in the decision of the District Judge. The present appeal is from the judgment of King, J.

Section 38 of the Act states that any *tavazhi* represented by the majority of its major members may claim to take its share of all the properties of the *tarwad* over which it has power of disposal, and separate from the *tarwad*, provided that no *tavazhi* shall claim to be divided from the *tarwad* during the lifetime of an ancestress common to the *tavazhi* and to any other *tavazhi* or *tavazhis* of the *tarwad*, except with the consent of the ancestress, if she is a member of the *tarwad*. There is an explanation to the section which says that for the purposes of Chap. VI (which deals with the right of partition) a male member of a *tarwad* or a female member without any living child or descendant in the female line, shall be deemed to be a *tavazhi* if he or she has no living female ascendant who is a member of the *tarwad*. The respondent has no living female ascendant and he himself constitutes a *tavazhi*. Therefore he had the right to institute the suit for the partition of the *tarwad*. Sub-s. (1) of s. 43 allows two-thirds of the major members of a *tarwad* to present a petition to the Collector for the registration of the *tarwad* as impartible. Sub-s. (3) states that if after giving notice to all the major members of the *tarwad* and making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the *tarwad* have signed the petition with their free consent and desire the registration of the *tarwad* as impartible, he shall register the *tarwad* as impartible. Section 43 is embodied in Chap. VII which deals exclusively with impartible *tarwads*. Chapters VI and VII stand apart and there is nothing in any of the sections of these two chapters which suggests that a *tavazhi* is precluded from filing a suit for partition because there happens to be pending an application for registration under Chap. VII.

If the ordinary rule of Hindu Law that the filing of a partition suit involves the automatic severance of the joint status applies, it is clear that there would be no power in the Collector to register a *tarwad* as impartible, once a suit for partition has been filed. It is not contested that the ordinary rule of Hindu Law does apply. In fact it was so held in *Kunchi Amma* v. *Minakshi*

Amma (1). This being the position, the filing of the suit on October 23, 1933 put an end to the right of the other members of the *tarwad* to apply for registration under s. 43 and the Collector had no power to order registration. His order of January 15, 1934 must be regarded as being null and void. Mr. Sitarama Rao has suggested that the doctrine of *lis pendens* applies and that, inasmuch as the application under s. 43 was filed first, the suit was incompetent. The doctrine of *lis pendens* obviously can have no application here. There is a right to partition given in Chap. VI and there is nothing in Chap. VII which prevents that right being exercised while the *tarwad* remains unregistered. We consider that the decision under appeal is correct. The appeal will be dismissed with costs in favour of respondent No. 1.

M.-S. *Appeal dismissed.*

(1) 160 Ind. Cas. 594; A I R 1936 Mad. 155; 59 M 693; 70 M L J 114; (1936) M W N 27; 43 L W 111; 8 R M 670.

ALLAHABAD HIGH COURT

Civil Revision Application No. 228 of 1939
November 28, 1940
MULLA, J.

DISTRICT BOARD, DEHRA DUN
—PLAINTIFF—APPLICANT
versus
BABU RAM—DEFENDANT
—OPPOSITE PARTY

Limitation Act (IX of 1908), Art. 120—Suit by District Board for realising tax on circumstances and property, is governed by Art. 120.

A suit brought by the District Board for realizing a certain amount as tax on circumstances and property, is not really a suit for recovery of money but for the recovery of a liability under a particular statute and does not fall within the purview of Arts. 37 to 115, Lim. Act, but is governed by Art. 120. *President, Municipal Commission, Guntur* v. *Srikakulapu Padmarazu* (1) and 167 Ind. Cas. 490 (2), relied on.

C. R. App. against the decree of the Small Cause Court, Dehra Dun, dated April 5, 1939.

Mr. *Raj Bahadar Jaini*, for the Applicant.

Order.—These are two applications in revision by the District Board, Dehra Dun, which raise the same question of law for consideration. In each case the District Board brought a suit for realising a certain amount as tax on circumstances and property for the period 1934 35. The suit in each case was brought more than three years after the date on which the tax was payable. Both suits have been dismissed by the same learned Small Cause Court Judge on the ground that they being suits for recovery of money were subject to the three years' rule of limitation and were consequently barred by time. The only question for consideration in these cases is whether this view of the law of limitation taken by the learned Small Cause Court Judge is correct. Having considered the relevant provisions of the Lim. Act, I am clearly of the opinion that the learned Small Cause Court Judge was wrong in holding that the three years, rule of limitation applied to these suits. They are not really suits for recovery of money but for the recovey of a liability under a particular statute. The suits to which the three years rule of limitation is applicable are set out in Arts. 37 to 115, Lim. Act. The suits in question obviously do not fall within the purview of any one of these articles. It is thus clear that they are governed by Art. 120 which provides for suits for which no period of limitation is provided elsewhere in the schedule to the Lim. Act. The learned Judge was therefore wrong in applying the three years' rule of limitation and dismissing the suits as time-barred. This view of the law of limitation is fully supported by the judgment of the Madras Hight Court in *President, Municipal Commission, Guntur* v. *Srikakulupu Padmarazu* (1). The same principle has been affirmed by a Full Bench of the Madras High Court in *Rajah of Vizianagram* v. *Thammanna* (2). The relevant portion of the judgment in the Full Bench case runs as follows:

"The other question dealt with in the judgment of the District Munsif is one of limitation. He has held the suits to be barred in respect of certain items on the footing that such a suit is governed by the three years, rule of limitation. We see no warrant for applying the three years rule. The suit is not one for rent nor is it based on any contract express or implied. It is to enforce a liability created by statute."

The suit in which these observations were made by the Full Bench was brought under s. 88, Madras Local Boards Act, for the recovery of a cess. The result, therefore, is that I allow these applications in revision and setting aside the decrees of the Court below decree the suit in each case with costs in both Courts.

S. *Application allowed.*

(1) 3 M 124.
(2) A I R 1937 Mad. 217; 167 Ind. Cas. 490; 45 L W 74; (1937) M W N 7; (1937) 1 M L J 91; 9 R M 462; I L R (1937) Mad. 498 (F B).

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 33/12 of 1939

October 19, 1940

ALMOND, J. C. AND MIR AHMED, J.

Mst. MOTAI AND ANOTHER—PETITIONERS

versus

LT. COL. SIR MOHD. AKBAR KHAN CHIEF OF HOTI AND OTHERS—RESPONDENTS

Suits Valuation Act (VII of 1887), s. 8—Mortgage—Redemption suit—Value for jurisdiction—Civil Procedure Code (Act V of 1908), s. 107, O. XLI, r. 23, O. XLIII, r. 1 (u)—Unsuccessful litigant in lower Court cannot be allowed to patch up weak parts in case and fill up omissions—Property mortgaged for Rs. 8—Equity of redemption sold for Rs. 25,000—Redemption suit—First Appellate Court's order of remand—Second appeal, if competent.

In a suit for redemption of a mortgage of immovable property the value for jurisdiction is the amount of money which is found to be due on the mortgage. The market value of the property mortgaged can on no account be ever the value for jurisdiction in a redemption suit. 96 Ind. Cas. 890 (1), relied on. 105 Ind. Cas. 412 (2), not followed.

The provisions of s. 107, Civil P. C., as elucidated by O. XLI, r. 23 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Court to patch up the weak part of the case and fill up omissions in the Court of Appeal. 132 Ind. Cas. 721, (3) relied on.

Where the mortgagor mortgaged his immovable property for Rs. 8 and subsequently sold the equity of redemption for Rs. 25,000, in a suit for redemption by the purchaser:

Held, that a second appeal being competent under s. 31 (1) (*b*), N.-W. F. P. Courts Regulation, the first Appellate Court's order of remand was appealable under O. XLIII, r. 1 (*u*), Civil P. C.

A. against the order of the District Judge, Peshawar, dated January 17, 1939.

Qazi *Mohd. Aslam*, for the Appellant.

Messrs. *Hukum Chand*, *Peer Bakhsh* and *Ghulam Mohd.* for Respondents Nos. 1, 2, 4, 7, 8 and 6, respectively.

Respondents Nos. 3, 8 and 9 in person.

Mir Ahmed, J.—6 *kanals* 5 *marlas* of land situated in Mahal Mardan and represented by *Khasra* Nos. 1545 and 1546 were originally owned by one Burhanuddin. In the records of 1885-86 the land is shown as mortgaged to one Fazal Shah for Rs. 8. Fazal Shah died and the land was then shown in the records in the names of his four widows. Three of the widows transferred their mortgagee rights to one Sherdil. Burhanuddin, the owner, also died. His sons Mohiyuddin and Rahmanuddin sold the equity of redemption to the Nawab Sahib of Hoti for Rs. 25,000. Sherdil died as well. His son Shah Sawar transferred the mortgagee rights in a portion of the land to several persons who will be referred to in this judgment as "transferees".

The Nawab Sahib of Hoti has filed this suit for possession by redemption of the land originally owned by Burhanuddin on payment of Rs. 8. He impleaded *Mst.* Motai, widow of Fazal Shah, Shah Sawar, son of Sherdil, and the "transferees." The suit was resisted *inter alia* on the ground that it was not within time. The trial Judge pointed out that the suit was filed on August 27, 1936, that the plaintiff had to prove that the mortgage was effected on or after August 27 1876, that the plaintiff could only prove that the mortgage was mentioned in the records of 1885-86, and that he therefore failed to prove that the mortgage was effected on or after August 27, 1876 and not before it. He therefore held that the suit was time-barred and dismissed it. He did not adjudicate on the other issues. An appeal was preferred to the District Court at Peshawar. At the time of the hearing the plaintiff's Counsel produced before the District Judge a copy of a mutation by which Burhanuddin obtained a piece of land from a widow by inheritance in 1883-84. The learned Counsel asked the Judge that the case should be remanded and he should be allowed to search the land records in order to find out if there was any other information in those records with regard to this case. The appellate Judge admitted the document produced by Counsel and directed that it should be placed on the original file. He remanded the case under O. XLI, r. 23, Civil P. C., to enable the plaintiff to produce land records in his favour. He directed that the issue regarding limitation and the other issues in the case should all be again taken into consideration in the light of the fresh evidence produced. The transferees have presented an appeal to this Court, and *Mst.* Motai, the surviving widow of Fazal Shah, and Shah Sawar, the son of Sherdil, have jointly instituted another appeal against the same order. They have in both appeals asked for the setting aside of the order of remand. This judgment will cover both cases.

Two preliminary points arose for decision in these appeals. Firstly, whether the trial Judge had pecuniary jurisdiction to hear the case. The property was sold for Rs. 25,000 although the mortgage money secured was Rs. 8. It was suggested that the value for jurisdiction should have been Rs. 25,000 and not Rs. 8 and that the trial Judge who was Sub-Judge, fourth class, could not therefore hear the case. Secondly, whether a further

appeal lay. The value for jurisdiction was only Rs 8 and the same value was adopted in the Court of Appeal. The single Judge of this Court who heard the case, referred the appeals to a Bench. Two rulings were cited before us on the question of valuation. They are *Jaswant Ram* v. *Moti Ram* (1) and *Ma Hla Saing* v. *Ma Su We* (2). The Lahore High Court has held in *Jaswant Ram* v. *Moti Ram* (1) that

"in a suit for the redemption of immovable property the value for purposes of jurisdiction is the amount found by the Court to be the value of the mortgagee's charge on the property and not the amount alleged by the plaintiff to be due to the mortgagee."

The Rangoon High Court has on the other hand laid down in *Ma Hla Saing* v. *Ma Su We* (2) that the market value of the property should be the criterion. We have consulted other authorities also which the learned Counsel did not care to produce. We find that the Allahabad, Madras and Nagpur High Courts have held that the value for jurisdiction in a redemption suit should be the amount of the principal debt secured, and that the Bombay and Calcutta High Courts have laid down that the value should be the amount due on the mortgage. Section 7 (*ix*), Court Fees Act, governs the court-fee payable in redemption suits. It is to the following effect :

"In suits against a mortgagee for the recovery of the property mortgaged.....according to the principal money expressed to be secured by the instrument of mortgage."

Section 8, Suits Valuation Act, is as under :

"Where in suits other than those referred to in the Court Fees Act, 1870, s. 7, paras. V. VI and IX and para. X. cl. (d) Court fees are payable *ad valorem* under the Court Fees Act, 1870 the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same."

It will be observed that in s. 8, Suits Valuation Act, the Legislature deliberately excluded suits under s. 7 (*ix*), Court Fees Act, from the category of these cases in which the value for the purposes of jurisdiction was directed to be the same as that for court-fee. A scrutiny of the Suits Valuation Act shows that no provision has been made in that Act for the valuation of redemption suits for purposes of jurisdiction. In redemption suits the court-fee has to be paid on the principal money secured. But there are other amounts besides the principal debt which have also to be paid to the mortgagee before a mortgagor gets back his property. One of them is interest. It may be due to this that the matter of valuation for jurisdiction was left to the Court to decide on the data which is placed before it in the form of a complete list of charges which the mortgagor has to pay before redemption is decreed. In the alternative it may be a lacuna in law. Whatever may be the cause we think that the Lahore view which is supported by the views of the Bombay and Calcutta High Courts is sound. We hold therefore that the value for jurisdiction is the amount of money which is found to be due on the mortgage. We may observe with due respect that the view of the Rangoon High Court is not correct. The market value of the property mortgaged could on no account be ever the value for jurisdiction in redemption suit. The property under mortgage is split into two bundles of rights. One bundle of rights is called the "equity of redemption" and the other bundle of rights is called the "mortgagee rights." There is no controversy in redemption suits about the "equity of redemption." The controversy is about the "mortgagee rights". So, to say that the two bundles together go to form the subject-matter of the suit and their price is the value for jurisdiction does not appear to be correct. In this particular case the sum of Rs. 8 is the only amount payable on the footing of the mortgage. We consequently find that the value for jurisdiction is Rs, 8 and the trial Judge (Sub-Judge fourth class) has jurisdiction to decide the case. Next we proceed to discuss the question of further appeal. Section 31 of the N. W. F. P. Courts Regulation contains rules regarding further appeals. We reproduce it verbatim below :

" 31 (1). A further appeal shall lie to the Court of the Judicial Commissioner in any of the following cases from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit, namely :

(*a*) in a small cause or unclassed suit,

(*i*) if the value of the suit is one thousand rupees, or upwards, or the decree involves directly some claim to, or question respecting property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below, or

(*ii*) if the value of the suit is two thousand five hundred rupees or upwards, or the decree of the District Court involves directly some claim to, or question respecting property of like value;

(*b*) in a land suit,

(*i*) if the value of the suit is two hundred and fifty rupees or upwards, or the decree involves directly some claim to or question respecting property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below or

(1) A I R 1926 Lah. 376; 96 Ind. Cas. 890; 7 L 570; 27 P L R 605; 9 Lah. L J 68; 2 Lah. Cas. 306 (F B).

(2) A I R 1927 Rang. 304; 105 Ind. Cas. 412; 5 R 499.

(ii) if the value of the suit is one thousand rupees or upwards or the decree of the District Court involves directly some claim to or question respecting property of like value.

(2) The provisions of O. XLI, Civil P. C, 1908, other than r. 35 of the said order shall apply as far as may be to further appeals under this section and to the execution of decrees passed on such appeals."

Clause (*b*) allows a further appeal in a land suit if the value of the suit is Rs. 250 or upwards or if the decree involves directly some claim to, or question respecting property of like value that is to say Rs. 250 or upwards. In this case the decree involves a question respecting property of the value of Rs. 25,000 for if the suit is time-barred the Nawab of Hoti will lose the equity of redemption which he has purchased for that amount. It follows that a further appeal would have been competent to this Court if the District Judge had finally decided the case. Under O. XLIII, r. 1 (*u*), Civil P. C. therefore an appeal is competent from the order of remand to this Court. We hold accordingly. Now we have to see whether the lower appellate Judge was right in remanding the case. Curiously, we do not find the document produced by the plaintiff with his memorandum of appeal either on the appellate file or on the file of the original Court. We could not trace it. However, we had the benefit of seeing a copy of it which was in the possession of the learned Counsel for the plaintiff. The document produced has no relevency whats ever in this case. The net result of the remand is therefore to allow the plaintiff to fish out evidence in order to prove his case and make up the lacuna which at the present moment exists. Their Lordships of the Privy Council have not approved of this method in the ruling reported in *Parsotim Thakur* v. *Lal Mohar Thakur* (3). The portion of the headnote which is apposite may be reproduced as follows:

"The provisions of s. 107 as elucidated by O. XLI, r. 23 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Court, to patch up the week part of of the case and fill up commissions in the Court of Appeal."

We are therefore of opinion that the order of remand was not justified. We accept the appeals to this extent that we set aside the order of remand. We send back the case to the lower appellate Judge with the direction that he should now proceed to decide the case on merits. The costs will abide the result, Pleader's fee Rs. 32.

D. *Order accordingly*

(3) A I R 1931 P C 143; 132 Ind. Cas. 721; 10 Pat. 654; 58 I A 254; 33 Bom. L R 1015; (1931) A L J 513; 35 C W N 786; Ind. Rul. (1931) P C 209, 34 L W 76; 54 C L J 1; 12 P L T 683; (1931) M W N 929; 61 M L J 489 (P C).

ALLAHABAD HIGH COURT

Criminal Appeal No. 31 of 1940

December 4, 1940

MOHAMMAD ISMAIL AND HAMILTON, JJ.

EMPEROR—PROSECUTOR

versus

NANUA—RESPONDENT

Evidence Act (I of 1872), ss. 25, 27, 8—Statement and act, difference—Accused taking in his hands certain articles and handing them over—Whether amounts to statement or confession—Applicability of s. 8 to such case—Criminal Procedure Code Act V of 1898), s. 164—Maker of statement not warned by Magistrate—Defect, if cured by s 29, Evidence Act (I of 1872)—Criminal trial—Confession—Part of confession relied on by Court—Other part proved to be false—Such part can be discarded.

The difference between a statement and an act is clear. A statement must consist of words, be they spoken, be they written, or be they spelled out, as would be done by a mute person who spells out words on his fingers, and even words would not always be statements, as for instance, if a person recited the numbers from 1 to 10, if one considers a statement in the sense used in s 162, Criminal P. C. Acts however exclude words and cannot be translated into words. It cannot be held therefore that the fact that in the case the accused by taking in his hands certain articles and handing them over, made a statement much less can it be said that he made a statement which amounts to a confession within the meaning of s. 25, Evi. Act To such a case of s. 8, Evi. Act, applies. 188 Ind Cas. 561 (3), explained. 52 Ind. Cas. 601 (5) and 152 Ind. Cas. 473 (6), dissented from. [p 876, col. 2.]

Where a Magistrate has not before recording a confession explained to the person making it that he was not bound to make a confession and that if he did so it may be used as evidence against him, and thus has not complied fully with s. 164, Criminal P. C., the defect is not fatal in view of s. 29, Evi. Act. 178 Ind. Cas. 694 (1) and 137 Ind. Cas. 863 (2), relied on. [p. 875, col. 1.]

If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case when part of it is proved false by other evidence. In such a case the Court is entitled to rely on one part disregarding at the same time the other. [*ibid.*]

The Govt. Advocate, for the Crown.

Mr. *J. Swarup*, for the Respondent.

Judgment—This is an appeal by the Provincial Govt. against the acquittal of Nanua who was tried for the murder of *Mst.* Shyama said to have been committed on October 12, 1939 between Maupur and Bhaupur villages, District Aligarh. *Mst.* Shyama lived in Maupur village which is less than half a mile from Bhaupur where the appellant resides, and during the day

on October 12 she had gone to Bhaupur wearing some silver and gold ornaments and carrying a scale and weights and similar things as she used to do a little business in the neighbourhood of Maupur. She did not return after dark, and P. W. Raghubir, her nephew, with whom she lived, became anxious and went to look for her. At about 10-30 P. M., her corpse was found in a well which lay between Maupur and Bhaupur. The medical evidence shows that she had a contused wound on the bridge of the nose which had fractured the nasal bone, an incised wound on the left nostril, a punctured wound on the left cheek and four broken ribs on the right side of the chest and three broken ribs on the left side of the chest. Death was due, in the opinion of the Civil Surgeon, to asphyxia and shock as the result of the injuries to the ribs and to her face. On the next morning at 7-30, Raghubir reported the occurrence saying that *Mst.* Shyama was greatly troubled with asthma and it appeared that she had committed suicide by throwing herself into the well. The Civil Surgeon when examined in the Court of the committing Magistrate stated that the fracture of the ribs was caused before death and could have resulted from a fall in a well, but death was due to asphyxia caused either by pressure on the chest or on the mouth or nose. She did not die from drowning, so that she was dead before she got into the well and the incised and punctured wounds on the face could not have been caused by a fall.

Taking all the injuries together, it appears to us that the fracture of the ribs was due to the murderer kneeling on her chest while he was causing asphyxia. We may here add that her ornaments and the scale and other things which she was carrying were pointed out by the appellant and this fact also disproves the possibility of *Mst.* Shyama having committed suicide. Reghubir, the nephew, *Mst.* Sharbati, an aunt of the deceased, and *Mst.* Tirbeni, her daughter, who all lived in the same house, prove that the appellant owed very small sum of money to the deceased. *Mst.* Tirbeni puts the debt at Re. 1 but the other two witnesses say he owed Rs. 2, and this is also the statement of P. W. Genda of Maupur who at 4-30 saw the appellant and the deceased near a tree quarrelling about that debt. *Mst.* Shyama according to him was demanding Rs. 2 and abusing the accused who promised to pay the money in two or three days. Considering that *Mst.* Tirbeni disagrees with three witnesses as to the amount owed we prefer the evidence of the greater number of witnesses especially as Genda is not connected with either side and his evidence is therefore not suspicious on the ground of partiality or for the matter of that on any other ground.

The next and very important witness is Genga Sahai of the village of the appellant. He says that in the evening he saw the deceased leaving his village with the accused following her, which we only take to mean that he was walking in the same direction a few paces behind her. This was the last time that the deceased was seen alive and seeing how near Bhapur and Maupur villages are it must have been only a few minutes before she was murdered. Ganga Sahai is an independent witness of the village of the appellant who has no reason whatsoever to give false evidence againt the appellant and we accept his statement as true. Sub-Inspector Harmohan Singh, who was absent when the report of the finding of the corpse was made, took up the investigation on the 14th and arrested the appellant on that day. The appellant took him and witnesses Ganga Ram, Maqsud Ahmad, Nand Ram and Sundar Lad to a place 45 paces from his house and dug out silver ornaments and two eight-anna pieces of the deceased and handed them over. He then took the same persons to a sugarcane field where he picked up a bundle containing the balance, *chadras*, weights and other things which the deceased had with her at the time of the occurrence and handed them over. These two places are far one from the other, one being north of the village and the other being south of it. A *dhoti* which the appellant was wearing was taken from him and sent to the chemical examiner, and the *dhoti* was found to have a number of small blood stains, none being larger than half an inch. There were seven such places on the *dhoti*. The *dhoti* was sent to the imperial serologist, but somehow or other his report was not placed on the record, as it should have been, and there is no evidence therefore that the blood was human blood.

The appellant was sent up before a Magistrate and made a statement to the effect that he was standing in a field when *Mst.* Shyama was returning from Bhaupur to Maupur and she demanded money from him. He answered that he had not got the money then but would pay the following day and she became ready to beat him with shoes whereupon he struck her on the nose with his fist, so that she died, and he threw her dead body into the well where it was recovered, after removing her ornaments. If

this purports to be a confession of murder it is difficult to say, for the appellant may have intended to allege that the death of the woman from his giving her a blow with fist on the nose was an accident and his offence would be only one of causing hurt. In any case we must find that the manner in which she met her death is not correctly described in the confession for the doctor's evidence makes it clear that the woman died from asphyxia and not from a blow on the nose. If any part a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case when part of it is proved false by other evidence, as is the case here. We are entitled therefore to rely on the statement against the appellant disregarding at the same time statement as to how *Mst.* Shyama died.

It has however been urged by the learned Counsel for the accused that this confession is inadmissible because the Magistrate who recorded the confession did not comply with s. 164 (3), Criminal P. C., which lays down that a Magistrate shall before recording a confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. As the Magistrate did not give this warning he has not entered in the certificate either that he gave such a warning. The Magistrate was examined but he has not been able to state that he certainly gave such a warning and we therefore must take it that he forgot to do so. Section 29, Evi. Act, however lays down that if a confession is otherwise relevant it does not become irrelevant because the maker of it was not warned that he was not bound to make such confession and that evidence of it might be given against him. We are of opinion that although the Magistrate did not comply fully with s. 164, Criminal P. C., the defect is not fatal in view of s. 29, Evi. Act, and our view is supported by *Emperor* v. *Lal Singh* (1) and also by *Vellamoonji Goundan In re* (2) The learned Counsel for the appellant has also urged that the handing over of ornaments and other articles by the appellant amounts to a statement which is inadmissible in view of a Full Bench decision of this Court reported in *Baldeo* v. *Emperor* (3). The question referred to the Full Bench there was as follows :

"What portion, if any, of the statement to the effect that the knife with which he and Baldeo and Lakhan had murdered Maharaj Singh was at his house under a heap of *pyal* alleged to have been made by the appellant Tirmal to the Sub-Inspector of Police, Rafiq Ahmad, is admissible in evidence under s. 27, Evi. Act ?"

The decision of the Full Bench was that in view of the decision of their Lordships of the Privy Council in *Pakala Narayana Swami* v. *King-Emperor* (4) no part of the statement was admissible. It is clear however that this decision was about a statement as opposed to an act, and here we have to consider whether an act and a statement stand on the same footing. For this the learned Counsel has relied on *Hira Gobar* v. *Emperor* (5) and on *Turab* v. *Emperor*(6), which followed it. This latter decision quotes the relvant portion of the Bombay judgment. In the Bombay case, Shah, J. observed as follows :

"In my opinion the evidence taken as a whole shows that it is evidence of a confession of the accused in the presence of a Police Officer. It is true that in terms it purports to establish that accused No. 1 pointed out the house and the various places connected with the offence and it is contended that it is really evidence of the conduct of the accused, and that therefore it is admissible under s 8, Evi Act. It is clear from the evidence that the real significance of the conduct arises out of the statements made by the accused at the time, and that the conduct, apart from the statements made either expressly or impliedly by gestures by the accused, has very little value. The meaning that was conveyed to the witnesses by what is contended to be the conduct of the accused and not his statements was really conveyed by the statements made at the time when he pointed out the various places. Such statements would clearly be inadmissible under ss. 25 and 26, Evi. Act, as they were made to the Police Officer or to the complainant in the presence of the Police Officer. It is common ground that no fact is deposed to as discovered in consequence of the information furnished by the accused and that s. 27, Evi. Act, does not apply. I am unable to accept the contention urged by the learned Govt. Pleader that this evidence, which is substantially evidence of the confession of the accused in the presence of a Police Officer, can be admitted

(1) (1938) A L J 943; 178 Ind. Cas. 694; A I R 1938 All. 625; I L R (1938) All. 875; 40 Cr. L J 132; 1939 A L R 881; 11 R A 327.

(2) A I R 1932 Mad. 431; 137 Ind. Cas. 863; 62 M L J 559; 35 L W 542; (1932) M W N 449; Ind. Rul. (1932) Mad. 459; 33 Cr. L J 526, (1932) Cr. Cas. 412; 55 M 711.

(3) (1940) A L J 241; 188 Ind. Cas. 562; A I R 1940 All. 263; 41 Cr. L J 627; 13 R A 48; I L R (1940) All. 396 (F B).

(4) (1939) A L J 298; 180 Ind. Cas. 1; A I R 1939 P C 47; 1939 O L R 134; (1939) M W N 185; 40 Cr L J 364; 11 R P C 166; 1939 O W N 282; 20 P L T 265; 49 L W 349; 43 C W N 473; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; (1939) 1 M L J 756; 18 Pat. 234; 66 I A 66; I L R (1939) Kar. P C 123 (P C).

(5) A I R 1919 Bom. 162; 52 Ind. Cas. 601; 20 Cr. L J 681; 21 Bom. L R 724.

(6) A I R 1935 Oudh 1; 152 Ind. Cas. 473; 11 O W N 1383; 7 R O 235; 36 Cr. L J 166; (1935) Cr. Cas. 11; 10 Luck 281.

as evidence of conduct, apart from the accompanying statements, under s. 8."

While Heaton, J. stated :

"As regards the other item, I entirely agree with my learned brother that in this case what the appellant was doing was that he was making a confession to a Police Officer. But the confession comprised not merely words, but gestures, and what is sought to be done is, while not proving the words, to prove gestures and further to prove all that is necessary to give significance to those gestures. But I quite agree that gestures are just as much a part of a confession as are the words used. So that item of evidence also must be discarded."

With all respect to the learned Judges who decided those two cases we are unable to share their views. Section 25, Evi. Act, runs as follows : "No confession made to a Police Officer shall be proved as against the person accused of any offence," and s. 27 runs as follows :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

In those cases the confession was found to be inadmissible apparently under s. 25, Evi. Act, because it was made to a Police Officer and, in the circumstances of those cases, s. 27 did not come into play, and not because the statements made to the Police Officer was inadmissible in evidence for the reasons given in the Full Bench decision of this Court to which we have referred. With all respect to the learned Judges who decided the Bombay and the Oudh cases we have difficulty in agreeing that the pointing out of property amounts to a confession. In *Emperor* v. *Misri* (7), a distinction was drawn between ss. 24 and 27, Evi. Act, which deal with confessions and s. 8, for with reference to s. 27 we find the following words :

"The section does not profess to and does not deal with evidence as to the conduct or acts of the accused, which is admissible under s. 8 or any of the preceding sections of the Evi. Act and is subject to no limitation so long as it is relevant.

Also in *Rafique-ud-din Ahmad* v. *Emperor* (8) the following words occur :

"Nextly, as regards production of articles, the evidence is relevant as evidence of conduct under s. 8, Evi. Act. Under that section statements accompanying or explaining conduct are also relevant as part of the conduct itself."

It appears to us from this that a distinction was drawn by the learned Judges between "acts" and "statements." The pointing out of a place whence property is recovered may denote nothing more than that the person pointing out the place is of opinion that something will or may be found there. A person may point out a place from which something is eventually recovered even if he does not actually himself know that there is something there, and we cannot in each and every case presume that because a person points to a certain place he knows it for a fact that a certain thing will be recovered there, nor can we presume that he himself put the property there or that he put the property there because he had committed a crime with respect to that property. We may perhaps say that his pointing out a place is an admission that he believes that it may lead to the discovery of something which may have some connection with some crime, but no more. For instance, a person may point out a place because someone has told him that something has been buried there. The person who has received that information may be entirely innocent even if the information was given to him by a person who was guilty. In s. 8, Evi. Act, which deals with the relevancy of the conduct of any party, Expln. I draws a clear distinction between statements and acts. The explanation reads as follows :

"The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts than statements ; but this explanation is not to affect the relevancy of statements under any other section of this Act."

"Conduct" may in certain circumstances include statements as well as acts, but in doing so it still retains the difference between an act and a statement. The difference between a statement and an act is in our opinion clear. A statement must consist of words, be they spoken, be they written, or be they spelled out, as would be done by a mute person who spells out words on his fingers, and we are inclined to think that even words would not always be statements, as for instance, if a person recited the numbers from 1 to 10, if one considers a statement in the sense used in s. 162, Criminal P. C. Acts however exclude words and in our opinion cannot be translated into words. For instance, if a person points out a place it is impossible to say whether had he spoken he would have said "look there" or "dig there" or "you will find there. . ." or "I have buried there . . ." or "I have committed such and such a crime." We are unable to hold therefore that the fact

(7) 31 A 592; 3 Ind. Cas. 26; 10 Cr. L J 212; 6 A L J 839 (F B).

(8) 62 C 572; 155 Ind. Cas. 687; A I R 1935 Cal. 184; 39 C W N 368; (1935) Cr. Cas. 241; 36 Cr. L J 808; 7 R C 606 (F B).

that in the present case the appellant, by taking in his hands certain articles and handing them over, made a statement much less can we find that he made a statement which amounts to a confession. If he also stated anything whatsoever we do not know what he stated, for none of the witnesses who have given evidence about this say that the appellant made any statement whatsoever. We come to the conclusion therefore that the Full Bench decision of this Court which refers to statements only has no application in the present case and that s. 8, Evi. Act, applies. From the fact that the appellant went to two different places and that from each of those he took into his possession property that was with the deceased at the time of her murder and handed it over we infer that he knew that those articles were in those two places.

We next have to consider whether that knowledge was due to the appellant having committed a crime or is compatible with his innocence. The two places were at a distance of some furlongs from the scene of the murder and at a considerable distance one from the other. We cannot but come to the conclusion that they were put in those places by the person who committed the crime, and we can exclude the possibility that it was some person other than the appellant who having committed the murder took those articles and put them in those two places and that the appellant knew of the articles being there because he managed to follow the murderer and so came to know where the murderer had put them. One must not forget in this connection that the appellant was seen a few paces behind the deceased going in the same direction very near the scene of the occurrence just before the murder was committed. We have stated above that because the confession is not correct in every particular we are not forced to disregard it altogether. The learned Sessions Judge has acquitted the appellant on the ground that his impression was that the confession did not contain that ring of truth throughout which would entitle him to rely upon it in spite of the evidence of the recovery of the articles, that the recovery of the articles was not by itself sufficient to support a conviction and finally because he thought that the deceased may have been a woman of loose morals as alleged by the accused and might therefore have been murdered for this reason by a person other than the accused. This allegation of loose morals was not made by the accused until he made a statement in the Sessions Court and in view of the fact that *Mst.* Tirbeni, the daughter of the deceased *Mst.* Shyama, is 30 years of age, *Mst.* Shyama must have been about 50, so it was not probable that she was of loose morals at that age.

The learned Judge, however, thinks that because the "*lahanga*" of the deceased was found separate from her body and she was almost naked when the corpse was taken out of the well one could infer that suggestion of the accused was correct. We need only say here that the place where the murder was committed was about 40 paces from the well where the corpse was recovered and the "*lahanga*" was recovered ten paces from the well. Had she been found by someone in a compromising position that could only have been where the "*lahanga*" was found ten paces from the well and there would have been no blood 40 paces from the well. It appears to us that the "*lahanga*" fell off after the corpse had been dragged some distance away and head constable, Hashmuddin, who inspected the locality found marks of something having been dragged from the place 40 paces from the well right up to the well. We have therefore no difficulty in finding that the theory of the woman being of bad character and found by someone in a compromising position is entirely untenable. Taking the cumulative effect of all the evidence which we have described we come to the conclusion that the prosecution has succeeded in proving the guilt of the accused and we therefore setting aside the order of acquitted passed by the Sessions Judge allow the Govt. appeal, and finding the accused guilty of murder under s. 302, I. P. C., sentence him to death and order the sentence to be carried out according to law.

S. *Appeal allowed.*

LAHORE HIGH COURT

Criminal Revisions Nos. 1256, 1257, 1258, and 1299 of 1940

November 19, 1940

SKEMP, J.

SAFDAR ALI SHAH—CONVICT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), ss. 114 (b), 133, 25—Accomplice—Corroboration in material particulars—Nature of corroboration—Circumstantial corroboration, if sufficient—Admissions not amounting to confessions, whether excluded by s. 25.

It is firmly established both in England and in India that in practice an accomplice must be corroborated in material particulars before the accused can be convicted. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

Held, on facts that the statement of accomplice about the acceptance of the bribe by the Sub-Inspector of Police to hush up the murder, being circumstantially corroborated, the offence was proved. *Rex* v. *Baskerville* (2), *Reg* v. *Mullins* (3), 103 Ind. Cas. 49 (4) and 106 Ind. Cas. 721 (5), relied on.

Under s. 25, Evi. Act only confessions are excluded and not admissions not amounting to confessions.

The accused, a Police Sub-Inspector, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount;

Held, that the statement as to acceptance of bribe being confession was inadmissible under s. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up being admission was admissible.

C. Rs. from the order of the Sessions Judge, Gurdaspur, dated June 22, 1940.

Mian *Abdul Aziz*, for the Petitioner.

Mr. *Karam Chand Jain*, Public Prosecutor, Gurdaspur for the Advocate-General, for the Crown.

Order.—This judgment will dispose of Criminal Revisions Nos. 1256, 1257, 1258 and 1299 of 1940. They have arisen from cases in which the findings are as follows: In village Ghuman, Police Station Dera Baba Nanak District Gurdaspur, there lived five brothers named Santa Singh, Banta Singh, Fauja Singh, Saudagar Singh and Ujagar Singh. Of these brothers, Fauja Singh alone was married to a woman named Viro. On October 3, 1939, Santa Singh and Banta Singh quarrelled, either about cotton or about *Mst.* Viro, and Santa Singh killed Banta Singh, with a blow on the head with a *dang*. The family and their fellow villagers wished to hush up the affair and gave out that Banta Singh had died from natural causes. This came to the ears of Safdar Ali Shah, Assistant Sub-Inspector, Police Station, Dera Baba Nanak, who was temporarily in charge of the *thana* during the absence of his superior officer on casual leave, and he took a bribe of Rs. 85 through Chet Singh *lambardar* of Ghuman in order not to proceed with the case. The body of Banta Singh was than cremated in the presence of Police constables from Dera Baba Nanak. This came to the knowledge of head Constable Siraj Din on October 5, 1939, and on October 6 he reported the matter to the Deputy Superintendent of Police, Gurdaspur, Mr. Boudrie. Under Mr. Boudrie's orders the matter was investigated by the District Inspector, Sardar Ganga Singh, and a formal first report was made on October 10, Santa Singh was convicted under s. 304, I. P. C. for the homicide of his brother and sentenced to four years' rigorous imprisonment. He was also convicted under s. 201, I. P. C. for causing evidence of a crime to disappear and sentenced to one year's rigorous imprisonment, Chet Singh *lambardar*, Mohammad Sharif and Ghulam Mohammad constables were convicted under s. 201, Safdar Ali Shah of abetment, and each sentenced to one year's rigorous imprisonment. Safdar Ali Shah was convicted under s. 161, I. P. C. for taking a bribe and sentenced to six months' rigorous imprisonment; Chet Singh was convicted under s. 162 for giving the bribe and under ss. 161/109 of abetting the taking and similarly sentenced to six months' rigorous imprisoment on each count.

On appeal the learned Sessions Judge, it is said following *Nebti Mandal* v. *Emperor* (1), acquitted Santa Singh of the charge under s. 304; he also acquitted Chet Singh under ss. 161/109 and 162. He acquitted Ghulam Mohammad constable but maintained the convictions of the others, that is, Chet Singh and Mohammad Sharif under s. 201; and Safdar Ali Shah under ss. 201/109 and s. 161. He reduced the sentences under ss. 201/109 to six months' rigorous imprisonment, maintaining that under s. 161, the sentences of Safdar Ali Shah to run concurrently. Safdar Ali Shah has presented a petition for revision against each of his convictions though Mian Abdul Aziz (petitions Nos. 1256 and 1257), Chet Singh through Mr. Maurice (No. 1299) and Mohammad Sharif constable through Mr. Wajid Ali Shah (No. 1258). The Crown was represented by Mr. Karam Chand Jain, the learned Public Prosecutor of Gurdaspur District.

As the learned Sessions Judge said, the

(1) 19 Pat. 369; 190 Ind. Cas. 457; A I R 1940 Pat. 289; 41 Cr. L J 910; 7 B R 59; 13 R P 220; 22 P L T 98.

first point to decide is whether Banta Singh died from natural causes or from violence. Of these the Sessions Judge did not rely on *Mst.* Viro nor does Crown Counsel; they both rely on Sain Ditta and Chanda Singh. Sain Ditta who the *chaukidar* of village Ghuman, said in cross-examination that he was maltreated in various ways by the Police. In particular he was kept at the *thana* until he agreed to make a statement as the Police wished. He said that the Inspector threatened to *challan* him if he did not give the true facts and then he changed his first statement which the *lambardar* and others had asked him to make. The trial Magistrate thought that the allegations against the Police made by Sain Ditta and some other witnesses were true, the Sessions Judge did not. Whether they are true or not Sain Ditta was either forced by the Police, to make a statement, or has deposed falsely against the Police, and either way he is not a reliable witness. I must therefore exclude his statement. Chanda Singh, by origin a carpenter of Ghuman, is now a mechanic or mechanical engineer engaged in business in district Jhang. He was staying in Ghuman and says that having heard of Banta Singh's death in a fight he went to see him and saw the head injury. Three days later, at the instance of the Assistant Sub-Inspector, he wrote a *panchyatnama* to the effect that Banta Singh had died of natural causes. This was signed or thumb marked by 36 persons. Fifteen or twenty days later, a constable came for him to Jhang and said that his brother Sundar Singh was being maltreated by the Police and would not be released until Chanda Singh came to Dera Baba Nanak. Accordingly he went and Sundar Singh did complain of maltratment. Sundar Singh has given evidence as a defence witness and stated that he was beaten, one of his teeth broken and that he was kept at the Police Station Dera Baba Nanak for seven days and told that he would not be released till Chanda Singh came.

Chanda Singh has exaggerated. Admittedly, he has only three teeth in his upper jaw and three in the lower jaw and the other teeth "fell off long ago." It was the fourth tooth in the upper jaw which is broken. Clearly not much violence would be required and assuming it to be true that the Police molested Sundar Singh that is not in itself a strong reason for disbelieving Chanda Singh. On the other hand, there is a strong reason for believing Chanda Singh. His wife was ill in Ghuman and died shortly before the *panchayatnama* was written. When the Police sent for him he refused to come, but he was forced to come because he was the only literate man in the village. There are two medical witnesses, Chet Ram a retired compounder and Rattan Singh homeopath both of whom practice at Dera Baba Nanak. Chet Ram carries on a practice with a doctor Megh Raj. On October 3, 1939 about 5-30 P. M. Saudagar Singh (brother of Santa Singh and Banta Singh) and Chet Singh accused came to Chet Ram and told him they wished to take the doctor to Ghuman as one of their men had been hurt. Chet Ram said the doctor could not go as it was evening. At 6 o'clock the same evening the same two men went to Rattan Singh. On his enquiry they told him that 'the patient had got hurt with a *dang* blow from his brother, and had an injury on his head. Rattan Singh refused to go as he had no previous experience of head wounds and thought that it might be a Police case. There was also a dispute about the question of fee—Rattan Singh wanted Rs. 7, Saudagar Singh and Chet Singh offered him Rs. 4-8-0. In cross-examination on behalf of the accused it transpired that Dr. Rattan Singh had visied Ghuman twice or thrice during the last two years to see a woman of the carpenter class (apparently the wife of Chanda Singh). On each of those occasions he was taken to Ghuman by Saudagar Singh. That is obviously why Saudagar Singh and Chet Singh went to him on this occasion. No reason has been shown for not believing either of these witnesses.

There is also circumstantial evidence, The witnesses say that Banta Singh was laid on a bed with a quilt below him and a quilt on top of him. On October 10, 1939 a charpoy and two quilts were found in the joint house of the brothers in the presence of three witnesses which were proved by serological examination to be stained with human blood. In particular the bed was stained towards the head. This is strong circumstantial corroboration that Banta Singh was killed. So is the *panchyatnama* executed at the instance of Safdar Ali Shah. If Safdar Ali Shah were acting *bona fide* he only needed to report that he had inquired into the rumours about Banta Singh's death and found them unfounded. Secondly, if a *panchyatnama* were written at all why should he not write it himself instead of forcing a villager to do so? Clearly because Safdar Ali Shah wished it to appear that this document came from the villagers themselves. Relying on the statements of Chanda Singh, Chet Ram, Dr. Rattan Singh

together with the bloodstained articles and the curious circumstances surrounding the *panchayatnama* I regard it as proved that Banta Singh died by violence.

The next point is the payment of the bribe. Sardar Shah, a Police constable, was sent from Dera Baba Nanak in company of one Kaka Ram *alias* Narindar Nath in a tonga to Ghuman to fetch Chet Singh, *lambardar*. At Dera Baba Nanak at Safdar Ali Shah's house Chet Singh paid Rs. 85 to Safdar Ali Shah. Narindar Nath says that late at night, on October 3, one Bela Singh, *lambardar* of the neighbouring village of Kotha, told him that Santa Singh had murdered Banta Singh with a *dang* and asked him to get the matter hushed up. Narindar Nath accompanied Chet Singh to the house of Safdar Ali Shah and during the night told him what had happened: Safdar Ali Shah asked for Rs. 500 and the matter was settled at Rs. 100. Narindar Nath then went back to Ghuman, leaving Chet Singh at Safdar Ali Shah's house. On October 5, Sardar Shah, constable, came for Narindar Nath and Safdar Ali Shah sent him to fetch Chet Singh. Chet Singh paid Rs. 85 in the presence of Narindar Nath and Sardar Shah to Safdar Ali Shah. The learned Sessions Judge did not rely on these witnesses because they were accomplices. He said:

"The learned Public Prosecutor has himself conceded what is evident from the tenor of Narindra Nath's evidence, namely that Narindra Nath is a tout; in other words, he is an accomplice of the appellant. Moreover, a perusal of his statement shows that it will be unsafe to rely upon him. Another witness to the payment of the bribe is Sardar Shah but, as held above, I also consider him to be an unreliable witness."

Above the learned Sessions Judge had said the evidence points to the conclusion that Sardar Shah was an accomplice of the appellants. I asked the learned Public Prosecutor what he meant by 'tout' and he admitted that the expression was unfortunate. There is no evidence whatever that Narindar Nath was a tout in the sense in which the word is usually understood, that is that he solicited the bribe on behalf of the Assistant Sub-Inspector. That both he and Sardar Shah were accomplices there is no manner of doubt. The Sessions Judge wrote as if he thought that an accomplice could not be believed; but the matter is not quite so simple as that. The statute law in this country is contained in s. 133, Evi. Act, which states:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

And in s. 114 (*b*) 'that an accomplice is unworthy of credit unless he is corroborated in material particulars.' It is now firmly established both in England and in this country that in practice an accomplice must be corroborated in material particulars before the accused can be convicted. The most authoritative case is *Rex* v. *Baskerville* (2) a judgment of the Court of appeal presided over by Lord Reading as Lord Chief Justice. Lord Reading quoted with approval the dictum of Mulla, J. in *Reg.* v. *Mullins* (3):

"Confirmation does not mean that there should be independent evidence of that which an accomplice, relates, or his testimony would be unnecessary. Confirmation might be circumstantial, *e.g.*, where a prisoner was indicted for receiving stolen sheep and a quantity of mutton was found in his house corresponding in size with the stolen sheep."

The judgment said (p. 667*):

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

Rex v. *Baskerville* (2) has been repeatedly followed in India, *e. g.*, *Barkati* v. *Emperor* (4) at p. 589 and *Ram Prasad* v. *Emperor*, 106 Ind. Cas. 721 (5). The learned Public Prosecutor drew my attention to *Deonandan Pershad Singh* v. *Emperor* (6) where a Police Officer had demanded and received a bribe and the principal witnesses were those who had paid the bribe. A Bench of the Calcutta High Court held that the circumstances were possibly such as to justify an exceptional treatment, *i. e.* to justify a conviction on their uncorroborated testimony:

"They are certainly such that a much slighter degree of corroboration is needed to establish their credit than would be the case if they were entirely voluntary accomplices in the offences which they speak to."

Having read the evidence of Narindar Nath and Sardar Shah, I believe it. Their stories are so detailed and so consistent that they bring conviction to the mind. In this case, of course, there is no question as to the identity of the accused. There is further corroboration in a promissory note Ex. P-10 whereby Ujagar Singh and

(2) (1916) 2 K B 658; 86 L J K B 28; 115 L T 453; 80 J P 446; 25 Cox C C 524; 60 S J 696.
(3) (1848) 3 Cox C C 526.
(4) A I R 1927 Lah. 581 (589); 103 Ind. Cas. 49; 28 Cr. L J 625; 8 A I Cr. R 273.
(5) 106 Ind. Cas. 721; A I R 1927 Oudh 369; 29 Cr. L J 129; 2 Luck. 631; 1 Luck. Cas. 339; 8 A I Cr. R 449
(6) 33 C 649; 3 Cr. L J 452; 10 C W N 669.

* Page of (1916) 2 K B—[*Ed.*]

Fauja Singh on October 4, the very day after their brother's death, borrowed Rs. 140 from Atma Singh. The promissory note significantly and unusually gives the object of the loan as the purchase of bullocks. It is unlikely that men would borrow money for the purchase of bullocks a day after their brother's death. Atma Singh was not called, but the execution of the promissory note and the payment of the money was proved by the scribe Budha Mal. In defence, it was proved that one bullock was bought for Rs. 28 for which a receipt was given. There was also evidence that another bullock was purchased for Rs. 80 there being no receipt; this evidence was disbelieved by both the Courts below and I have not been asked to believe it. Siraj Din, the *moharrir*, head constable at Dera Baba Nanak, was informed on October 5, by Ali Ahmad, constable, that two brothers had fought and one had killed the other with a *dang*. By Siraj Din's orders Ali Ahmed informed the Assistant Sub-Inspector, Safdar Ali Shah, who heard the story in Siraj Din's presence at the Police Station. Subsequently, Safdar Ali Shah sent for Siraj Din to his house and there told him that the information was correct and that the people had seen him at noon that day, forced Rs. 80 on him and asked him to hush the matter up. Siraj Din said that the matter could not be hushed up and recommended him to go to the Superintendent of Police or the Deputy Superintendent of Police. Safdar Ali Shah left the Police Station and went to Ghuman returning the following night, but recording his return at 9 A. M, the following morning. He wrote a report Ex. PP to the effect that Banta Singh had died of natural causes and there were no grounds for suspecting any body. At 7 A. M., on October 6, Siraj Din had an interview with Safdar Ali Shah who said he had settled the matter and brought written statements of the witnesses, Siraj Din determined to report the matter and obtaining leave to go to Batala actually reported to Mr. Boudrie at Gurdaspur. Mr. Boudrie instructed him to put the matter in writing and he made a written report, Ex. P. B, on the afternoon of October 6, which is admissible under s. 153, Evi. Act, to corroborate Siraj Din's evidence in Court. I see no reason for not believing Siraj Din. I particularly enquired from Mr. Abdul Aziz who argued the petition on behalf of Safdar Ali Shah that what motive Siraj Din had for deposing falsely; Mr Abdul Aziz had to reply that though allegations had been made as to enmity, nothing had been definitely proved.

Mr. Abdul Aziz, indeed, made a point that the confession to Siraj Din as to the receipt of Rs. 80 was inadmissible in evidence by virtue of s. 25, Evi. Act. This point, he said, had escaped the attention of all concerned in the lower Courts. This appears to be so and the reason is that the principle underlying s. 25, that the Police are supposed to obtain confessions by improper means, can hardly apply to a confession made by a superior in the force to his subordinate. But the words of the statute are plain and the confession is excluded—only the confession however and not admissions not amounting to a confession such as that Safdar Ali Shah had heard a rumour and that people had approached him and asked him to get the matter hushed up. I cannot rely on the confession in view of s. 25, Evi. Act: but I do rely on the admissions.

It is then proved that Banta Singh died by violence, but the Assistant Sub-Inspector went to the village, got a *panchayatnama* written on behalf of the villagers by a man whose wife had just died; and I believe the evidence of Narindar Nath and Sardar Shah that Chet Singh paid a bribe of Rs. 85 to Safdar Ali Shah. This is accomplice evidence but it is corroborated by the borrowing of Rs. 140 by Banta Singh's brothers on October 4, by the admissions of Safdar Ali Shah to Siraj Din and the immediate action taken by Siraj Din. I think the payment of the bribe to Safdar Ali Shah by Chet Singh is proved. Therefore Safdar Ali Shah is guilty under s. 161 and Chet Singh under s. 162 and ss. 161/109. But the learned Sessions Judge acquitted Chet Singh, there is no appeal by Govt. so I cannot interfere. As to the convictions under s. 201, the homicide was certainly hushed up and the body must have been burned. Chet Singh must have been a party to this and, in all probability, Safdar Ali Shah; but Sain Ditta is the only witness who gives direct evidence as to the burning of Banta Singh's body and as I am not relying upon him, the conviction of Muhammad Sharif cannot be maintained, nor can the convictions of Chet Singh and Safdar Ali Shah for abetment, which rest upon a moral certainty rather than upon legal evidence. The reasons why I have come to conclusions different from those of the learned Sessions Judge is that differing from him I do not rely upon Sain Ditta, whereas I do upon Narindar Nath and

Sardar Shah. The final result is that the conviction of Safdar Ali Shah under s. 161, I. P. C. is maintained and of course the sentence. Safdar Ali Shah must surrender to his bail and serve out his term of imprisonment. The other petition for revision must be accepted and the bail bonds of the petitioners cancelled.

D. *Order accordingly.*

PRIVY COUNCIL

Appeal from the Allahabad High Court

December 4, 1940

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

Maharani HEMANTA KUMARI DEBI AND OTHERS—APPELLANTS

versus

GAURI SHANKER TEWARI AND OTHERS—RESPONDENTS

Hindu Law—Religious endowment — Dedication—Bathing ghat *on banks of Ganges at Benares—Dedication, nature of—Partial or complete — Whether must be complete — Essentials for valid dedication—Prayag or Puthiya* ghat *at Benares — Nature of dedication —Plaintiff held owner of said* ghat *and could restrain defendants from using it for acting as* ghatias *without plaintiff's consent in exercise of profession of* ghatias.

A bating *ghat* on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu Law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a *dharamsala* or a *math*, notwithstanding that it be not dedicated to any particular diety. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu Law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this, from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu Law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also "where the owner retained the property in himself but granted the community or part of the community and easement over it for certain specified purposes." [p. 884, col. 2; p. 885, col. 1]

There is the very broadest distinction between saying that the ownership of a person in a bathing *ghat* is not absolute because it is qualified by the public's right of user for purposes of bathing, and say that the person is not the owner at all, but a mere *mutawalli* in whom nothing vests because his predecessor had dedicated the *ghat* in the full sense of divesting himself completely of all interest therein. Dedication in the full sense known to the Hindu Law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu Law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu Law it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. When the dedication is only partial the property in some parts of India might nonetheless in common parlance be described as *devottar* ; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; the only difference being that it passes with the charge upon it. *St. Mary Newington Vestry* v. *Jacobs* (2), *Harrison* v. *Rutland (Duke)* (3) and *Chairman of Howrah Municipality* v. *Khetra Krishna Mitra* (4), referred to. [p. 885, col. 2.]

The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu ; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular diety that nothing short of complete dedication would be appropriate for a public bathing *ghat*. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication: rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing *ghats* ; though it might be common enough in the case of banks dedicated to the public for bathing purposes : even then the ownership of the banks would be another matter :

Held, that the plaintiff was the owner of the Pryag or Puthiya *ghat* at Benares and permanent injunction could be granted to the plaintiff, restraining the defendants from frequenting the Prayag *ghat*, without the consent of the plaintiff or her successor-in-title, for the purpose of acting as *ghatias* thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of *ghatias*.

Messrs. *C. S. Rewcastle*, *K. C.* and *C. Sidney Smith*, for the Appellants.

Messrs. *J. M. Parikh* and *P. V. Subba Row*, for the Respondents.

Sir George Rankin.—The sanctity which Hindu thought and feeling attribute to the Ganges and the special veneration which its stream commands as it flows past the holy City of Benares (Kashi) are manifested by the temples and bathing *ghats* upon the banks. The efficacy of its waters to wash away every form of sin and pollution, is widely accepted doctrine among the orthodox and brings the Hindu pilgrim in large numbers seeking to acquire

religious merit and advantage. According to evidence given in the present case "Mankarnika, Dasaswamedh, Panch Ganga, Assi and Barna are the *panch tirthas* of Kashi: one who comes to Kashi on pilgrimage has to visit all these five places." In this appeal their Lordships are concerned with a bathing *ghat* which is known as the Pryag or Puthiya *ghat* and which is covered by the name Dasaswamedh—the name of a *mohalla* of the City.

The suit was brought on February 15, 1929, in the Court of the Additional Subordinate Judge of Benares. The plaintiff was Maharani Hemanta Kumari Debi, widow of the last male owner of the Puthiya Raj estate. She claimed to be owner of the *ghat*. She will be referred to as "the plaintiff" notwithstanding that pending this appeal she has by relinquishment accelerated the interest of her husband's reversioners who have been joined with her as appellants to His Majesty in Council. She impleaded six sets of defendants, forteen persons in alleging that they belonged to a class of Brahmins known as *ghatias* and that they and their predecessors, had been allowed by the owners of the *ghat* to sit on different portions of it in order to gain a livelihood by receiving alms and gifts from pilgrim bathers. She complained that the defendants were abusing the permission granted to them, by altering the condition of the steps putting down platforms of earth and wood, erecting canopies and blocking up the free space to the detriment of the utility cleanliness and beauty of the *ghat*. She alleged that the defendants were mere squatters; that she had been willing to allow them to continue to sit on the *ghat* if they would execute written agreements for the proper conduct of the *ghat*; but that they had failed or refused so to do. She asked for relief in different forms—a declaration that she was the owner of the *ghat* and that the defendants had no right to sit on any portion of it; an order of ejectment of the defendants; an order for removal of the various obstructions put up by the defendants; and an injunction restraining the defendants "from using any portion of the said Pryag *ghat* as *ghatias* in any season of the year and from sitting and squatting over the same for the purposes of collecting *dan dakshina* from the bathers."

A number of written statements were filed The defendants numbered 2, 8 and 11 pleaded that they were mere servants of other defendants. The main defence as pleaded on behalf of the rest denied the plaintiff's proprietary right and set up that the *ghatias* were a community whose business and duty it was to assist bathers; that a *ghat* necessarily involved a right on the part of some members of this community to occupy portions of it by the use of seats or platforms of the kind known as *chaukis* or *takhts*; that this right was a form of property heritable and transferable by Hindu Law; that the defendants and their ancestors had been in occupation of definite sites on the *ghat* for hundreds of years; and that they had been guilty of no impropriety. They maintained that a right to occupy sites on the *ghat* by laying out *chaukis* and *takhts* had become vested in them by lost grant prescription or custom.

The learned trial Judge heard more than twenty witnesses and by his judgment (June 25, 1930) came to the conclusion that the plaintiff's ownership of the *ghat* was proved and that she had a right to sue as owner notwithstanding that the *ghat* was dedicated to the use of the public for purposes of bathing. He found that the *ghatias* do not belong to any particular class or community but are called *ghatias* because they sit on the *ghats*. He thought that there was nothing in any Shastra to show that their presence at the *ghat* is indispensable for the performance of religious ceremonies or that a bath in the Ganges would not yield any spiritual benefit unless accompanied by gifts to them. He found that in the case of the plaintiff's *ghat* and neighbouring *ghats* the *ghatias* had sat by leave and licence of the owners. He negatived the existence of any customary right in the defendants and found that at no time had any grant of any interest in the *ghat* been made to them. He further held that they could have no claim by prescription to an exclusive right to occupy any specific portion of a bathing *ghat* dedicated to the use of the public. In the result he found for the plaintiff, but, following a practice which is not to be commended, he contented himself with ordering "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which he was granting save by this reference to prayers in the plaint which might well have been improved by revision.

An appeal to the High Court was taken by a number of the defendants. On

March 27, 1935, it came before a Division Bench, who, in referring it to a Full Bench, recorded an order mentioning that before them it was not in dispute that the plaintiff was owner of the *ghat* or that the defendants or their predecessors had sat on different portions of the *ghat* for generations; also that defendants did not claim any right by virtue of adverse possession but that they did claim a right of property in the *ghat* in respect of their long use of it for the purpose of assisting the bathers. A single judgment was given by the Full Bench (Sulaiman, C. J Bajpai and Ganga Nath, JJ.) on January 3, 1936. The learned Judges maintained the decree of the trial Judge in so far as it directed removal of railings, planks, canopies and other articles of obstruction but discharged the trial Judge's order of ejectment and the injunction granted by him to restrain the defendants from using the *ghat* as *ghatias* or sitting or squatting over the same. They discharged also the declaration made by the trial Judge that the plaintiff was owner of the *ghat*.

The plaintiff upon this appeal complains of these variations and asks that the decree of the trial Judge be restored.

In the view of the learned Judges of the Full Bench the right claimed by the defendants may be divided into two parts: (1) a right to exclusive possession over specific plots of land and to place platforms and canopies over them; (2) the right to minister to the needs of the bathing public and to receive alms and gifts for their services. As regards the first the Full Bench found some difficulty in appreciating the nature of the right claimed but they found that *ghatias* as members of a class have no customary right and that the individual defendants could have no right by custom to exclusive possession of any parts of the *ghat*. The claim to such a right by prescription or lost grant was also held to be bad. The Full Bench considered it to be proved that the *takhts* and canopies had been obstructions leaving little space for passage, injurious to the pavement and dangerous to the public using the *ghat*. In their Lordships' view, the reasons given by the learned Judges in their judgment fully justify their order for removal of the obstructions and their rejection of the defendants' claim to have acquired any rights in this *ghat* whether by custom, prescription or grant. The defendants have not appealed from the High Court's decree.

But the Full Bench set aside the trial Judge's decree of ejectment and the injunction granted by him on the ground that such relief would interfere with the right of "the bathing public" to take to the *ghat* persons who may help in the proper performance of "spiritual ablutions" and ceremonies. It would be inconvenient, in a suit not constituted for the purpose, that an attempt should be made to define with exactness the extent of the user which the public have as of right in this *ghat*. But if it be assumed that any bather may bring with him his own priest or his own friend to assist in ceremonial ablutions, this is not in their Lordships' view a valid reason for refusing to the plaintiff an order in ejectment together with a properly framed injunction. The defendants have been sitting on the *ghat* for the purpose of carrying on their occupation there and have claimed to be entitled to exclusive possession of parts of the *ghat* as a right of property. If the plaintiff's ownership and possession entitle her to relief, then, upon it appearing that the defendants have no such rights as they claim, she is as well entitled to an order that the defendants should remove themselves as to an order for removal of their canopies. They are not persons who come with bathers to the *ghat* but persons who cumber the *ghat* in order to intercept the bathers and who do so continuously habitually and as an occupation or profession. A right to stand, sit or squat on the *ghat* for the purposes of exercising the profession of *ghatias* may be acquired by consent of the plaintiff but as matters stand it is not the right of any of the defendants.

As the rights claimed by the defendants have not been established, it is not clear that they have anything to gain by disputing whether the plaintiff is owner of the *ghat* or is merely the hereditary superintendent of a religious endowment. In either case she would be entitled to maintain a suit in respect of the grievances complained of, and to obtain the same or similar relief. But as the plaintiff sued as owner and as the Full Bench appear to have held that she was a manager or *mutawalli* it is right to consider whether the trial Judge's declaration of the plaintiff's ownership was well founded.

A bathing *ghat* on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu Law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a *dharamsala* or

a *math*, notwithstanding that it be not dedicated to any particular diety. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu Law which involves the complete cession of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs." That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu Law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also as Mr. Mayne in his well-known work was careful to notice "where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes" (Hindu Law and Usage 6th Ed, 1900, s. 438, p. 567). In *Jaggamoni Dasi* v. *Nilmoni Ghosal* (1), the plaintiff's ancestor had built a temple and bathing *ghat*, as well as a room and another *ghat* for use by persons at the point of death. The defendant having used the *ghat* for the landing of goods, Field, J. observed :—

"There is here no deed of endowment and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father in building these temples, this *antorjoli* room and this *ghat* intended to give to the Hindu community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this *ghat* and this *antorjoli* room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, etc."

The judgment of the Full Bench in the present case is open to criticism in respect that it does not take due account of this distinction. Speaking of the tolls collected from shopkeepers on the *ghat* at festivals, the learned Judges, though noticing that no trustee or manager had ever been appointed and that the plaintiff and her predecessors had bought the land, built the masonry steps and had always looked after and repaired the *ghat*, say :—

"The *ghat* having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realised the income of the *ghat* and made repairs as a manager or *mutwalli* and not as absolute proprietor . . The plaintiff is not entitled to a declaration of an absolute proprietary title in the *ghat*, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the *ghat* ceases to be used as such."

Another passage deals with the right of the defendants as follows: –

"The *ghat* having been dedicated to the public the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the right of the public. As already stated, there is no difference in principle between the dedication of a *ghat* to the public and the dedication of a high road."

Now there is the very broadest distinction between saying that the plaintiff's ownership is not absolute because it is qualified by the public's right of user for purposes of bathing, and saying that the plaintiff is not the owner at all, but a mere *mutawalli* in whom nothing vests because her predecessor had dedicated the *ghat* in the full sense of divesting himself completely of all interest therein. When in English Law the owner of land is said to have dedicated it for a highway it is not intended or implied that his right of ownership has been divested. On the contrary if any member of the public exceeds the permitted user a right of action in trespass arises to the dedicator or his successor in title by virtue of his ownership and possession. *St. Mary Newington Vestry* v. *Jacobs* (2) *Harrison* v. *Rutland (Duke)* (3). Dedication in the full sense known to the Hindu Law is a different matter, In the usual case ofcomplete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu Law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu Law.

"It is not essential to a valid dedication that the legal title should pass from the owner nor is it in-

(1) 9 C 75; 11 C L R 502; 7 Ind. Jur. 252.

(2) (1872) L R 7 Q B 47; 41 L J M C 72; 25 L T 300; 20 W R 249.

(3) (1893) 1 Q B 142; 62 L J Q B 117; 4 R 155; 68 L T 35; 41 W R 332.

consistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated."

Chairman of the Howrah Municipality v. *Khetra Krishna Mitra* (4), (*per* Mookerjee, J. at 348). When the dedication is only partial the property in some parts of India might none the less in common parlance be described as *devottar*; but whether it be charged with a sum of money for the worship of an idol or be subject to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way- "the only difference being" as Mr. Mayne observes in the passage already referred to in this judgment "that it passes with the charge upon it." (Hindu Law, and Usage. 6th ed., 1900. sec. 438, p. 567.)

The conclusion of the Full Bench that the plaintiff had only the right of reversion if ever the *ghat* ceases to be used as such appears to have been drawn from the mere fact that the *ghat* was "dedicated to the public." But a review of the history of the *ghat* and the conduct of the plaintiff and her predecessors is required to determine whether the river bank at this spot was dedicated in such sense as to make an end of private ownership therein. The written statements of the defendants set up that

"the land on the bank of the holy River Ganges between the two confluents of Baruna and Assi rivulets in the city of Benares is *waqf* property from time immemorial the same having been dedicated to the Hindu community at large."

The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. Whether the question be limited to the *ghat* in suit or be enlarged by consideration of the evidence about neighbouring *ghats*, it seems to their Lordships that there is no substantial ground for holding that the plaintiff's predecessors or any of them had divested themselves of all property in this *ghat* and had accepted the position of having a mere right of management. No express dedication has been proved by production of a deed of endowment or otherwise. No manager has ever been appointed. Not one instance has been shown in which the plaintiff or any predecessor has purported to act as superintendent, *sebait* or *mutawalli*. On the contrary they have been treated as owners whenever by disrepair the *ghat* has attracted the attention of public authority. They have repaired and substantially improved the *ghat* at their own expense. They have closed it to bathers on proper occasions and have levied tolls on the keepers of shops at festivals. That their expenditure upon the *ghat* has exceeded their receipts and that they would not wish to make a profit from the tolls is probable enough but in no way tends to prove that they have parted with all right as owners of the soil. The evidence as to agreements taken from *ghatias* upon nearby *ghats* is strong to show that in them the proprietors have retained their rights of ownership notwithstanding that the *ghats* are public bathing places. The learned trial Judge very reasonably thought that the evidence was overwhelming to show the plaintiff's proprietary right and their Lordships though bearing well in mind that there was a bathing *ghat* at this spot before the purchase of the plaintiff's predecessor in 1814, think that there is little to support a contrary view. The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular diety that nothing short of complete dedication would be appropriate for a public bathing *ghat*. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication; rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing *ghats*: though it might be common enough in the case of tanks dedicated to the public for bathing purposes: even then the ownership of the banks would be another matter.

Their Lordships are of opinion that the declaration made by the trial Judge as to the plaintiff's ownership as well as his order of ejectment against the defendants was correct. They think that the terms of the permanent injunction to be granted to the plaintiff should restain the defendants from frequenting the Payag *ghat*, without the consent of the plaintiff or her successor-in title, for the purpose of acting as *ghatias*

(4) 4 C L J 343 (348); 33 C 1290; 10 C W N 1044.

thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of *ghatias*.

They will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated January 3, 1936, be set aside and that the decree of the Additional Subordinate Judge of Benares dated June 25, 1930, be restored, with the variation mentioned as to the terms of the permanent injunction. The respondents will pay the costs of the plaintiff in the High Court and of the appellants in this appeal. The appellants must however, pay to the respondents the costs of the application to restore the appeal, which had been dismissed for non-prosecution, as directed by the Order in Council of July 25, 1939, and there must be a set-off as regards these costs.

S. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Douglas Grant* and *Dold*.

Solicitors for the Respondents:—Messrs. *Harold Shephard*.

OUDH CHIEF COURT

Criminal Appeal No. 12 of 1941

March 7, 1941

GHULAM HASAN, J.

RAGHUBAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT

Penal Code (Act XLV of 1860), s. 332—Ingredients of offence under—Constable assaulted while attempting to arrest accused without warrant or authority to do so—No offence under s. 332 — No allegation by constable that he proceeded under s. 54 (1), Criminal Procedure Code (Act V of 1898)—S. 54 (1), Criminal Procedure Code does not apply.

In order to bring the case within the purview of s. 332, I. P. C., it is necessary to establish that the public servant was acting at the time of the assault as such public servant and in the particular matter discharging a duty imposed upon him as such public servant. A constable who had no warrant of arrest in his possession at the time of the assault, nor had he been entrusted with the duty of arresting the accused, cannot be said to have been acting in the discharge of his duty if he intended or wanted to arrest the accused. Where there is no allegation by the constable in his deposition that he proceeded under s. 54 (1), Criminal P. C., s. 54 (1), Criminal P. C., does not apply. *Queen-Empress* v. *Dalip* (1) and 138 Ind. Cas. 844 (3), relied on. 6 Ind. Cas. 7 (1) (2), referred to. [p. 888, col. 2; p. 889, cols. 1 & 2.]

Cr. A. against the order of the Assistant Sessions Judge of Sitapur, dated December 11, 1940.

Mr. *S. D. Misra*, for the Appellants.

Mr. *H. N. Misra*, for Appellants Nos. 2 to 6.

The Assistant Govt. Advocate, for the Crown.

Judgment.—Angne, Sumer, Jangali, Kumar and Maiku, Pasis of village Chaturaia Police Station Mahsoi, District Sitapur, have been convicted by the Assistant Sessions Judge of Sitapur under s. 147 of the I. P. C. and sentenced to one year's rigorous imprisonment. They have also been convicted under s. 332 read with s. 149 of the I. P. C. for assaulting and causing hurt to Basdeo Lal, a constable of Thana Mahsoi, and sentenced to two years' rigorous imprisonment; both sentences to run concurrently. Raghubar Pasi of the same village, who was tried along with the other appellants, and also found guilty under s. 147 and sentenced to one year's rigorous imprisonment. He was found guilty under s. 332 of the I. P. C. as well and since he is a registered member of Criminal Tribes and had certain convictions he was sentenced to seven years' rigorous imprisonment under s. 23 of the Criminal Tribes Act, both sentences to run concurrently.

According to the prosecution it appears that Jangali accused was suspected of an offence under s. 399 of the I. P. C. and was wanted by the Police. Two attempts were made by the Mahsoi Police to effect his arrest, one on June 23, 1940, and the other on June 30, 1940, but they were unsuccessful. On the latter date Basdeo constable, in whose beat village Chaturaia lies was deputed to execute the warrant against Jangali but was unsuccessful. Certain identification proceedings were to be held in connection with the same case under s. 399 of the I. P. C. on July 12, 1940. Basdeo constable was deputed on July 10, 1940, to effect service on seven witnesses of that case. Out of the seven witnesses to be served two of them, namely Ganga Sahai lived in Bilahri and Bhagwan Din lived in village Tatraia while the remaining five lived in village Chaturi. After leaving the Police Station the same day, namely on July 10, 1940 Basdeo constable proceeded to village Rampur and took Gobre brother of the *chaukidar* along with him the *chaukidar* being absent—to village Bilahri and served Ganga Sahai. From there he took one Nakkhar and proceeded to village Tatraia in order to effect service on Bhagwan Din but could not find him. Thereupon

he proceeded to village Chaturi where he effected service on five persons already mentioned. Basdeo constable proceeded back to Tatraia along with the two persons, Nakkhar and Gobre, in order to make another attempt to effect service on Bhagwan Din. While the party was returning to village Chaturi and reached near the grove of Laltu Chamar, situate near village Tatraia, at about sunset the six appellants emerged from the grove and started belabouring the constable with *lathis*. The constable fell down and when a few persons from the neighbouring fields rushed up on hearing the cries, the six appellants fled away. After the assault the constable was removed to village Tatraia where he effected service on Bhagwan Din and then proceeded to village Ramshala in a cart and ultimately reached Police Station Mahsoi in the morning. He made the first information report (Ex. 1) and deposited his turban, *kullah* and shirt at the Police Station. The constable was examined by the Civil Surgeon on July 12, 1940. The constable had received ten injuries on various parts of his body and in the opinion of the Civil Surgeon, they had been caused by a blunt weapon like a *lathi*. The injuries were of a simple character.

The accused denied the charge.

The learned Assistant Sessions Judge relying upon the prosecution evidence found that all the six accused had used force in prosecution of the common object of assaulting the constable and were guilty of rioting under s. 147 of the I. P. C. and s. 332, I. P. C./149, I. P. C. The accused set up the plea of self-defence and produced some evidence in support of it but this was rightly rejected by the learned Assistant Sessions Judge.

The first question that falls to be determined is whether the prosecution has succeeded in establishing the offence under s. 332 of the I. P. C. against the accused.

Basdeo constable (P. W. No. 1) admits in his evidence that if the accused had not beaten him, he would have arrested Jangali accused as he was wanted in the s 399 case. P. W. No. 1 further states that when he reached the grove on seeing Jangali he asked his companions to come quietly with him as he would arrest Jangali.

P. W. No. 2 Gobre, his companion, states that

"when we reached near the grove, we saw Jangali in the grove. The constable told me that he would arrest Jangali. Constable had a *danda* and we two were armed with *lathis*."

P. W. No. 3 Nakkhar, another companion, also states:—

"We saw Jangali and other accused coming out. The constable told us to arrest Jangali accused."

Similarly P. W. No. 10 Mata Din states that Basdeo told him that he had come to arrest Jangali and to effect service on witnesses.

A reference to the evidence of Abdul Hamid Khan, constable, (P. W. No. 8), shows that Basdeo constable was merely asked to effect service of bonds on witnesses and he was not given any warrant for arrest nor was he directed to effect any arrest.

The above evidence in my opinion is sufficient to show that as soon as Basdeo saw Jangali in the grove, he at once showed a determination to arrest Jangali accused but before he could do so he was evidently overpowered by the appellants. The learned Assistant Sessions Judge has not referred to this portion of the prosecution evidence in the judgment. He, however, states that

"it is in the evidence of the constable that at the time of assault the accused persons were saying that they would beat him in a way so as to make him incapable of doing *pairvi* in s. 399 case. Under these circumstances it is reasonable to infer that the six accused assaulted the constable with the intention that he may be deterred from performing his duty as a public servant. In my opinion all the ingredients of s. 332 of the I. P. C. have been established."

This important fact, however, does not find a place in the first information report, which was given by the constable himself. Having considered the evidence carefully, I am satisfied that the prosecution has failed to establish the necessary ingredients of the offence under s. 332 of the I. P. C. Section 332 of the I. P. C. requires that the public servant must be acting in the discharge of his duty as such public servant at the time of the assault. To my mind it is quite clear from the evidence that Basdeo cannot be said to have been acting in the discharge of his duty if he intended or wanted to arrest Jangali when he was beaten. The constable had no warrant of arrest in his possession at the time of the assault, nor had he been entrusted with the duty of arresting Jangali at the time when the assault was made upon him. As a matter of fact he had been charged with the duty of serving notices on the witnesses in the various villages mentioned above. In order to bring the case within the purview of s. 332, it is necessary to establish that the public servant must be acting at the time as such public servant and

in the particular matter discharging a duty imposed upon him as such public servant. In *Queen-Empress* v. *Dalip* (I. L. R. 18 All. 246) 1) it was held that the words "in the discharge of his duty as such public servant" in the earlier portion of s. 332 of the I. P. C. mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. In this case a warrant issued by a Magistrate for the arrest of an accused under s. 114 of the Criminal P. C. was sent to a certain *thana* for execution. It was copied at the *thana* into a book kept for the purpose and made over to a particular constable for execution. After the departure of the constable it was discovered that the accused lived in a village other than that where he was supposed to be. The officer temporarily in charge of the *thana* made a copy from the book at the *thana*, endorsed on the back the names of certain other constables and having signed the endorsement, sent them with this paper to arrest the accused. The constables arrested the accused, but as they were returning with him in custody, some of the friends of the accused, aided by the accused himself, attacked them, rescued the accused and caused hurt to the Police. It was held that the Police Officers concerned in arresting the accused under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of s. 332 of the I. P. C. so as to render the accused liable to conviction under that section; but, inasmuch as they were acting in good faith under the colour of their office, s. 99 of the I. P. C. applied and the accused and his associates might be properly convicted under ss. 147 and 323 of the I. P. C.

I am not aware whether the principle enunciated by Sir John Edge, C. J. and Mr. Justice Burkitt in the above decision has been departed from in any reported case. The above case was referred to *In re Mahomed Yakoob* (VII Madras Law Times Reports, 386 (1,) (2) and was distinguished on the facts.

Reference has been made by the learned Assistant Govt. Advocate to s. 54 and in particular upon the first, 3rd and 9th clauses of s. 54 of the Criminal P. C, and it has been argued that it was open to the constable to have arrested Jangali accused without a warrant by virtue of the powers conferred upon a Police Officer under this section. These clauses have clearly no application. The third clause applies to a case where the person has been proclaimed as an offender either under this Code or by order of the provincial Govt. As regards the 9th clause there is no case of requisition having been received from another Police Officer for the arrest of Jangali accused. As regards the first clause, it is perfectly clear from the evidence that Basdeo did not act under s. 54 of the Criminal P. C. He did not state that he wanted to arrest Jangali accused because he had been concerned in any cognizable offence or on account of the fact that a reasonable complaint had been made against him or credible information had been received by him, or any reasonable suspicion existed of Jangali having been concerned in any such cognizable offence. It appears that he did not act on account of the existence of any reasonable suspicion or belief in his mind against Jangali accused about his having been concerned in any cognizable offence. Since the constable had failed to effect the arrest of Jangali accused on a previous occasion he presumably purported to have acted under cover of the old warrant which admittedly was not in his possession. In any case it cannot be said from the facts of the present case that Basdeo acted *suo motu* in exercise of his powers under s. 54 of the Criminal P. C. In *Kartik Chandra Maity* v. *Emperor* (A. I. R. 1932 Patna, 171) (3) it was held that :

"If a constable in effecting an arrest specifies a certain power which proves to be wanting, resistence to him or escape from his custody constitutes no offence. Where the constable purports to act under a warrant which is found to be invalid, and where there is no allegation by the constable in his deposition that he proceeded under s. 54 (1), s. 54 (1) does not apply."

It was further observed :

"To hold that s. 54 applies in such cases without any intimation to the accused, and without any allegation by the constable in his deposition that he proceeded under the section would be to nullify several salutary provisions contained in Part. B, Ch. VI, Criminal P. C. relating to the execution of warrants of arrest."

In this view of the matter the convictions of the appellants under s. 332-149 cannot be upheld and must be set aside.

(1) 18 A 246; A W N 1896, 48.
(2) 7 M L T 386 (1); 6 Ind. Cas. 7 (1); (1910) M W N 579.
(3) A I R 1932 Pat. 171; 138 Ind. Cas. 844; 13 P L T 135; (1932) Cr. Cas. 347; 33 Cr. L J 706; Ind. Rul. (1932) Pat. 190.

I am, however, of opinion that the assault on the constable was not justified and the appellants had no justification whatever to cause bodily injuries to him. The appellants are, therefore, punishable for the rioting which they committed with the common object of assaulting the constable and for further causing him bodily injuries. I maintain the convictions of the appellants under s. 147 of the I. P. C. but reduce their sentences to six months' rigorous imprisonment under that section. I further convict them under ss. 323-149 of the I. P. C. and six months' rigorous imprisonment is awarded to them under these sections. The sentences under the two sections shall run concurrently.

The learned Assistant Sessions Judge has distinguished the case of Raghubar from the other appellants on the ground that there was a previous conviction against him and that he was liable to the minimum punishment of seven years' rigorous imprisonment under s. 23 (1) (*a*) of the Criminal Tribes Act (VI of 1924). As I have acquitted Raghubar of the offence under s. 332 of the I. P. C. and convicted him of an offence under s. 323 only, s. 23 of the Criminal Tribes Act will no longer be applicable. Section 23 (1) (*a*) of the Criminal Tribes Act lays down :

"Whoever, being a member of any criminal tribe and having been convicted of any of the offences under the I. P. C. specified in Sch. I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished,

(*a*) on a second conviction, with imprisonment for a term of not less than seven years....."

Raghubar was previously convicted twice under s. 457 and once under s. 379 of the I. P. C. His present conviction does not fall under any of those sections nor under any of the other offences enumerated in Sch. I appended to the Criminal Tribes Act.

The result, therefore, is that the appeal is partly allowed, the convictions of the appellants under s. 147 are maintained but the sentences are reduced to six months' rigorous imprisonment. The convictions under ss. 332-149 of the I. P. C. are set aside and the appellants are convicted in lieu thereof of an offence under ss. 323-149 of the I. P. C. and sentenced to a period of six months. The sentences under ss. 147 and 323 of the I. P. C. shall run concurrently. The conviction and sentence of Raghubar under s. 332 of the I. P. C. read with s. 23 of the Criminal Tribes Act are set aside.

S. *Appeal partly allowed.*

PRIVY COUNCIL

Appeal from the Patna High Court

December 2, 1910

LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN

THE JAGADAMBA LOAN CO., LTD.—APPELLANTS

versus

Raja SHIBA PRASAD SINGH AND OTHERS —RESPONDENTS

Lessor and lessee—Mortgage by lessee of lease-hold property—Privity of estate or privity of contract between mortgagee and lessor, if exists—Mortgagee entering into possession—Effect—Liability of mortgagee for rent and royalty due from lessor.

In case of a mortgage of a lease-hold property by the lessee the interest taken by the mortgagee is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate. No privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term. There is no privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee.

Hence the mortgagee of the lease-hold property is not liable to the lessor for the rents and royalties due by the lessor from the lessee. 179 Ind. Cas. 328 (1), referred to.

Mr. *J. M. Pringle*, for the Appellants.

Messrs. *C. S. Rewcastle*, *K. C.* and *R. K. Handoo*, for the Respondents.

Sir George Rankin.—The controversy in this case has reference to 650 *bighas* of coal land in *Mouza* Jinagara in the District of Manbhum in Bihar. In these, the appellants, the Jagadamba Loan Company, Limited, are mortgagees of certain lease-hold interests which were granted by the Jharia Raj as *zemindar* to one Charles Smith upon the terms of two *kabulyats* dated April 24, 1907. By one of these instruments Charles Smith took settlement of the surface rights for 999 years at an annual rent of Rs. 650: by the other the sub-soil rights were settled with him for the same period upon certain terms as to payment of royalty which need not here be set out. The rent for the surface rights

was secured by a provision that

"the lease-hold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge."

As regards the sub-soil rights the provision was

"that for the amount of royalty the leasehold land and the machineries remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land."

The appellants' mortgage is dated February 4, 1920. It was executed by the leasee Charles Smith. It recited that several subleases had in the meantime been granted by him one being in favour of the Jinagara Coal Company, Limited. It provided that the appellants should from time to time make advances upon a cash credit loan account and that Charles Smith the mortgagor should repay the same with certain interest on February 4, 1923. Subject to a proviso for redemption it conveyed to the appellants all the estate and interest of the mortgagor including his right to rent and royalties from sub-leases. The mortgagor covenanted that during the subsistence of the security he would pay all rents, royalties, taxes, etc. and observe the covenants of the head leases. In case of the mortgagor's default in payment of the principal and interest when due the appellants were to be entitled to enter into possession of the mortgaged premises and receive the rents, issues and profits thereof, and in case of the mortgagor's default in payment of the rents, royalties or taxes due in respect of the lands the appellants were to be at liberty to enter into possession without being accountable as a mortgagee in possession.

It is agreed that the appellants eventually collected certain rents and profits from sub-lessees of Charles Smith and in this sense entered into possession; but the dates and other particulars of the appellant's action do not appear from the record submitted to the Board. It is not suggested that the appellants at any time paid rent to the Jharia Raj in respect of the leasehold interests in mortgage to them.

The suit out of which this appeal arises was brought in the Court of the Subordinate Judge at Dhanbad on April 20, 1928. It was brought on behalf of the Raj as lessor against Charles Smith (the first defendant) as lessee and certain other parties as sub-lessees. The appellants were not originally impleaded: they were added as parties on January 4, 1929, but took no steps to contest the suit until after it had resulted in a sale as hereafter mentioned. The plaint claimed large sums as due to the Raj for rent and royalty in arrear in respect of the 650 *bighas*, prayed that an account of the raisings of coal should be had to ascertain the sums due for royalty, claimed that the arrears were a first charge on the leasehold properties, and asked for enforcement of the charge by sale. Certain accounts having been taken as directed by the trial Judge on June 14, 1929, a preliminary decree for sale was made on December 9, 1929, and a final decree on August 30, 1930. The sale took place on June 25, 1931. After setting off the sale proceeds against the amount due to the Raj, a large sum remained due and unpaid, and on June 23, 1934, application was made on behalf of the Raj under O. XXXIV, r. 6, of the Civil P. C. for a personal decree for the deficiency against the estate of Charles Smith the lessee (who had died pending suit), against one of his sub-lessees, and against the appellants. The deficiency was said to amount to a lac of rupees.

This claim was resisted by the appellants who lodged an objection dated July 28, 1934, maintaining that between themselves and the Raj as lessors there was neither privity of contract nor of estate.

The learned Subordinate Judge on December 6, 1934, upheld the objection and refused to make a personal decree against the appellants, but on appeal the High Court at Patna (Terrell, C. J. and Fazl Ali, J.) reversed his decision and passed a decree on February 18, 1938, against the appellants for the sums due to the Raj for rent and royalties in respect of the six years before suit.

From this decree an appeal has now been brought to His Majesty in Council. The appellants, as a new ground of objection in addition to those previously insisted on, have relied upon the fact that the plaintiffs agreed to exclude from the sale the interest of certain sub-lessees, and say that in any case the property which was included in the decree for sale was neither "the mortgaged property nor a sufficient part thereof" within the meaning of r. 5 (3) of O. XXXIV. Whether upon this new ground the appellants could resist a personal decree for the deficiency under r. 6, of that order, is, however, a question which their Lordships do not find it necessary to discuss or decide.

Since the decision of the High Court in this case, the position of a mortgagee of leaseholds has been considered by the Board in *Ram Kinkar Banerjee* v. *Satya*

Charan Srimani (1). It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor: hence the interest taken by the mortgagee is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate. In that case, however, the mortgagees had not entered into possession of the properties mortgaged.

In the present case no question arises of novation by reason of the appellants having paid rent to the Raj or otherwise. Their Lordships have, however, to consider whether the appellants have become liable for the rents and royalities by reason of their entry into possession of the mortgaged property. They are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term.

The High Court were of opinion that the appellants were liable by reason of privity of contract and in support of this view cited Dallas, C. J. in *Williams* v. *Bosanquet* (2).

"and even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: it is, therefore, a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants."

Before relying upon this dictum it would be necessary to enquire whether the principle which it expresses has been accepted in the Law of England and how it consists with the doctrine, generally accepted, that the assignee's liability to the lessor can be brought to an end by his assigning the premises over to another. But in their Lordships' view the principle of the decision in *Ram Kinkar Banerjee's case* (1), *(supra)* is inconsistent with there being privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. It would be somewhat remarkable if the lease in *Ram Kinkar's case* (1), was not thought to be one in which "the contract is with the lessee and his assigns"; yet no suggestion is to be discovered to the effect that the mortgagees were liable by privity of contract. Their Lordships are of opinion that the principle of that decision is equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the present.

They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court dated February 18, 1938, set aside and that of the Subordinate Judge dated December 6, 1934, restored. The first respondent will pay the appellants costs in the High Court and of this appeal.

S. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Hy. S. L. Polak & Co.*

Solicitors for the Respondents.—Messrs. *Douglas Grant & Dold.*

(1) 66 I A 50; 179 Ind. Cas. 328; A I R 1939 P C 14; 43 C W N 281; 49 L W 229; 1939 O L R 46; 5 B R 255; 11 R P C 134; 1939 O W N 43, 1939 R D 144; (1939) 1 M L J 544; 69 C L J 254; I L R (1939) 1 Cal. 263; 41 Bom. L R 6.2; (1939) M W N 601 (P C).

(2) (1819) 1 Br. & B 238 (263); 3 Moore 500; 21 R R 585.

OUDH CHIEF COURT

Civil Revision Application No. 22 of 1941

February 19, 1941

BENNETT, J.

RAM PADARATH MISIR AND OTHERS—DEFENDANTS—APPLICANTS

versus

DATA DIN MISIR AND OTHERS—PLAINTIFFS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Order allowing application to withdraw suit with liberty to bring fresh suit—Whether appealable—Revision, if lies—Omission to plead alternative case or implead party, if 'formal defects'—Failure to produce documents at proper time, whether "sufficient ground."

No appeal lies against an order allowing an application under r. 1 of O. XXIII, Civil P. C., for permission to withdraw the suit with liberty to sue afresh. An application in revision, however, lies against such an order where the Court has been guilty of material irregularity in passing the order. [p. 893, col. 1; p. 894, col. 2.]

[Case-law referred to.]

An omission to put forward an alternative case or to implead certain parties is not a formal defect. The failure to produce documents at the proper time is not a sufficient ground within the meaning of r. 1 of O. XXIII, Civil P. C, and in permitting the plaintiff to withdraw the suit with liberty to sue afresh on these grounds the Court acts with material irregularity and its order can be revised. [p. 896, col. 1.]

C. R. App. of the order of the Civil Judge of Fyzabad, dated October 8, 1937.

Mr. *Akhlaque Husain*, for the Applicants.

Mr. *Salik Ram*, for the Respondents.

Order.—This is a second civil appeal against the judgment and decree passed by the learned Civil Judge of Fyzabad on October 8, 1937, setting aside a decree passed by the Munsif Havali, Fyzabad, on May 11, 1937.

The Munsif dismissed the suit. In first appeal the Civil Judge allowed the application of the plaintiffs under r. 1 of O. XXIII of the Civil P. C., for permission to withdraw the suit with liberty to sue a fresh. The defendants, that is the present appellants, were given their costs. The reason for allowing the application is given in the following sentence of the Civil Judge's order :—

"In the interest of justice I allow the application as there seems formal defects in the plaint as alleged in the application."

The first question which arises is whether an appeal lies against this order. The learned Counsel for the appellants concedes that no appeal would ordinarily lie, but he points out that a decree was passed by the Civil Judge setting aside the decree passed by the Munsif and he explains that it was on this account that an appeal was preferred. It is asked in the memorandum of appeal that if a second appeal does not lie the appeal may be treated as an application for revision under s. 115 of the Civil P. C.

Learned Counsel for the respondents contends that an application in revision does not lie and he bases this contention mainly on two cases of the Allahabad High Court.

In *Jhukku Lal* v. *Bisheshar Das*, (I. L. R. 40 All 612) (1) it was held in somewhat similar circumstances (though permission to withdraw was given by the trial Court after the evidence had concluded in this case) that the Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the Court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application was not sufficient to bring the case within the purview of s. 115.

In *Chandrika Lal* v. *Sami Nath*, (I. L. R. 50 All. 835) (2) it was held that where a Court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, the Court was within its jurisdiction, and that the High Court should not interfere.

On the other hand the learned Counsel for the appellants has cited rulings both of the Allahabad and of other High Courts which show that in certain circumstances an application in revision lies.

In *Rahmat Ullah* v. *Dharam Singh*, (20 A. L. J. R. 90) (3) it was held by the Allahabad High Court in revision that where after remand of a suit by the Appellate Court, the plaintiff applied for permission to withdraw the suit "for some reasons and defects", with liberty to bring a fresh suit, but no reasons were assigned or defects specified, and the only order passed by the Court was "allowed" the Court had not exercised its jurisdiction as required by law, and the order was set aside.

Again in *Raghubir Das* v. *Sital Prasad*, (A. I. R. 1935 All. 740) (4) it was said that while the High Court is very reluctant to interfere in revision with orders passed under O. XXIII, r. 1, the reluctance has been in every case to interfere with the discretion of the Court. Where the Court has not observed the rule and has not had before it the considerations by which it ought to be guided it is certainly proper to exercise the revisional powers of the High Court.

In *Bai Kashibai* v. *Shidapa Annapa* (I L. R. 37 Bom 682) (5) after the case for both the plaintiff and the defendant had been closed and all their witnesses had been examined, the Court gave time to the plaintiff to adduce documents to counteract the effect of the documents already produced by the defendant. On the plaintiff's inability to adduce the documents on the appointed day, he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court passed an order granting leave. It was held that the Court had acted with material irregularity in the exercise of its jurisdiction. The hearing had finished and it was improper to allow the plaintiff to try and produce documents to counteract the defendant's documents. The plaintiff's failure to produce the documents was not a sufficient ground to put the defendant

(1) 40 A 612; 46 Ind. Cas. 71; 16 A L J 495.
(2) 50 A 835; 115 Ind. Cas. 124; A I R 1929 All. 133; 26 A L J 774.
(3) 20 A L J 90; 64 Ind. Cas. 948; A I R 1922 All. 185 (1).
(4) A I R 1935 All. 740; 157 Ind. Cas. 673; (1935) A L J 983; 1935 A L R 851; A W R 1935, 924.
(5) 37 B 682; 21 Ind. Cas. 23; 15 Bom. L R 823.

to the trouble and annoyance of a fresh suit.

In *Haridas Sadhu Khan* v. *Giridhari Sadhu Khan*, (A. I. R. 1934 Cal. 59) (6) an order of Subordinate Judge was set aside where the provisions of O. XXIII, r. 1 had not been satisfied. In this case the defects alleged were that certain necessary parties were not impleaded and certain properties were not included in the claim. It was held that these were not formal defects and that there was no reason, therefore, why the suit should fail by reason of any formal defects, nor was there any other sufficient reason for a fresh suit.

In an earlier case of the Calcutta High Court *Moti Lal Dutt* v. *Kali Das Bhattacharji*, (A. I. R. 1931 Cal. 107) (7) it was said that the power given to the Court to give permission to withdraw a suit has to be governed by certain considerations, and if it appears that those considerations were not present, it must be held that the order was passed without jurisdiction in the sense that it had exercised its power in the wrong exercise of jurisdiction or at at any rate it was a material irregularity.

It was also said that permission should not ordinarily be given so as to cause much harassment to the opposite party. It should only be given when the Court is satisfied that the defect is not for any fault of the plaintiff but for discovery of certain facts which renders the suit in its present shape defective. After having lost a party cannot ordinarily be permitted to withdraw with liberty to bring a fresh suit unless the Court is absolutely satisfied that the failure of the plaintiff was due to certain defects which were not known to him at the time of the institution or the trial of the suit. Although an order granting permission in circumstances which did not justify such permission is not an order totally without jurisdiction, it is not one which can be supported as it is vitiated by material irregularity.

Lastly it was held by this Court in *Bidya Dhar* v. *Kapurthala Estate* (A. I. R. 1935 Oudh 495) (8) that the failure of the plaintiff to produce documents at the proper time or any other default on his part in properly prosecuting the suit cannot be regarded as a sufficient ground within the meaning of O. XXIII, r. 1, and that where in the absence of sufficient grounds the Court allows a suit to be withdrawn with liberty to bring a fresh suit, it acts with material irregularity in the exercise of its jurisdiction and its order is open to revision.

It will appear, therefore, that in certain circumstances an application in revision lies against an order passed by a Court under O. XXIII, r. 1 and that it is necessary to see whether the Court has been guilty of material irregularity in passing the order.

I come now to the facts of the present case. The suit was brought for possession of 7 *biswas* of land situated in village Sindhaura Mohal Pirthi Singh and for Rs. 5 by way of damages. It was alleged that the plaintiffs held a *patta istimrar* dated June 11, 1936, in respect of this land from Keshoraj Singh and Jagannath Singh, *zamindar* of the land, and that the defendants had cut and appropriated a babool tree therefrom and thereby dispossessed them.

The defendants contested the suit alleging that Keshoraj and Jagannath were not the owners of the land and had no right to lease it to the plaintiffs. They also contended that neither the lessor nor the lessee had ever been in possession of the land in suit and that the suit was time-barred. It was further contended that the former *zamindar* had given the land in suit along with other land under a *shankalapa patta* to the ancestors of the defendants and that consequently the tree in question belonged to them.

The following issues were framed:—

1. Were Keshoraj and Jagannath superior proprietors of the land in suit in 1936 and as such entitled to grant a *patta istimrar* to the plaintiffs?

2. Are Exs. 1 and 2 (*patta* and *kabuliyat*) genuine and valid?

(3) Have the plaintiffs been in possession of the land in suit within limitation?

4. Were plaintiffs owners of the tree in suit?

5. To what relief, if any, are the plaintiffs entitled?

The judgment of the Munsif shows that on the 1st issue the plaintiffs filed eleven documents, of which eight were filed to prove the title of Keshoraj and Jagannath in the land in suit. The *khetauni* of a partition which took place in 1890 showed

(6) A I R 1934 Cal. 59; 148 Ind. Cas. 111; 57 C L J 498; 6 R C 430.
(7) A I R 1931 Cal. 107; 130 Ind. Cas. 142; 34 C W N 912; Ind. Rul. (1931) Cal. 334.
(8) A I R 1935 Oudh 495; 158 Ind. Cas. 280; 1935 O W N 1066; 1935 O L R 568 (1); 8 R O 81.

that Pirthi Singh was the owner of Plot No. 1220 of the old settlement which contained the land in suit. On his death the property was mutated in the names of his sons Baij Nath Singh and Surajpal Singh by an order of September 7, 1892, and on the death of Surajpal Singh his half share was mutated in the name of Baij Nath Singh by an order dated September 7, 1900. It was further proved that on the death of Baijnath Singh the property was inherited by *Mst.* Brij Dei, widow of Surajpal Singh. The Munsif observed that *Mst.* Brij Dei was not the heir of Baij Nath Singh and had no right to inherit his property. Mutation was effected in her name on April 24, 1926. There was no plea or proof that she had completed title by adverse possession.

It further appeared that *Mst.* Brij Dei had gifted one-third of the property to her grand son Jagannath Singh (son of her daughter) and that mutation had been effected thereon on July 21, 1932. The deed of gift was not, however, produced nor was the gift in favour of Jagannath Singh proved.

The remaining two-thirds of the property in the possession of *Mst.* Brij Dei was mutated in the name of another grand son Keshoraj (son of another daughter by an order dated September 24, 1935, on the basis of some *iqrarnama* which was not produced.

The Munsif observed that this was the only evidence to prove the title of Jagannath and Keshoraj in the property in suit. He remarked that it was evident that *Mst.* Brij Dei had no title in the property of Pirthi Singh and hence had no right to transfer it to Jagannath and Keshoraj. In any event the transfers alleged to have taken place in their favour had not been proved. Consequently in the Munsif's opinion the plaintiffs transferors had no title in the land in suit and no right to grant a *patta* to the plaintiffs.

On the second issue the Munsif found that it was not proved what property was transferred by Exs. 1 and 2.

On the third issue the Munsif found that the plaintiffs had not been in possession of the land, and on the fourth issue that they were not owners of the tree. Consequently he decided that they were not entitled to any relief.

In their appeal to the Civil Judge, which was preferred on July 7, 1937, the plaintiffs challenged all these findings and also contended that the trial Court should have held that Keshoraj and Jagannath had possessory title and could transfer their possession to the appellants.

On September 3, 1937, the plaintiffs applied to the Civil Judge for admission of certain additional documentary evidence in appeal. No order was passed on this application. It was not supported by an affidavit.

The appeal came up for hearing on October 8, 1937, and on this date the plaintiffs presented another application which must be taken to be an application under O. XXIII, r. 1 of the Civil P. C., although this rule is not referred to in it. The previous application of September 3, was not pressed.

In the application of October 8, it was said that certain defects had crept into the suit as a result of which the plaintiffs might be prejudiced as their claim had become defective and it was apprehended that it might be dismissed. Consequently they asked for permission to withdraw the suit with liberty to institute a fresh suit.

The following defects were alleged:

(1) The objection about "possessory title" had not been taken.

(2) Keshoraj and Jagannath Singh had not been made parties.

(3) Certain necessary papers of which a list was given were not filed in the original Court.

The papers preferred to (3) where those to which the application of September 3, 1937, related, and it was because they were included in the application of October 8, 1937, that the previous application was not pressed.

Reference to the omission about possessory title in (1) was presumably made in view of the fact that one of the grounds of appeal was that the Court below should have held that Keshoraj and Jagannath had possessory title.

The question now for consideration is whether the lower Appellate Court was justified in granting permission under r. 1 of O. XXIII on account of these alleged defects. It is contended that it acted with material irregularity in the exercise of its jurisdiction by granting this permission, and that it failed to apply its mind properly to the provisions of O. XXIII, r. 1. It is clear that the defects alleged cannot properly be described as formal defects. If they are defects at all they are material defects. It has been argued that the lower Appellate Court might have been justified

in granting permission on other grounds. But the order of the Civil Judge does not show that he took any other grounds into consideration. The application of October 8, 1937, indicates that the application was made in view of certain defects, and the Civil Judge apparently had these in mind when he spoke of "formal defects". He did not, however, say that he was satisfied that the suit must fail on this account.

It is clear from the first alleged defect that the plaintiffs wished to put forward an alternative case and clearly this defect was not of a formal nature. Nor was the omission to implead other parties. And it has been held both by the Bombay High Court and by this Court that the failure to produce documents at the proper time is not a sufficient ground within the meaning of r. 1 of O XXIII. For such defects the plaintiffs themselves were wholly responsible. It is not suggested that subsequent to the institution of the suit there was a discovery of any facts which rendered the suit defective.

It appears to me, therefore, that the Civil Judge must be held to have acted with material irregularity in permitting the plaintiffs to withdraw the suit with liberty to sue afresh. I treat the appeal as an application in revision and allow it with costs, set aside the order of the lower Appellate Court and direct that the first appeal be disposed of by the Civil Judge according to law. The plaintiffs will be at liberty to press their application for admission of additional documentary evidence, on which no order has yet been passed, but I do not express any opinion on the question whether it should be allowed or not.

S. *Application allowed.*

MADRAS HIGH COURT

Civil Revision Petition No. 656 of 1939

August 19, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

V. S. SINGARACHARIAR—PETITIONER

versus

PAPPATHI AMMAL—RESPONDENT

Madras Agriculturists' Relief Act (IV of 1938), s. 3 (ii)—Holder of vendor's lien in land, if agriculturist.

The holder of a vendor's lien in agricultural land is qualified to be an agriculturist.

C. R. P. to revise order of the District Munsif, Trichinopoly, dated December 14, 1938

Messrs. *K. S. Desikan* and *K. Raman*, for the Petitioner.

Messrs. *C. S. Rama Rao Sahib* and *A. Sundaram Ayyar*, for the Respondent.

Order.—In view of our decision in C. R. P. No. 513 of 1939 *Subburamiar* v. *Venkatachalapathi* (1). that a simple mortgagee of agricultural land has a saleable interest therein sufficient to satisfy s. 3 (*ii*) (*a*), Mad. Act IV of 1938, it would seem to follow that the holder of a vendor's lien in agricultural land is equally qualified to be an agriculturist. But the trial Court has not gone fully into the question whether in fact the lien subsists. The transferee did not admit his liability to pay to his transferor, as the learned Judge seems to think, but to the plaintiff—the holder of the incumbrance over the right transferred. Whether or not the vendor's lien subsists will, in our opinion, depend largely on the circumstances of the transfer—for instance, if the transferee has the right to hold the unpaid money for the protection of his own interest against the incumbrances, there can hardly be a debt due to the transferor in respect of which the lien may be said to subsist. But this question can best be investigated by the trial Court in disposing of the pending application under s. 19. With these observations, the petition is dismissed with costs.

N.-S. *Petition dismissed.*

(1) A I R 1940 Mad. 941; 192 Ind Cas 100; (1940) 2 M L J 516; 52 L W 480; (1940) M W N 1006; 13 R M 534.

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Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. Where, therefore, in the course of an administration suit for partition one of the heirs mortgages his undivided share in the whole of the joint estate, the other heirs take the allotted properties, in the absence of fraud, free from the mortgage, irrespective of the doctrine of *lis pendens* and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share. DAW S. IN *v.* ARJANDAS *Rang.* 294

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—— *Mortgage—Property burdened with simple mortgage—Stranger entering into adverse possession—His adverse possession against mortgagee, when commences.*

If a stranger enters into adverse possession of property burdened with a simple mortgage, then he only prescribes for the interest of the person entitled to immediate possession, that is to say, of the mortgagor. All that the mortgagor has is the right to redeem. Therefore all that the stranger gets is the right to redeem. He does not get a full title to the property, and as for the mortgagee, his right to possession does not accrue until he has obtained his decree for foreclosure, or in the case of sale, until he has purchased (if he happens to be the purchaser); therefore, adverse possession as against him does not commence until that date. UMAR HAJI KARIM *v.* BADRIDAS RAMRAI *Nag.* 306

—— *Stranger entering subsequent to mortgage—Foreclosure suit without joining trespasser as party—Rights of trespasser and mortgagee—Procedure to be followed.*

The mortgagee is not affected by anything done behind his back after his mortgage; therefore he is entitled to foreclose his mortgagor, (or bring the property to sale), without joining subsequent purchasers of the right to redeem, (or those in a lesser position such as trespassers whose title had not yet ripened), and by so doing he acquires substantial rights. On the other hand the purchaser of the mortgagor's rights, or the trespasser who has, or is on the way to ousting him and acquiring his rights, is also not without rights: and he is clearly not affected by a litigation to which he was not a party. The only way to do justice between these two conflicting rights is to adjust the equities. They are best adjusted by affording the purchaser, or the trespasser, (as the case may be), an opportunity to redeem that portion of the property in which he is interested on paying a proportionate part of the mortgage money. UMAR HAJI KARIM *v.* BADRIDAS RAMRAI *Nag.* 306

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Where in a suit claiming maintenance against an estate the defendant has not raised a plea that as the estate was governed by the Agra Estates Act and that the plaintiff under no circumstances was entitled to maintenance at a rate higher than Rs. 50 a month as provided in Sch. II, Estates Act, he cannot be allowed to raise such a plea in appeal if it results in a serious prejudice to the plaintiff. JAMUNA KUNWAR *v.* ARJUN SINGH *All.* 27

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—— **s. 271**—*Issue submitted to Civil Court under s. 271—Application to Civil Court to refer issue to arbitration—Sch. II, Civil Procedure Code, if applies to such application.*

The provisions of Sch. II, Civil P. C., clearly apply to applications in a suit. An application made to the Civil Court to whom the issue of proprietary title had been referred under s. 271 Agra Ten. Act praying that the issue be referred to Arbitration is an application in a suit and hence governed by Sch. II, Civil P. C. MAHA RAM *v.* HARBANS *All.* 17 F B

—— **s. 271**—*Reference to Civil Court under s. 271 whether delegation of authority by Revenue Court—Revenue Court, if competent to pass decree on basis of Civil Court's judgment.*

There is no delegation by the revenue Court

Agra Tenancy Act—concld.

under s. 271, Agra Ten. Act. The provisions in regard to reference of an issue to the Civil Court are mandatory The revenue Court has no discretion in the matter. In so far as this issue is concerned, the Civil Court is a Court of original jurisdiction, and in disposing of the issue that Court is not exercising an authority delegated by the Revenue Court. The Civil Court is in fact seised of the suit in which the issue referred to it under s. 271 arises and is therefore competent to refer the issue to arbitration under Sch. II, Civil P. C.

Para. 16 (2) of Sch. II, Civil P. C., does not provide that the decree which is to follow upon the judgment must be the decree of the Court which granted the application to refer an issue to arbitration. Hence the Revenue Court is competent to pass a decree on the finding of the Civil Court on an issue submitted to it under s. 271 even though the finding is based on an award in arbitration. MAHA RAM *v.* HARBANS *All.* 17 F B

——— s. 271—*S.* 271, *if requires personal decision by Court—Reference by Civil Court to arbitration—Decision based on award is decision of Court.*

There is nothing in s. 271, Agra Ten. Act from which it can be inferred that the Legislature intended that the decision of the Civil Court should not proceed upon an arbitration award. Where there has been a reference to arbitration and the award has been accepted, the decision in the suit is the decision of the Court, notwithstanding the fact that the Judge himself is not the person who has decided the question in issue between the parties. The provisions of O. XX, Civil P. C., governing the delivery of judgments and the granting of decrees, etc. relate, just as clearly as s. 274, Agra Ten. Act, to judgments and decrees of the Court. The provisions of Sch. II, of the Code however are without doubt applicable to proceedings in the Courts and decisions based upon arbitration awards are decisions of the Courts. MAHA RAM *v.* HARBANS *All.* 17 F B

——— ss. 271, 264—*Sch. II, Civil Procedure Code applies to proceedings under s. 271 in Civil Court by virtue of s. 141, Civil Procedure Code—Reference by Civil Court to arbitration, of issue referred to it under s. 271—Finding based on such award, validity—Reference to arbitration, if inconsistent with s. 271 within meaning of s. 264.*

Section 141, Civil P. C., applies to all proceedings in any Court of civil jurisdiction and is not restricted to original proceedings. The proceedings in the Civil Court after the record has been sent to that Court by the revenue Court in accordance with s. 271, Agra Ten. Act, are undoubtedly proceedings in a Court of civil jurisdiction. Hence Sch. II, Civil P. C., applies to such proceedings by virtue of s. 141. Consequently the Civil Court has jurisdiction to refer the issue submitted to him under s 271, Agra Ten. Act, to arbitration and the finding based upon the award in the arbitration is a valid finding and the decree of the Revenue Court based upon such finding is perfectly legal. Reference to arbitration by the Civil Court of the issue submitted to it under s. 271 is not inconsistent with s 271, within the meaning of s. 264. MAHA RAM *v.* HARBANS *All* 17 F B

Alluvion and Diluvion—*Accretion—Long possession—Inference as to title—Whether proof that title rested on reformation* in situ *and not on accretion.*

Long possession would raise the inference of title to possession, but it would afford no basis for the further inference that that title rested on reformation *in situ* and not on accretion. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

Alluvion and Diluvion—concld.

——— *Reformation* in situ—Zamindar's *admission in road cess return that certain land is reformation* in situ *lands comprised in his* touzi, *if conclusive as to nature of that land—Admission made with view to avoid assessment to further tax—Effect of admission.*

Where a *zemindar* makes an admission in the road cess return that a certain land is reformation in *situ* of lands comprised in his *touzi*, the admission is almost conclusive as to the nature of that land. It has great weight unless neither explained away or shown to be wrong, but the weight of the admission is nullified, where it is proved that it was made with a view to avoid assessment to further cess. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

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SEE Mortgage 748
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——— *Evidence—Question as to which set of witnesses to be believed—Finding of trial Court on question, value of.*

Where the only question is, which set of witnesses is to be believed the findings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of Appeal. RAJNANDINI *v* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— *Evidence—Question of fact depending on reliance to be placed on testimony of witnesses—Findings of trial Court, value of.*

In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judge who tried the case and saw the witnesses is entitled to great weight. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— *Letters Patent—Finding of fact impugned by High Court in Letters Patent or second Appellate Court—It is not enough for High Court to say that it is not satisfied that matters of fact were proved—It must be satisfied that there was no sufficient evidence—Soundness of conclusions derived from findings of fact—High Court in Letters Patent Appeal, if can adjudicate upon—Finding of fact arrived at on evidence, interference with.*

While considering a finding of fact arrived by the lower Appellate Court, it is necessary for the High Court in Letters Patent Appeal to distinguish between evidence which would be sufficient and evidence which the High Court itself might think satisfactory. It is not allowable for the High Court in second appeal, or in Letters Patent appeal to say merely that it is not satisfied that matters of fact were proved, within the meaning of s 3, Evi. Act; it should have to go further, in order to impugn the finding of fact of the first Appellate Court and say that there was no sufficient evidence. The High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact On the other hand, if there is evidence upon which a finding of fact has been arrived at which could have been arrived at with propriety, function of the High

Appeal—concld.

Court is at an end. DEOKALI PATTAH *v.* RAMDEVI *Rang.* 286

——— *Letters Patent—Principles governing grant of leave, stated.*

There are, at any rate, four cases in which leave to appeal under the Letters Patent should be given. First, in a case in which a question has arisen which is of general importance. In such case as that it is manifestly, in the public interest that a more authoritative decision should be given than is possible at the hands of a single Judge. And to this head might be added a case in which the matter involved is of altogether unusual private importance, either by reason of the magnitude of the material issues involved or for some other reason. Secondly, there are cases in which a question arises of very frequent occurrence. Such a case might arise where, on some new statute a point arises which will govern the rights and liabilities of a large number of people. An authoritative decision in a case like that is necessary to serve as a precedent for future cases. And, thirdly, there are those cases in which the existing authorities by which the Court is to be guided are either obscure or conflicting. In such a case as that it is to the public interest that all doubts should be dissolved and for that reason it is obviously proper to grant leave to appeal under the Letters Patent There is then a further case which arises and it is one in which greater difficulty arises. It is the case in which the Judge himself who decides the case feels a reasonable doubt as to the correctness of his own decision and thinks that for that reason it is just to the parties that a further appeal should be allowed. But it is a ground which should, be exercised with considerable care and in a proper case only and leave to appeal should not be granted too lightly. KALYAN DAS *v.* BRIJ KISHORE *All.* 495

Arbitration—*Held on fact that Bank could not repudiate Pleader's authority to refer dispute to arbitration and that it was bound by the award*

The local agent of the Bank had undoubtedly authority to engage a Pleader and to deliver a *vakalatnama* on behalf of the Bank. It was on the *vakalatnama* so delivered that the suit had been instituted in the name of the Bank. That *vakalatnama* contained a power given to the Pleader to enter into arbitration on behalf of the Bank. The Pleader himself moved the application for reference to arbitration and participated in the arbitration proceedings on behalf of the Bank :

Held, that the *vakalatnama* was not the *vakalatnama* of the agent but the *vakalatnama* of the Bank itself. The Bank was bound by the terms of that *vakalatnama* and although the agent might not have the power from the Bank to refer the matters in dispute to arbitration, the Pleader, on the basis of that *vakalatnama* had authority to apply for referring the matter to arbitration. Where the award was against the Bank, the Bank was not entitled to repudiate the authority of the Pleader for the purpose of nullifying the proceedings EAST BENGAL BANK, LTD. *v.* JOGESH CHANDRA BANERJEE *Cal.* 553

——— *Parties to reference and arbitrators aware of subject-matter of reference—Award made with respect to such subject-matter—Objection that application for reference did not specify matter of reference, if can be raised in second appeal.*

Where in a case of a reference to arbitration by the Court, the parties as well as the arbitrators are well aware of the subject-matter of the reference and the arbitrators have passed an award with respect to that matter, an objection that the actual application for a reference to arbitration did not specify the matter to be arbitrated upon cannot be allowed to be raised for the first time is second appeal MAHA RAM *v.* HARBANS *All.* 17 F B

Arbitration Act (IX of 1899), applicability of. SEE Companies Act, 1913, s 152 553

——— s. 19—*By contract in writing defendants selling certain goods of Japanese manufacture to plaintiff—After shipment of part of goods defendants asking for extension of time for shipping remaining goods due to outbreak of war—Plaintiff not accepting request—Defendant under terms of contract cancelling it and repudiating liability for damages—Plaintiff's suit for damages—Defendant relying on arbitration clause in contract applying for stay—Defendant held could apply for stay but held that under special circumstances it could not be granted.*

Under a contract in writing the defendants sold certain piecegoods of Japanese manufacture to the plaintiff A part of the goods were shipped and accepted by the plaintiffs. Thereafter the defendants requested the plaintiff for an extension of time for shipping the rest of the goods due to outbreak of war. The plaintiff did not accept the request. The defendants thereupon informed the plaintiff that the contract stood cancelled as per terms of the contract and also repudiated his liability to pay any damages. The plaintiff instituted a suit for damages. Relying on the arbitration clause contained in the contract, the defendants applied for stay of suit under s. 19, Arbitration Act. It was contended on behalf of the plaintiff, that the defendant could not take up the position of cancelling the contract and at the same time invoke the arbitration clause in the contract:

Held, that by using the word "cancellation," the defendants meant no more than that owing to the events which had happened, they had been relieved of their liability to deliver the goods. They did not mean that the contract had come to an end for all purposes, as when a contract is rendered void by frustration. The defendants were not therefore deprived of their right to apply for, and obtain, an order for stay.

Held, also that one of the questions which the tribunal dealing with his matter would have to decide was whether the state of things then existing in the Far East was war within the meaning of the contract. It was by no means a simple question of law and was most unsuited for decision by laymen. Under the terms of the contract the defendants were entitled to have the matter referred to the decision of two Japanese merchants. If the defendants were to take that course, the decision would cause considerable embarrassment to the parties responsible for it. That was a special circumstance in this case which must be taken into consideration. Having regard therefore to the nature of this dispute, and to the terms of this particular arbitration clause, the Court ought to exercise its discretion against the defendants. TULARAM CHAMPALAL *v.* JEWANRAM GANGARAM *Cal.* 126

——— s. 19—*Proceeding within the meaning of s. 19, when commences—Defendant supplied with copy of plaint—Grant of time by Court for filing written statement, whether step taken by defendant in proceedings.*

Arbitration Act—concld.

Having regard to the provisions of O. V, r 2, Civil P C, the proceedings cannot be said to have commenced within the meaning of s. 19, Arbitration Act until the defendant has been supplied with a copy of the plaint. The fixing of time by the Court for filing a written statement when the defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings inasmuch as time for filing written statement is necessarily given by the Court. PREM NATH-PRAN NATH *v.* AMBA PRASHAD *Lah* 167

Banker and customer—*Money deposited with Bank by company as statutory obligation imposed by s. 282-B Companies Act (VII of 1913)—Liquidation of Bank Company, if entitled to priority over ordinary creditors.*

The mere fact that the depositor is the trustee and the money deposited is trust money, does not affect the relation which the law creates between a Bank and an ordinary customer, namely, the relation of debtor and creditor. The legal effect of the notice to the Bank that the moneys deposited were trust moneys is only to cast a duty on the Bank not to participate in a breach of trust by the trustee. Consequently where money is deposited with the Bank by a company, as the result of the statutory obligation imposed upon the company by s 282-B (1), Companies Act, the company is not entitled to rank in the liquidation of the Bank in priority to the ordinary creditors. MANAGING DIRECTOR NAYAR MODERN BANK LTD. *v.* OFFICIAL LIQUIDATORS OF THE TRAVANCORE NATIONAL AND QUILON BANK LTD, *Mad.* 821

——*Surety for customer for payments, made to latter under chit fund—Bank, if bound to disclose to surety its affairs regarding indebtedness of constituent.*

Where a bank calls upon its customer to furnish surety with regard to the payment made under a chit fund, as such payment cannot be distinguished from any other obligation, it is for the surety to interrogate the debtor on the question of his indebtedness. Under such circumstances that the bank is not compelled to break the confidence of its constituents and disclose its affairs to the surety in respect of the former's indebtedness. KRISHNASWAMI AYYAR *v.* TRAVANCORE NATIONAL BANK, LTD. *Mad.* 332

Bengal Agricultural Debtors Act (VII of 1936) s. 8. SEE Civil Procedure Code 1908, s. 47, O. XXI, r. 90 451

——ss. 8, 35, 34—*Application under s. 8—Execution proceedings relating to debt included in application, if automatically stayed even if no notice under s. 34 is issued.*

The intention of the Legislature was to provide that all proceedings for the execution of decrees for debts included in an application under s. 8 should be automatically stayed as soon as the application was filed before a Board. In view of the language of s. 35 of the Act it is impossible to hold that it could have been the intention of the Legislature that a judgment-debtor should be deprived of a valuable right which had been conferred upon him by the Act by reason merely of some carelessness on the part of the Board, which might result in failure to issue the required notice under s. 34. TAMIZALI *v.* MD. NASARALI BHUIYA *Cal.* 451

——ss. 25 (1) (c), 27 (1)—*Under s. 25 (1) (c), subject to s. 27 (1), Board can order usufructuary mortgagee to restore possession to mortgagor.*

Under s. 25 (1) (c), Ben. Agri. Debtors Act, the Board has jurisdiction to give directions subject to the provision of s. 27 (1) as to the manner in which the sum for which the debt had been settled should be paid. The intention of the Legislature in enacting s 27 (1) was merely to specify the extent to which a mortgage will continue to subsist after an award has been made. Subject to the provisions of this section, the Board have full authority to modify the terms of the original mortgage upon which the loan had been advanced.

Board has, therefore, jurisdiction to order the usufructuary mortgagee to restore possession of the mortgaged property to the mortgagor and thus convert the usufructuary mortgage into a simple mortgage. The amount at which the mortgage debt is settled would however continue to be a charge under s. 27 on the mortgaged property until the terms of the settlement have been fulfilled. FAZLUR RAHMAN SARKAR *v.* ATAL BEHARY GHOSH *Cal.* 254

——s. 27 (1) SEE Bengal Agricultural Debtors Act, 1936, s. 25 (1) (c) 254

——s. 34. SEE Bengal Agricultural Debtors Act, 1936, s. 8 451

——s. 35. SEE Bengal Agricultural Debtors Act, 1936, s. 8. 451

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—*Accretions of land to patni tenure, whether become increment thereto under s. 4—Possession of increment*—Patnidar's *right to—Absence of offer by* patnidar *to pay additional rent for increment cannot deprive him of right conferred by s. 4.*

Accretions of land to a *patni* tenure become an increment to the tenure under s. 4, Ben. Alluvion and Diluvion Regulation. The *patnidar* has the right to possess those lands and the *semindars*, have no right to possess in *khas*. The absence of an offer by the *patnidars* to pay additional rent for the increment to their tenure cannot take away the rights conferred on them by s. 4. There can be no question of forfeiture where the *patnidars* have never denied that the lands were accretions. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

Bengal Public Demands Recovery Act (III of 1913), ss. 3 (1), 7—*In execution of its mortgage decree plaintiff purchasing property—Plaintiff's name mutated in Collectorate records—Certificate, proceedings for recovery of cess in respect of aforesaid property—Notices under s. 7 served—Report to certificate officer that property had already been sold to plaintiff*—Notices on recorded proprietors (including plaintiff) served—*Plaintiff's name included in sale proclamation—Held, that the plaintiff's name was added within meaning of s. 3 (1) that consequently certificate sale was binding on plaintiff.*

Certain property had been purchased by the plaintiff Bank in execution of its mortgage decree and obtained possession. Thereafter the plaintiff applied for mutation in the Collectorate records and the mutation was ordered. In the meantime a certificate had been filed against the former proprietors of this property in respect of arrears of cess. After notices under s 7, Public Demands Recovery Act, had been served on the persons against whom the certificate was filed a report was made to the certificate officer to the effect that the property had already been sold to the plaintiff Bank. The case again came before the certificate officer who stated that the names of two more recorded proprietors had been supplied to him and he directed that notices should issue against them. Subsequently

Bengal Public Demands Recovery Act—concld.

the usual sale proclamation was issued under r. 46 of the rules in Sch II, to the Act, and admittedly this proclamation contained the plaintiff's name:

Held, that in a case of this sort, to nullify the effect of a certificate sale, a very heavy onus would lie on the plaintiff to show that there had been a non-compliance with the requisite formalities required under the Public Demands Recovery Act, and that the plaintiff's name had not been added within the meaning of s. 3 (1) of the Act Having regard to the circumstances it was clear in this case that the plaintiff Bank had not discharged this onus. As the plaintiff's name actually appeared in the sale proclamation there was also a presumption to the effect that this sale proclamation was drawn up after notice to the plaintiff as required under r. 46 (2) contained in Sch. II, to the Act. AMIYA BIKASH DATTA v. MOHALUXMI BANK LTD. *Cal.* 48

——ss. 5, 35, 37—*Jurisdiction of certificate officer, whether depends upon situation of property in respect of which demand arises or upon place where money is payable or demandable.*

Whether certificate officer is a Collector or a Sub-Divisional Officer or some officer appointed by the Collector under s 3 (3) of the Act, he is a certificate officer of the district and not of any local area in the district; and he exercises jurisdiction in the district as implied in s. 5 and not merely in some local area in the district. The certificate officer referred to in s. 5 is the certificate officer of the place where the public demand is payable; for it is there that it is a demand at all. The jurisdiction of the certificate officer under s 5 does not therefore depend upon the situation of the property in respect of which the demand arises, but upon the place where the money is demandable or payable. If this place is within the district where the certificate officer holds office, the certificate officer has jurisdiction to receive the requisition and to make a certificate. SECRETARY OF STATE v. SADEK REZA *Cal.* 807

——s. 7. SEE Bengal Public Demands Recovery Act, 1913, s. 3 (1) 48

——ss. 35, 37, 5—*Cancellation of certificate on ground that it is not duly filed or question whether certificate is duly filed, whether excluded from jurisdiction of Civil Court.*

Per *Narsing Rau, J.*—Cancellation of certificate on ground that the certificate has not been "duly filed" is not beyond the jurisdiction of the Civil Court under s. 35, Ben. Public Demands Recovery Act, Similarly under s. 37 the question whether the certificate has been duly filed under the Act is not excluded from the purview of the Civil Court, therefore the Civil Court can go into this question by virtue of the general provision in s. 9, Civil P. C. SECRETARY OF STATE v. SADEK REZA *Cal* 803

——s. 37. SEE Bengal Public Demands Recovery Act, 1913, s 35 807

Bengal Tenancy Act (VIII of 1885 as amended in 1938) s. 26-C. SEE Bengal Tenancy Act, 1885, as amended 38, s. 26-F. 530

——s. 26-F—*Co sharer tenants exercising right of re-purchase under s. 26-F, whether should make other co-sharers parties to proceeding.*

There is no provision in the Ben. Ten Act, which makes it necessary that the co-sharer tenant who seeks to exercise his right of re-purchase under s 26-F, of the new Act should make the other co-sharers parties to the proceeding. The provision of s 188 cannot be attracted to the present s. 26-F and, as such the non-joinder of the other co-sharer tenants would not in any way make the proceeding defective. GOBARDHAN BAR v. GUNADHAR BAR *Cal.* 530

——ss. 26-F and 26-C—*Right of pre-emption when accrues, whether at date of registration or at date of execution of deed of transfer.*

It is perfectly true that the Amending Act of 1938 is not retrospective in its operation. It does not take away or impair any vested right that accrued under the old section and the rights which it creates could arise only in respect of transfers taking place after it came into force.

But the rights of pre-emption under both the Amending Act and the old Act accrue only at the date of registration of the deed of transfer and not at the date of its execution. Hence no question of the Amending Act being retrospective can arise. Sections 26-F and 26-C as amended read with ss. 26-F and 26-C of the old Beng. Ten Act make it clear, that the provisions of the new Act would be applicable in respect of transfers which were registered after the new Act came into force, whereas the old Act would apply to the cases where the document of transfer was registered at a time when the old Act was still in operation. GOBARDHAN BAR v. GUNADHAR BAR *Cal* 530

——ss. 26 F, 26-C—*Right of re-purchase under s. 26-F and pre-emption under Muhammadan Law, compared and distinguished from Roman Law.*

The right of Shafa as recognized by the Muhammadan Law as well as the right of re-purchase created by s 26-F, Ben. Ten. Act, are not rights of pre-emption in the sense in which they were used by the Roman lawyers Pre-emption, according to Roman Law, connoted an obligation on the part of the intending vendor to sell preferentially to the pre-emptor, if he offered as good conditions as any intending vendee. The right of purchase that is created by s. 26-F, Ben. Ten. Act, like the right of pre-emption under the Muhammadan Law, attaches an obligation to a particular status which binds the purchaser from the person obliged to hand over the property purchased to the obligee on receiving the price paid by him for it with or without additional compensation The obligation can only arise when the property passes from the original owner to the purchaser. Under s. 26-C, Ben. Ten. Act, the transfer can only be made by registered document and title cannot possibly pass to the transferee till registration is effected. GOBARDHAN BAR v. GUNADHAR BAR *Cal.* 530

——s. 51—*Scope—Written lease—Presumption of terms, if can be drawn under s.* 51.

There cannot be scope for any presumption under s. 51, Ben. Ten. Act, of the terms of a lease in a case where there is a written lease setting forth the terms. In such a case therefore the tenant proving the rent paid in the previous years is not entitled to the presumption that it is the rent payable. ATUL KRISHNA BOSE v ZAHED MONDAL *Cal.* 635

Bihar Money-lenders Act (III of 1938), s 2 (f) *"Loan"—Debt in question held not "loan" within meaning of section.*

The arrangement between the parties who were co-sharers was that any collection which were due from the tenants should be divided by the common *patwari* half and half. The *patwari*, instead of sending half the amount to one of them made over all the amount to the other who thereafter became liable to pay the same to the former not as a loan but on account of the fact that the other had received the money from the *patwari* on trust for or for the use of the former;

Bihar Money-lenders Act—contd.

Held, that the debt was not a "loan" within the meaning of s. 2 (*f*), Bihar Money lenders Act and, therefore, the Act had no application to the case. ADIT NARAYAN SINGH *v.* BINAPANI *Pat.* 110

——— s 11 - *Order determining instalments, whether appealable.*

A decision under s. 47, Civil P. C., is not a decree within the meaning of s. 2 (2) unless it in some way finally determines the rights of the parties with regard to all or any of the matters in controversy. An order determining instalments under s. 11, Bihar Money-lender's Act is not an order which conclusively determines the rights of the parties and consequently no appeal lies from such an order. DHANUKDHARI SINGH *v.* RAMRATAN SINGH *Pat.* 670

——— ss. 13, 14—*Application under s.* 13—*Matters required by section determined*—*Sale under s.* 14—*Fresh proclamation is essential — Previous waiver before application under s.* 13, *if gives jurisdiction to hold sale under s.* 14, *without fresh proclamation.*

Section 14, Bihar Money-lenders' Act, makes it clear that after the property has been valued or such portion of it as is sufficient to satisfy the decree, a sale proclamation of the actual property to be sold must be drawn up, and in it must be stated the value of the property as determined by the Court under s 13. Whatever has happened earlier, once an application is made under s. 13, a fresh sale proclamation must be drawn up under s. 14 after the property actually to be sold has been decided upon and its value fixed. The waiver of a fresh sale proclamation in the earlier stages of the case, before an application under s. 13 was put in, cannot possibly be construed as a waiver of an entirely new sale proclamation which s 14 of the Act requires the sale without the issue of a new sale proclamation containing the matters set out in s 14, is without jurisdiction and must be set aside. GUNJARI MAHATANI *v.* NIL KAMAL PANDE *Pat.* 176

——— s 14. SEE Bihar Money-lenders' Act, 1938, s. 13 176

——— s. 15—*Bihar Money-lenders (Regulation of Transactions) Act (VII of* 1939), *s.* 11—*Compromise decree under execution—Court's jurisdiction to decide whether judgment-debtor should be allowed to pay decree by instalments.*

The judgment-debtor's application under the Bihar Money-lenders Act to be allowed to pay a compromise decree, obtained on August 12, 1936, by instalments was dismissed. The appeal was dismissed by the District Judge on the ground that after the passing of the decree under execution the lower Court had no power to allow the payment of the decretal amount by instalments:

Held, that whether judging by the old s. 15 of Act III of 1938 which was in force at the time the Subordinate Judge made his order, or by the present s. 11 of Act VII of 1939 which was in force on May 1, 1939, the date of the order passed by the District Judge, the Judge was wrong in coming to the conclusion that he had no jurisdiction to enter into the question whether the judgment-debtor should be relieved to the extent of being allowed to pay the decree by instalments JUGESHWARI PRASAD *v.* KAMALA PRASAD *Pat.* 224

——— s 16—*Act coming into force before the conclusion of sale—No objection under s.* 16 *taken —Sale held—Objection under s* 16 *in application under O. XXI, r.* 90, *Civil Procedure Code cannot be allowed subsequently—Application under r.* 90 *dismissed by lower Court—In appeal against dismissal objection under s.*16 *cannot be allowed.*

Bihar Money-lenders Act—concld.

Where before the sale was concluded, the Bihar Money lenders Act had come in force, and the Court could be asked to value, the property under s. 16 of the Act, but the Court was never asked to value, and no objection whatsoever was taken to the sale proceeding on the old proclamation of sale this point cannot be put forward before the Court because it was a ground that could have been put forward before the sale was concluded and therefore, not a ground which could be urged even for the admission of the application under O. XXI, r. 90. If the lower Court could not admit the judgment-debtor's application under O. XXI, r. 90, Civil P. C. on this allegation, he cannot raise it in appeal before the High Court CHANDRA SEKHAR DAR MISRA *v.* BHAGWAN DAS *Pat.* 124

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), ss. 6, 8—*Compound interest—Loan advanced before commencement of Act—Discretion of Court under s.* 8 *in respect of such interest—Discretion how to be exercised.*

The Bihar Money-lender's Act which was intended to afford relief to the debtors prohibits compound interest only on loan advanced after the commencement of the Act (s. 6). There is no such prohibition with regard to loans advanced before the commencement of the Act. Section 8 of the Act, however, gives a discretion to the Court, in case of loan advanced before the commencement of the Act. Section 8 does not lay down any conditions under which the Court may exercise its powers but gives a wide discretion This discretion, however, cannot be exercised arbitrarily. MADHO PRASAD SINGH *v.* MUKUTDHARI SINGH *Pat.* 661

——— s 7—*S.* 7, *concluding portion, construction of — Words "the loan", meaning of — Bond executed for past liability—Amount for which bond is executed, whether 'the amount of loan.'*

The concluding portion of s 7, Bihar Money-lenders Act, 1939, makes it quite clear that two classes of cases are contemplated, (1) loan advanced and (2) loan based on a document. If the section was meant to limit the amount of interest in all cases to "the amount of loan advanced", the subsequent words "or, if the loan is based on a document the amount of loan mentioned in, or evidenced by such document" would be superfluous. The words 'the loan" in the passage 'if the loan is based on a document" mean with reference to the previous context, the loan in respect of which the suit is brought; and the word "loan" here must be understood as defined in s. 2, cl. (*f*). Clearly therefore, a bond executed for past liability constitutes a loan within the meaning of the Act. In the case of such a bond the amount for which it is executed is "the amount of loan" within the meaning of s. 7 of the Act No doubt the expression "the amount of loan mentioned in, or evidenced by such document" may suggest that to determine the amount of loan one must not go behind the document. But it could never have been the intention of the Legislature, while enacting s. 7, to override the provisions of the Contract Act or the Evi. Act. MADHO PRASAD SINGH *v.* MUKUTDHARI SINGH *Pat* 661

——— s. 8 SEE Bihar Money-lenders Act, 1939, s. 6. 661

——— s. 7. SEE Bihar Moneylenders (Regulation of Transactions) Act, 1939, s. 8 561

——— ss. 7, 9—*S.* 7 *governs all provisions of Act.*

The scheme of the Act is perfectly clear and

Bihar Money-lenders (Regulation of Transactions) Act—contd.

shows that the provisions of s. 7 govern all the provisions of this Act, that is to say, in no case can a Court pass a decree for an amount of interest greater than the amount of the principal less any sum which has been paid or recovered on account of interest for the period preceding the institution of the suit. HANUMAN SINGH v. GAYA SINGH *Pat.* 381

——— ss. 8, 7—*Mortgage for Rs.* 960 *at Re.* 1-4-0 *interest per mensem in* 1928—*Rs.* 203 *only paid in cash, balance set-off against previous mortgage of* 1925 *for Rs* 486—*Payment by mortgagor of Rs.* 100 *in* 1929 *and Rs.* 800 *in* 1934 *appropriated towards interest—Suit on mortgage—Payment appropriated towards interest held could not be used to reduce principal under s.* 8—*Mortgagee held entitled to decree for Rs.* 689 *only, which was total of advances made in* 1925 *and* 1928—*Plaintiff held not entitled to claim any further interest in suit.*

The Bihar Money-lenders Act, was enacted for the protection of such debtors as needed some relief on account of their property or inability to pay their debts. That may be the reason why proviso to s. 8 excludes rom the operation of s. 8 such debtors as were able to pay their interest at the agreed rate and had already paid it.

The plaintiff brought a suit on the basis of a mortgage bond, executed by the defendant on August 11, 1928, to secure a loan of Rs. 960 which was to bear interest at the rate of Re. 1-4-0 per cent. per mensem, with yearly rests. Out of the sum of Rs. 960 a sum of Rs. 203 only was paid in cash and the balance was set-off against a previous debt which was due to the plaintiff under a mortgage bond executed in 1925 for a sum of Rs. 486. Sum of Rs. 100 had been paid by the defendant towards the dues under the bond in suit on June 25, 1929, and a further sum of Rs. 800 had been paid by him on September 30, 1934. The plaintiff, after giving credit as to these two amounts, claimed that a sum of Rs. 2,100 was still due to him;

Held, that as on the dates on which the sums of Rs. 100 and Rs. 800 respectively were paid by the defendant, the Bihar Money-lenders Act, was not in operation the creditor was entitled to charge interest at the bond rate on that date and the interest which was due to him on those dates was far in excess of the amounts actually paid. Under the law the creditor was entitled to appropriate these payments towards interest and after the appropriation had been made those amounts could not be used to reduce the principal under s. 8 according to the proviso to s. 8 of the Bihar Money-lenders Act The plaintiff was therefore entitled to a decree for a sum of Rs. 689 which was the total of the principal sums which were advanced by him 1925 and 1928 respectively. If interest was calculated at the rate of nine per cent. per annum. as it should be under s. 8 of the Act, the amount which was payable as interest on the total principal sums advanced by the plaintiff was much less than the sum of Rs 900 which had already been paid towards interest. That being so, the plaintiff was not entitled to claim any further interest in the suit. Section 7 of the Act was not applicable to the case JAGATMAYA KUMRI v. RAM BAHADUR PRASAD *Pat.* 561

——— s. 9—*Concluding sentence of s.* 9, *meaning explained.*

The concluding sentence of s. 9 means that where the Court has exercised the discretion under s 8 and reduced the rate of interest to 9 per cent, thereby relieving the debtor of all liability in respect of interest in excess of 9 per cent. per annum simple in the case of a secured loan or in excess of 12 per cent. per annum simple in the case of an unsecured loan, and if the limit provided by s 7 has not been reached and there is still an excess out of the amount left in deposit with the transferee of the equity of redemption then the mortgagee shall be entitled to recover that excess in addition to the amount which he may otherwise be entitled to recover, but always within the limit fixed by s. 7. HANUMAN SINGH v. GAYA SINGH *Pat.* 381

——— ss. 9, 8—*Court not exercising discretion under s.* 8—*S.* 9, *if comes into operation.*

Section 9 only comes into operation where the Court exercises the discretion vested in it by s. 8. When the Court does not choose to re-open the transaction the provisions of s. 9 will never come into operation. HANUMAN SINGH v. GAYA SINGH *Pat.* 381

——— s. 11. SEE Bihar Money-lenders Act, 1938, s. 15 224

Bihar and Orissa Co-operative Societies Act (VI of 1935), ss. 44 (3) (a), 57 (2)—*Award by Registrar—Liquidator taking proceedings on award—Plaintiff aggrieved—Suit by him without sanction of Registrar, maintainability.*

Where the liquidator was empowered by s 44 (3) (a), Bihar and Orissa Co-operative Societies Act to take proceedings to execute the award, and the plaintiff, being aggrieved by the liquidator's action in taking such proceedings failed to apply to the Registrar to interfere with the liquidator's act or to grant leave for the institution of a suit under s. 57 (2) and he instituted a suit without asking the Registrar to exercise his powers of revision or to grant leave for the institution of the suit :

Held, that the suit must fail in the absence of the Registrar's sanction for its institution. LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE SOCIETY v. DOMI RAM CHAUDHARY *Pat.* 142

Bihar and Orissa Village Administration Act (III of 1922), ss. 53 (2) (b), 76—*Sub-Divisional Magistrate, if can stay proceedings of Panchayat.*

The only provision in the Bihar and Orissa Village Administration Act enabling a Sub Divisional Magistrate to interfere with the proceeding of a Panchayat in criminal case, while the case is pending, is s. 53 (2) (*b*), which enables either the Sub-Divisional Magistrate or the District Magistrate to transfer the case. There is no other provision in the Act which enables a Sub-Divisional Magistrate to interfere with the proceedings of a Panchayat either by stay or otherwise. GONI MAHTON v EMPEROR *Pat* 491

——— s. 76—*S.* 345 (6), *Criminal Procedure Code* (*Act V of* 1898), *applicability of, to Panchayat—Panchayat, whether bound to accept compromise entered into by parties.*

Section 345 (6), Criminal P. C., does not apply to a Panchayat. Section 76, Bihar and Orissa Village Administration Act is merely an enabling section and it does not mean that a Panchayat is bound to accept a compromise entered into by the parties. Where one of the parties resiles from the compromise it is clearly a proper case in which the Panchayat should not act on it. GONI MAHTON v. EMPEROR *Pat.* 491

Bihar Tenancy Act (VIII of 1885), s. 65—*Mortgage suit—Defendant claiming priority being purchaser in execution of rent decree under s. 65—Mortgagor challenging—Objection of defendant not upheld on ground that he failed to get encumbrance annulled within time under s 167—Mortgage decree passed—Execution taken out—Defendant raising same objection that property can only be sold subject to his prior charge—Held, that though decision in suit was wrong, the objection could not be raised in execution.*

Mortgagees instituted a suit for the sale of mortgaged property to realise their dues under the mortgage. One of the defendants, *i. e.*, defendant No. 2 was also a purchaser in execution of a decree passed in a rent suit. The mortgagor plaintiff distinctly challenged the priority of defendant No. 2 by alleging that the latter's purchase was not in execution of a rent decree but of a money decree. Defendant No. 2 did take up the challenge and claimed priority conferred by s. 65, Bihar Ten. Act on the ground that the decree in execution of which he purchased was a rent decree, and he further alleged that he had taken steps under s. 167 of the Bihar Ten. Act to annul the plaintiff's encumbrances. Although the Court found that the decree in execution of which the defendant purchased was a rent decree it held that as the defendant had not annulled the mortgage encumbrances within a statutory period prescribed by the Ten. Act his holding was subject to the plaintiff's mortgage and accordingly the plaintiff was entitled to a mortgage decree against both the defendants. In the result a decree was passed directing the sale of the mortgaged property. When the decree-holders applied to execute this decree defendant) No. 2 raised an objection that the mortgaged property could be sold only subject to his prior charge:

Held, that the mere fact that a purchaser in execution of a rent decree had not availed himself of his statutory right to annul the encumbrances did not, in any way, affect the priority conferred on him by s. 65 of the Act.

Held, however, that the defendant No. 2 sought in the litigation which resulted in this decree (the fact that it was a wrong decision being irrelevant) to establish his priority and had failed to do so and that being the case he could not be allowed subsequenly to reagitate that question in the proceedings in execution of the decree. CENTRAL CO-OPERATIVE BANK *v.* KASHI SAHU *Pat.* 108

Bombay High Court (Original Side) Rules, rr. 534, 895—*Discretion of Judge to direct taxation under r. 534—Dispute as to fact or terms of employment of solicitor, order of taxation, if can be refused—Client, whether can challenge his liability to pay under r. 895—Work done in mofussil—Bill can be taxed on original side—Work done on appellate side cannot be so taxed.*

A Judge has discretion to direct attorneys' bills to be taxed under r. 534 and where a bill is taxed, the attorney can apply by summary process for payment under r. 895. The taxation of a bill does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under r. 895 after taxation has taken place. When an application is made *ex parte* for a common form order for taxation, the Court may direct the solicitor to issue a summons, and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit;

Bombay High Court (Original Side) Rules—concld.

and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. The Taxing Master is entitled to tax the bill of costs in relation to work done in the *mofussil*, on the original side scale but costs incurred on the appellate side of the High Court cannot be so taxed. CHUNILAL & KANGA *v.* WAMANRAO S. MANTRI *Bom.* 449

Bombay Local Boards Act (VI of 1923 as amended by Act XIII of 1935), s. 136 (2)—*Sub-overseer and chairman of works committee of Local Board taking false measurements and fraudulently obtaining money from Local Board by tendering bill with false measurements sheet signed and countersigned by first and second accused respectively—Acts of accused held protected by s. 136, Local Boards Act and s. 197 Criminal Procedure Code (Act V of 1898).*

A sub overseer of the Local Board was, according to the rules of his employment, bound to supervise the works, to take measurements and to enter them in a measurement book maintained for the purpose and also to report to the District Local Board through the works committee, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The sub-overseer was obliged to sign the bill in authentication of the measurements given in it and the charges made. The duties of the Chairman of the works committee were to take measurements and, in the absence of a completion certificate, countersign the bills of the contractor and see that the payment is made without undue delay. Accused No. 1 who was an overseer of a Local Board and accused No. 2 who was an elected member of that Board and Chairman of the works committee, were prosecuted for offences of cheating and falsification of accounts on the allegation that they had dishonestly taken false measurements of certain work of repairs on the Road under their charge and fraudulently obtained from the president of the District Local Board certain amount by tendering a bill with the measurement sheet containing the false measurements attached to it duly signed by accused No. 1 and countersigned by accused No. 2:

Held, that the preferring of the bill was an official act and it did not make any difference that in the discharge of the official duty a fraudulent statement was inserted in the bill. Therefore, the act complained of, namely, the fraudulent and dishonest representation by means of the bill and measurement sheet, was protected under s 136, Bom. Local Boards Act. Accused No. 2, as the member was also entitled to protection under s. 197, Criminal P. C. VISHNU TATYABA NAIK *v.* EMPEROR *Bom.* 229

Bond. SEE Limitation Act, 1908, Art. 66 481 F B

Broker. SEE Contract Act, 1872, s 30 603

Burma Courts Act (XI of 1922), s. 7 (c)—*Amendment of Act in 1932—Creation of Assistant District Court—Whether deprives District Court, which passed decree, of its jurisdiction to execute its decree not exceeding pecuniary limits of Assistant District Court's jurisdiction—Proper Court, which is.*

Just because an inferior Court, (Assistant District Court) has been constituted under Burma Courts Amending Act, 1932, for the same local area after the passing of the decree, with jurisdiction to hear and determine suits or original proceedings of a certain value, the Court of a higher pecuniary jurisdiction

Burma Courts Act—concld.

(District Court) which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's (Assistant District Court) jurisdiction but is the proper Court which should execute the decree. P. L. S P. SUBRAMANIAN CHETTIAR *v.* L. N. CHETTYAR FIRM *Rang.* 318

——— s. 7 (c)—*"Original proceedings"—Meaning of.*

The words "original proceeding" in s. 7 (c), Burma Courts Act are not used in contradistinction to "proceeding in appeal", and can only mean proceedings which initiate something, such as, for example, pauper applications. These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. P L. S P. SUBRAMANIAN CHETTIAR *v.* L N. CHETTYAR FIRM *Rang.* 318

Burma Laws Act (XI of 1898), s. 13 (3)— *Expression, according to justice, equity and good conscience", meaning of.*

The phrase "according to justice, equity and good conscience" generally speaking, means English Law if applicable to the society and circumstances of Burma. TIA MYA *v.* MA KIN PU *Rang.* 836

Burmese Buddhist Law — *Adoption — Adoptive parent if can give adoptive child in adoption to another—Adopted child minor— Consent of person on his behalf, if necessary.*

Obiter.—An adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another. The adoptive parents step into the shoes of the natural parents, and as natural parents can give away their child in adoption, adoptive parents also may give away their *keittima* child in adoption to another person who takes the child with the intention that the child shall inherit to him and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And, just as the adoption from the natural parents has the effect of severing all the ties of the child with its natural family so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. MA KYIN SEIN *v.* MAUNG KYIN HTAIK *Rang.* 507

——— *Adoption—Adoptive parent's unilateral act, if can terminate adoption.*

The relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act (disclaimer) of the parent An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children. MA KYIN SEIN *v.* MAUNG KYIN HTAIK *Rang.* 507

——— *Adoption — Monk, if can adopt.*

A Buddhist monk is vowed to a life of celibacy and poverty, and has cut himself off from all worldly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person, bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is precluded by his personal law from having natural children cannot adopt. MA KYIN SEIN *v* MAUNG KYIN HTAIK *Rang.* 507

——— *Maintenance — Difference between English Law and Buddhist Law on wife's right to maintenance.*

In Buddhist Law, the spouses are for no purpose one person but of their after-acquired property they are tenants in common. The wife's interest in that property is a vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent, since this may be affected in various ways. It depends, for example, on whether the after acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality unlike that implied by English Law) collateral to the main contract of marriage. It is to the effect that the husband shall be the manager of the after-acquired property and shall apply it during the subsistence of the marriage (as to income) first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates. The Buddhist husband is therefore under a positive legal duty to maintain his wife, but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband. The latter when sued for maintenance has a good defence if he pleads and proves that before action brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root. But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not *qua* husband but *qua* manager, and no wrong done to him in the former capacity can benefit him in the latter. THA MYA *v.* MA KIN PU *Rang.* 836

Burmese Buddhist Law—contd.

——— *Maintenance—Husband taking second wife—Amount of maintenance to which first wife is entitled—Child's maintenance, if charge on husband's income.*

In Burmese Buddhist Law, the general rule is that wife is entitled by way of maintenance to an amount which is one-third of the income acquired by the exertions of her monogamous husband. But when the husband takes a second wife the amount of maintenance to which the first wife is entitled, is reduced, to one-sixth of his income and the costs of maintaining children is first charge on the income. THA MYA *v.* MA KIN PU *Rang.* 836

——— *Maintenance — Law in Burma — Child, if can sue its parent for maintenance — Cause of action.*

In Burma a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where, the circumstances are such that the wife is morally bound to support a child or children that fact may, and should, be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. THA MYA *v.* MA KIN PU *Rang.* 836

——— *Maintenance—Suit by wife for—Arrears for period before suit, if can be granted.*

In suit by a Buddhist wife against her husband for maintenance, the Court has no jurisdiction to order payment of arrears of maintenance for the period before suit commenced. THA MYA *v.* MA KIN PU *Rang.* 836

——— *Maintenance — Wife's suit — Husband subsequent to suit taking another wife—This fact, if can form part of wife's cause of action.*

Where subsequent to the wife's suit for maintenance the husband has taken a second wife, this

Burmese Buddhist Law—concld.

cannot, whatever its legal effect, form part of the wife's cause of action in the suit, as a premature suit is incurable by subsequent events. THA MYA *v.* MA KIN PU *Rang.* 836

——— *Marriage —Dissolution by desertion and a year's absence—Absence of communication*

It is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses. THA MYA *v* MA KIN PU *Rang.* 836

——— *Succession—Adoptive parents indicating by acts, desire to sever relation with their* keittima *child*—Keittima *child acquiescing in parents desire by living separately — He forfeits right to inheritance.*

If the adoptive parents show by their acts that they desire to sever the relationship with their *keittima* child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as *keittima* child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his rights of inheritance. MA KYIN SEIN *v.* MAUNG KYIN HTAIK *Rang.* 507

C. P. Land Revenue Act (II of 1917), ss. 187, 188—*Guardian of minor* lambardar, *whether can exercise powers of* lambardar *in relation to proprietary body.*

The guardian of a minor cannot exercise the powers of a *lambardar* in relation to the proprietary body. The power of a *lambardar* to act through a guardian is nowhere recognized in the Land Revenue Act; the only provision for the exercise of the powers of a *lambardar* who is under a disability is through a duly appointed *lambardar-gumashta*. BRIJMOHANSINGH *v.* TULSIRAM *Nag.* 75

——— **ss. 187 (3), 188** — Lambardar-gumashta's *authority, extent of.*

The phrase in sub-s. (3) of s. 187, C. P Land Revenue Act "the duties of the office" is sufficiently wide to cover both the phrases "the duties imposed" and "the powers conferred" in sub s. (1) of that section. The *lambardar-gumashta's* activities are not limited to the duties imposed under s. 188 (1) and he has authority to exercise any of the powers mentioned in sub s. (2). It is the same person who performs both the functions, whether he be a *lambardar* or a *lambardar-gumashta* appointed because of the *lambardar's* disability. The granting of leases is within those powers as much as is the collecting of rents or the acceptance of surrenders. BRIJMOHAN SINGH *v.* TULSIRAM *Nag.* 75

——— **—ss. 188 (1) (a)**—Lambardar gumashta, *if can collect that proportion of rent which would constitute revenue payable.*

Sub-s. (1) (*a*) of s. 188, C. P. Land Revenue Act, does not empower the *lambardar-gumashta* to collect that proportion of the rents which would constitute the revenue payable. BRIJMOHANSINGH *v.* TULSIRAM *Nag.* 75

——— **s. 189**—*Proprietary interest in* patti *lost by* lambardar-gumashta—*Whether ground for his removal.*

Section 189, C. P. Land Revenue Act is not mandatory but permissive, and if a *lambardar-gumastha* has been appointed who has a proprietary interest in the *patti* and subsequently loses that interest, it is open to the Deputy Commissioner to remove him on that ground. BRIJMOHANSINGH *v.* TULSIRAM *Nag.* 75

——— **s. 189**—*S.* 189 (1) (*d*), *applicability to* sadar-lambardar.

A *sadar-lambardar* is also a *lambardar* and is not merely a channel for the payment of revenue from other *lambardars*, and consequently s. 189 (1) (*d*) can also apply to a *sadar-lambardar*. BRIJMOHAN SINGH *v.* TULSIRAM *Nag.* 75

C. P. Local Self Government Act (IV of 1920), s. 23—*Applicability of, to village* panchayat.

Section 23 of the C. P. Local Self-Government Act has no application to the village *panchayat*. CHAMPALAL *v.* VILLAGE PANCHAYAT, SEMRI *Nag.* 609

C. P. Municipalities Act (II of 1922), s. 16 (3)—*Period of nominated members extended till new body elected and began to function—New body only constituted subsequent to meeting in question—Failure to summon old nominated members qualified to act as corporators and summoning of new elected members not then so qualified, if renders meeting invalid.*

The period of office of the nominated members of the Municipal Committee was extended till a new body was elected and began to function. The new elected body was to consist of nine elected, two nominated and two selected members. The nine elected members could not displace any nominated members of the old body for the reason that it was not possible to determine which elected member was a successor of which nominated member so as to attract the application of sub-s. 3 of s. 16. That new body was fully constituted subsequent to the meeting in question:

Held, that the failure to summon the old members who were qualified to act as corporators and summoning the new elected members who were then not so qualified rendered the proceedings of that meeting invalid and of no effect. ONKARSA *v* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— **s. 23**—*Failure to summon member, whether invalidates meeting — Invalidity, if cured by his attendance.*

Failure of the President to summon or non-receipt of summons does not invalidate a meeting but is capable of being regularized by the member's attendance at the meeting. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— **ss 31 (2), 23**—"*Convene*", *meaning of—President assenting to call meeting—Whether deemed to have convened it—Assent, if can be inferred from his presence—Irregularity in convening, if cured by s. 23.*

To convene means to call together or to assemble. When notices are sent to every member or circulated among the members by the Secretary, it must be presumed that it was with the consent of the Chairman, particularly when he attends the meeting. There is no law, rule or bye law laying down any special procedure to regulate the exercise of the President's power to convene meetings. If there is evidence of the President's assent to the calling of any meeting, he must be deemed to have convened the meeting. His assent is inferable from his presence at the meeting. Every meeting that is held must be presumed to have been convened by order of the President. Even on the assumption that there was any irregularity it cannot, in its nature, affect the validity of the meeting itself and is cured by s. 23 of the C. P. Municipalities Act. Strictly speaking, it is nothing more than an informality. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— **s. 66 (1) (b)**—*Tax on ginning and pressing of*

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cotton, whether tax on income derived from trade and ultra vires.

The tax on ginning and pressing of cotton is not a tax on income derived from the trade but on the process of ginning and pressing. This tax does not seek to take anything out of the income and consequently is not *ultra vires*. ONKARSA *v* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— s. 67 — *Omission in notification to specify date from which tax is to come into effect whether invalidates it—Tax must be deemed to come into force from date of notification—Presumptive force under s.* 67 (8).

The order of the Local Govt. sanctioning the proposal to impose a tax is not a mere executive order but an order having the force of law from which the Municipality concerned derives its authority to impose the tax of a particular nature. It is in its nature a legislative order with all the force of law. The Notification itself is nothing but publication of the order. The rule of interpretation bearing on the question of commencement of statutes is that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation. On this principle the order sanctioning the proposal to impose the tax and the rules relating to its assessment and collection would be deemed to come into force on the day on which they were notified in the *Gazette*. In any case the omission to specify the date cannot deprive the Notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax Under sub-s. 8 of s. 67 the Notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. That serves to validate the entire proceeding relating to the imposition of the tax and precludes any objection to its regularity or legality. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— s. 67 (1)—*When intention of resolution is clear, it is futile to stress its inelegance.*

There is a close connection between sub-ss. (1) and (2) of s. 67, C. P. Municipal Act. The integral part of a resolution contemplated in sub-s. (1) is not only the proposal to impose the tax which is implicit in the resolution but defining the class of persons or description of property proposed to be taxed, amount of tax to be imposed and the system of assessment to be adopted. When the intention is clearly apparent from the wording of the resolution it is futile to stress the mere inelegance of expression. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— s. 67 (7)—*Non-mention of s.* 67 (7) *in notification, if material.*

The omission to mention sub s. 7 of s. 67, is not material because the Local Govt. cannot publish a Notification under any other provision except that one. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag* 473

C. P. Village Panchayat Act (V of 1920), ss. 12 (1), 15 (1) (c)—Panchayat, *if can control market—If can levy taxes on shops in market—Reference to District Council, if essential.*

Section 12 of the C. P. Village Panchayat Act confers a discretionary power on *panchayats* to undertake the control and administration of certain matters specified in that section. That section does not expressly mention markets but there can be no doubt that holding of a market being a measure of public utility would be a matter falling under the head (1) of s. 12 (1). The contention that the village *panchayat* cannot undertake control of a market without reference to the District Council must fail for the reason that there is no mention of the District Council in that section and a Court of Law cannot insert that expression when it is not there.

C. P. Village Panchayat Act—contd.

The holding of a market is a measure of a public utility and as such the village *panchayat* can undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. Where the *panchayat* has assumed control of the market by a formal resolution, it has power to levy fees on persons exposing goods for sale in that market under s. 15 (1) (c) with the approval of the District Council. CHAMPALAL *v* VILLAGE PANCHAYAT, SEMRI *Nag* 609

Calcutta Municipal Act (III of 923 as amended in 939), ss. 27 (2), 30, 46, 47—*Rules under s.* 30, *r.* 14 (1) (iii)—*More than one election agent is not permissible—In first nomination paper candidate appointing* F *as his agent —In subsequent nomination paper he appointing himself as election agent—Previous appointment not revoked—Rejection of all nomination papers held justified*

The Calcutta Municipal Act, contemplates a single election agent. More than one election agent is not permissible.

The candidate delivered to the returning officer two nomination papers each accompanied by a declaration in writing stating that he had appointed *F* as his election agent. On a subsequent date he delivered to the returning officer six more nomination papers each accompanied by a declaration in which he appointed himself as his election agent without making any attempt to revoke the previous nomination of *F* as his election agent There was a scrutiny by the returning officer and he then rejected all the nomination papers on the ground that they contained declarations of more than one election agent. On the construction of r. 14, it was argued that the nomination papers or each of them were valid and that there was no justification for rejecting a valid nomination paper because on comparison with another nomination paper the returning officer discovered that more than one election agent had been appointed. It was argued that the returning officer was bound to take each nomination paper as a separate entity and come to his decision on that paper:

Held, that the returning officer had no power to decide which was the election agent whom the candidate wanted to appoint, but the candidate had power under s 33 to revoke either of the appointments and had he done so no fault would apparently have been found with the nomination. But the nomination and the declaration are both contained in Form I and they are considered as a single unit and if the returning officer was of opinion that the candidate had in his nomination papers failed to comply with the provision of the Act which provides that only one election agent shall be appointed he was justified in rejecting the nomination papers. MOHAMAD HOSSAIN *v.* MD. REFIQUE *Cal.* 833

——— ss. 46, 47—*Grounds set up in s.* 47 *not established—Court, if can declare election void.*

Section 46 sets out the grounds on which an application may be made to the Court and s. 47 sets out the grounds on which the election of the returned candidate may be declared void, and unless the grounds set out in s. 47 are established the Court

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is not empowered to declare the election void. MOHAMAD HOSSAIN *v.* MD. REFFIQUE. *Cal.* 833

——ss. 46, 47—*High Court's special jurisdiction as Election Court—Right of parties must be found within statute.*

High Court, sitting as an Election Court, exercises a special jurisdiction which is the creature of statute, and the rights of the parties must be found within the four corners of the statute and no right which is not so found can be imported. S. SHARAFUDDIN AHMED *v.* SHAMSUL HUQ *Cal.* 773

——ss. 46, 47—*Petition under ss.* 46 *and* 47 — *Returning Officer, if necessary party.*

The returning officer need not be made a party to an application under ss. 46 and 47 for getting an election declared void. MOHAMAD HOSSAIN *v.* MD. RAFFIQUE *Cal.* 833

——ss. 46, 47—*Right to recount is inseparably linked to claim to seat—Recount, when can be granted.*

There is no doubt that the Calcutta Municipal Act does not contain any provision which enables an unsuccessful candidate to claim the seat. The procedure of scrutiny and recount is inseparably linked to the claim to the seat. It enables a Court to review the decision of the revising officer as to the admissibility of the ballot papers with the object of further enabling the Court, (as for instance under the provisions of s 39, Ben. Municipal Act), to declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected. Hence when the Legislature excluded from Cal. Municipal Act the right to claim the seat, it also excluded the right to a recount.

A recount, however, can only be granted in cases which are substantiated by specific instances and by reliable *prima facie* evidence and must be disallowed where it is claimed merely as a method of obtaining evidence in support of a number of serious charges of which no particulars have been given. S. SHARAFUDDIN AHMED *v.* SHAMSUL HUQ. *Cal.* 773

——ss. 46 (1), 47—*S.* 46 (1), *construction of—Two candidates to be elected to constituancy—Election of either challenged—Entire election must be held afresh—Both candidates, if necessary parties—Failure to implead one, if fatal.*

Section 46 (1) must contemplate the challenge of the validity of an election whether it is an election of one person or of two persons, and where there are two candidates who would be elected to the constituency, if the challenge is made to either of the candidates, the result would be that the entire election in that constituency would have to be held afresh If that is so, it is obvious that both the candidates who may be affected by an election petition should be partie to it. Failure to implead one of them is a fatal omission. GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA ROY CHAUDHURI *Cal.* 752

——s. 47.

SEE Calcutta Municipal Act, 1923 s. 27 833

SEE Calcutta Municipal Act, 1923, s. 46 773

——s. 127—*Tenant - Servants occupying house of master—Deductions made from pay for occupying house—Servant, if becomes tenant—Points material for decision.*

The mere fact that a servant is paid less wages or some deductions are made from his pay for the benefit of being allowed to occupy a house of his master would not make him a tenant. In such a case the master would in law be taken to have possession. The relationship of master and servant is not however inconsistent with that of landlord and tenant. The

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question as to whether the master's house is a mere lodging provided for the servant or is left in occupation of the latter *qua* tenant must be answered by keeping in view not the form but the substance. If the servant's occupation of his master's house be ancillary to the performance of the duties which as servant he has engaged to perform, then his occupation would be considered as that of a servant, but if his occupation is not connected with his employment. he would be considered a tenant.

In deciding whether a person's occupation of certain premises is as a tenant or as a servant the material points for consideration are (*a*) whether a person is required to occupy the house in question for the performance of his services, or (*b*) did occupy it in order to their performance or (*c*) that it was conducive to that purpose more than any other house which he might have himself rented.

From the fact in the house the Commissioner sometimes holds meetings of public bodies of which he happens to be the chairman, though the meetings could have been as well held in his office it cannot be held that the case comes within the first head. It cannot be said that the Commissioner was required to occupy the house for the performance of his duties. He was not required to reside there, much less was his residence there ancillary and necessary to the performance of his duties.

In order that the case may fall within the propositions (*b*) and (*c*), the advantage must be shown to be decisive one and not merely slight. CORPORATION OF CALCUTTA *v* PROVINCE OF BENGAL. *Cal.* 457

——Sch II, Part I—*Charge, contents of—Ballot paper already delivered to elector—Elector's right to vote challenged on ground of being impostor—Candidate not proved to have abetted procuring of ballot paper—No offence under Sch. II, Para.* 1.

When the candidate charged with offence under Sch II, Para. 1, was absent when the elector applied for the ballot paper, and when the ballot paper had already been delivered to the elector under Para. 31 of the Govt. order, his right to vote was challenged on the ground of his being an impostor :

Held, that the candidate could not be said to have abetted the procuring of the ballot paper and hence no offence under Sch. II, Para. 1, was committed in the absence of proof that the candidate was aware that the alleged impostor was not the real person. GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA ROY CHOUDHURI *Cal.* 752

——Sch. II, Part I—*Personation—Candidate must be shown to have knowingly persuaded impostor to obtain voting paper.*

Schedule II, Part I, Para. 3, Cal. Municipal Act makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. The offence of personation is complete when the person applies for a ballot paper. It must be established that the candidate knowingly persuaded the impostor to obtain a voting paper, that is the knowledge of the candidate is essential in order that a corrupt practice be proved against him. GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA ROY CHOUDHURI *Cal.* 752

Caste. SEE Hindu Law 82

Charge.

SEE Registration 740

SEE Transfer of Property Act, 1882, s. 100 290

Chota Nagpur Tenancy Act (VI of 1908) as amended in 1938—*S.* 46 (4) (a), *whether retrospective.*

Chota Nagpur Tenancy Act—concld.

There is nothing in the language of s. 46 (4) (*a*), Chota Nagpur Tenancy Act to show that it has retrospective effect. Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the legislature to validate transfers which under the former law were invalid when they were made. DHANNA MUNDA *v.* KOEILA BANIAN *Pat.* 851

——ss. 46 (6) (before amendment of 1938)—*Plaintiff making transfer to defendant to whom transfer could not validly be made under s.* 46 (6)—*If estopped subsequently from challenging validity of transfer.*

The plaintiff is not estopped from challenging the validity of the transfer by showing that the defendants were not persons to whom a transfer of a part of the holding could be validly made according to the provisions of the Act as they stood at the time of the transfer, even if the plaintiff had obtained sanction of the Deputy Commissioner on making false representation to him. It is especially so when the defendants were aware that they could not accept the transfer. DHANNA MUNDA *v.* KOEILA BANIAN *Pat.* 851

Civil Procedure Code (Act V of 1908), ss. 2 (2), 115, O. I, r. 10—*Order of trial Court striking off some of defendants on ground that suit was not maintainable against them in absence of consent of Governor of Province under s.* 270, *Government of India Act—Whether decree—Revision, if lies.*

Order of the trial Court striking off some of the defendants holding that the suit was not maintainable against them in the absence of consent of the Governor of the Province under s. 270 (1) of the Govt. of India Act, 1935, those defendants being the servants of the Crown, amounts to a decree within the meaning of s. 2 (2), Civil P. C., even if the Court erroneously refers to O. I, r. 10, as, between the parties the trial Court had finally decided that the plaintiff could get no relief in the suit against those defendants. Such an order is therefore appealable and no revision is maintainable under s. 115 as it is the practice of the High Court to abstain from interference in revision in favour of a party who has another remedy by way of appeal and has not availed himself of it. NAND KUMAR SINGH *v.* PASHUPATI GHOSH GHOSH. *Pat.* 276

——s. 2 (11)—*Suit for specific performance of contract to alienate part of impartible estate against holder — Decree for compensation and not specific performance—Holder dying—In execution property attached in hands of his son—Son held legal representative.*

In a suit for specific performance of a contract against the holder of an impartible estate who had contracted to alienate a part of the estate, a decree for compensation instead of specific performance was passed. After his death the estate devolved on his son as his successor and the estate in his hands was attached in execution of the decree :

Held, that the decree was passed against the deceased in his representative capacity and that his successor was his legal representative within the meaning of s. 2 (11), Civil P. C. RAO BHIMSINGH *v.* GANGARAM *Nag.* 598

——s. 2 (11), O. XXII, r. 3—*Suit by plaintiff and* mutawalli *for declaration that certain property is* waqf—*Appeal from decree*—Mutawalli *dying—Plaintiff managing property of deceased and doing all his duties—Plaintiff held legal representative of deceased for purposes of appeal.*

Civil Procedure Code—contd.

A decree was passed in a suit by the plaintiff and a *mutawalli* of a mosque for a declaration that the mosque was *waqf* and while the appeal was pending the *mutawalli* died. Since then the plaintiff had been managing the mosque and the properties and performing the same duties as the deceased was alleged to have performed during his lifetime :

Held, that the plaintiff could be treated as the legal representative of the deceased for the purpose of the appeal. KAMMON *v.* ALLAH BAKHSH *Lah.* 323

——s. 11. See also *Res judicata* 44

——s. 24. SEE Civil Procedure Code, 1908, O. XLVI, r. 1 242

——s. 34—*Suit for arrears of maintenance—Widow leaving husband's house due to strained relations with adopted son, caused by herself—No demand for payment made in writing —No damages proved to have accrued, due to withholding of maintenance—If entitled to interest on arrears.*

Where owing to strained relations between the widow and her husband's adopted son, the root cause of which was the widow herself, the widow left her husband's house and sued for maintenance, and no demand for payment of maintenance and no damages had been proved to have accrued to her because the maintenance was withheld :

Held, that the equitable jurisdiction of the Court could not be attracted in awarding interest to widow on arrears of maintenance inasmuch as she brought the trouble on herself. Nor could she claim interest under s. 73, Contract Act merely because the money was withheld. She was, however, entitled to interest *pendente lite* and future, under s. 34, Civil P. C. at the rate of 6 per cent. per annum from the date of the suit up till the date of realization. JAMUNA KUNWAR *v.* ARJUN SINGH *All.* 27

——s. 47—*Decree-holder purchasing property—Sale confirmed—Judgment-debtor applying to have sale declared void—Civil Court alone can decide issue under s.* 47—*Issue cannot be decided by superior revenue Court.*

The judgment-debtors moved the Court which passed the decree to have the sale declared void and not for setting aside the confirmation of the sale under O. XXI, Civil P. C., on the ground that it was a nullity.

Held, that the proceeding was one under s. 47, Civil P. C, as it related to execution of the decree and was one between the parties to the suit, the decree-holders being the purchasers. The Civil Court was the only authority to determine whether or not the execution sale held by the Collector was valid. That issue could not be decided by the superior revenue Courts. ZIBAL *v.* MUKA *Nag* 274

——s. 47—*Validity of sale is question in execution—Sale held—Application under Bengal Agricultural Debtors' Act (VII of* 1936), *s.* 8—*Onus to prove that sale was illegal—Onus discharged—Effect.*

The question as to the validity of the execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of s. 47, Civil P. C. But when once an execution sale had been held there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case, the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the

Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. On discharge of this onus, the Court would have no option but to set aside the sale even if it had received no notice under s. 34, Beng. Agri. Debtors Act. The result would therefore be that even if the debt had been extinguished by the sale it would revive after the sale had been set aside and the provisions of the Beng. Agri. Debtors Act would apply thereto. TAMIZALI *v.* MOHD. MASARALI BHUIYA. *Cal.* 451

——— s. 47, O. XXI, r. 89—*Mortgagee purchasing property at auction sale in execution of mortgage decree—Application under O. XXI, r. 89 by prior purchaser of half of mortgaged property—Applicant, if becomes party to mortgage suit—Rejection of application—Subsequent suit for redemption by applicant, if barred.*

Where the mortgaged property is sold in execution of the mortgage decree and an application under O. XXI, r. 89, Civil P. C, to have the sale set aside is made by the prior purchaser of half of the mortgaged property, the applicant does not become a party to the mortgage suit in which the decree was passed. The dispute between him and the mortgagee who himself is the auction purchaser cannot be deemed to be a dispute between the parties to the suit within the meaning of s. 47 and hence a suit by the applicant for redemption of half of the mortgaged property cannot be said to be barred by s. 47.

The rejection of the application under O. XXI, r. 89 does not bar the subsequent suit to redeem, for, the applicant did not by his application under r. 89 make himself a party to the suit in which he could have been impleaded. KHIALMAL CHOITHRAM PUNJABI *v.* POHUMAL CHOITHRYM PUNJABI *Sind* 247

——— s. 47, O. XXI, r. 90—*Plea not taken before sale should be regarded as waived—Rule does not apply to debtor applying under Bengal Agricultural Debtors Act (VII of 1936), s. 8.*

The question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. Such a plea should be regarded as waived unless such plea is expressly taken before the sale. This plea of waiver does not, however, apply to the case of the judgment-debtor who has applied under s. 8, Beng. Agri. Debtors' Act. TAMIZALI *v.* MOHD. NASARALI BHUIYA. *Cal.* 451

——— s. 48—*Court dismissing execution application on ground that case was old one and with intention of removing it from its list —Second application for same relief—Whether in continuation of old one.*

Where an application for execution is dismissed by the Court not because of the decree-holder's default or negligence but on the ground that the case was an old one and the Court intended to remove it from its list, the second application made for similar relief must be regarded as continuation of the first one. MUNICIPAL COMMITTEE, HAFIZABAD *v.* GOPAL DAS *Lah.* 334

——— s. 50. See Civil Procedure Code, 1908, O. XXI, r. 19 783

——— ss. 50, 99—*Order of substitution by executing Court under s. 50 not affecting merits of case—No interference with, by Appellate Court by reason of s. 99.*

When the Court to which the decree has been transferred for execution makes an order for substitution under s. 50, Civil P. C it is a matter of procedure and not of jurisdiction.

An Appellate Court cannot therefore interfere with that order by reason of s. 99, where the merits of the case are not affected by the irregularity. DEBENDRA NATH HALDAR *v.* G. A. ARATOON *Pat.* 245

——— ss. 53, 2 (11)—*Suit for specific performance —Decree for alternative remedy of compensation —S. 53, if applies.*

Where a decree has been passed in a suit for specific performance for the alternative equitable remedy of compensation in lieu of specific performance, the decree may be regarded as creating a debt of record without its being a decree on a debt and consequently s. 53, Civil P. C., has no application. RAO BHIMSINGH *v.* GANGARAM *Nag.* 598

——— s. 60 (1)—*Disposing power under s. 60 (1), limits of.*

The reference to disposing power under s. 60 (1), Civil P. C., must be limited to the context, which is indicated by the words that follow:—"whether the sum be held in the name of the judgment-debtor or by another person in trust for him or on his behalf." BHAGWAN DASS RAM PRASAD *v.* SECRETARY OF STATE *Pat.* 360

——— s. 60 (1) (b)—*Sewing machines in tailor's shop whether tools of artisan.*

A tailor who uses a sewing machine is an artisan and the sewing machine is an artisan's tool. Section 60 (1) (*b*), Civil P. C., does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. Hence all the machines which were in use in the tailors shop at the time of the attachment are artisan's tools within the meaning of s. 60 (1) (*b*) and exempt from attachment. The fact that only one machine is sufficient for the tailor's maintenance or that he is working in another man's shop subsequent to attachment is no ground for refusing to release the machines from attachment. AHMAD SAYEED *v.* KANIZAK ZOHRA *All.* 826

——— s. 60 (1) (c)—*Judgment-debtor not taking plea under s. 60 (1) (c)—Stranger if can raise such plea subsequent to sale.*

Where a judgment-debtor does not object to the sale of the house on the ground of his being an agriculturist within the meaning of s. 60 (1) (c) and allows the house to be sold, it would be no longer open to him, much less to a stranger to raise the same objection in answer to a suit by the auction-purchaser for possession of the property purchased by him. SHEORAJ *v.* GANGA PRASAD *Oudh* 675

——— s. 60 (1) (c)—*Party claiming benefit under, —Onus—"Agriculturist," meaning of.*

A party claiming benefit of s. 60 (1) (c), Civil P. C., is bound to show that the person whose property was attached and sold was an agriculturist within the meaning of s. 60 (1) (c). The term "agriculturists" is used in cl. (c) in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. SHEORAJ *v.* GANGA PRASAD *Oudh* 675

——— s 60 (1) (c)—*Sale of zemindari — Vendor's right to retain possession of house on subsequent acquisition of exproprietary right by vendor.*

Where the ownership of the house or the materials thereof has passed to the auction-purchasers by virtue of the auction sale and the vendor has lost all interest therein from that date, the subsequent acquisition of exproprietary rights by the vendor cannot have the effect of reviving the owner-

Civil Procedure Code—contd.

ship in favour of the vendor. SHEORAJ v. GANGA PRASAD *Oudh* 675

——— 60 (1) (l)—*'Salary', meaning of.*

There is nothing in cl. (i) of s. 60 (1), Civil P. C., to indicate that the salary mentioned there is the net salary. BHAGWAN DASS RAMPROSAD v. SECRETARY OF STATE *Pat.* 360

——— s. 60 (1) (l), (k) as amended in 1937, O. XXI, r. 48— *Exemption of deposits in Provident Funds is separate from exemption in respect of salaries.*

The exemption of deposits in provident funds under cl. (k), s. 60 (1), Civil P. C., is separate from the exemption in respect of salaries given by cl. (i), and the result would be that the recurring contributions of the judgment-debtor to the provident fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by cl. (i). BHAGWANDAS RAMPROSAD v. SECRETARY OF STATE *Pat.* 360

——— ss. 63 and 73—*Rateable distribution—Attachment under O. XXI, r. 48—Attachment, when complete—Assets received by Court of lower grade—Application under ss 63 and 73 to Court of higher grade — Application transferred to Court of lower grade where assets were received—Applicant whether entitled to rateable distribution from date of execution application or from date of application under ss. 63 and 73.*

The attachment under O. XXI, r. 48, Civil P. C., becomes complete and effective as soon as the notice of the order issued by the Court is served upon the disbursing officer, who accepts it. Where the various executions against an officer are pending in the Court of Additional Small Causes and the applicant decree-holder applies under ss. 63 and 73, Civil P. C., to the Court of Small Causes and the application is sent to the Court of Additional Small Causes where the assets were received, the applicant decree-holder is entitled to rateable distribution from the date of her execution-application and not from the date of her application under ss. 63 and 73. It cannot be said that because the Office of the Accountant-General postpones the remission of the salary to a latter date there is no effective attachment. Section 73, Civil P. C. does not require the transfer of decrees to the Court where the process of realisation takes place as a condition precedent to an application under s. 63 of the Code and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realisation takes place. If the process of realisation takes place in the Court of an inferior grade, it is the duty of such Court to send the sale proceeds to the superior Court which, under s. 63, Civil P. C., is the proper Court to distribute the assets. But where this is not done, it cannot deprive the decree-holder in the higher grade Court to his right to rateable distribution. DR. MRS ELSIE, C. GRIFFIN EDWARD v. WILLIAM AINSLIE CANNON HOWARD *Oudh* 38

——— ss. 64, Expl. 73 — *Explanation to s 64, scope of—Court ordering execution application to be filed but mentioning that attachment should continue—No such order made on application for rateable distribution which was also filed — Decree-holder for rateable distribution, if can take advantage of order on execution application.*

The Explanation to s. 64, Civil P. C., clearly indicates that applications for rateable distribution go hand in hand with the application for execution. Hence where the Judge orders execution petition to be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application. SOHAN LAL GULAB RAI v. FIRM MUHAMMAD DIN MUHAMMAD YUNIS *Pesh.* 712

——— s. 67 (2)—*Rule under, promulgated by Coorg Local Government—Rule, if restrains execution of Coorg decree for money by sale of land when it is transferred for execution in British India.*

The rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Govt. of Coorg. It cannot be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. KATACHIKANDI THIYYATHIKANDI ABDULLA KAKA v. KADUMANDRA K. MUTHANNA *Mad.* 46

——— ss. 68, 47—*Decree transferred to Collector for execution — Jurisdiction of Court passing decree, if ousted—Application by judgment-debtor to Civil Court for payment of decree by instalments—Stay of proceedings before Collector ordered—Order not communicated and sale held—Sale and subsequent confirmation held invalid.*

The transfer of a decree to the Collector does not oust the jurisdiction of the Civil Court in all matters. After such a transfer the judgment-debtor applied to the Court which passed the decree for payment of the decree by instalments under s. 11, C. P. Money-lenders Act. The Court entertained the application and ordered the stay of the proceedings before the Collector. But the stay order was not communicated to the Collector with the result that the Collector held the sale and confirmed it;

Held, that the order of the Civil Court must be construed as an order recalling the decree and the Collector ceased to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalled it. Consequently, the power of the Collector to proceed with the case was suspended by virtue of the order made by the Court passing the decree.

Held, also that when the Civil Court exercised its authority and recalled the decree, its order recalling the decree by its own force deprived the power of the Collector to execute the decree and the Civil Court's order came into effect as soon as it was passed so as to suspend the Collector's power to proceed with the sale. ZIBAL v. MUKA *Nag.* 274

——— s. 73.

SEE Civil Procedure Code, 1908, s 63. 38

SEE Civil Procedure Code, 1908, s. 64 712

——— s 73—*Decrees by A, B and C against D and his father E who became insolvent—In execution of A's decree Court allowing Official Receiver to sell entire property as Court agent within certain time and to pay D's share into Court—Property sold beyond period fixed—Execution petitions by B and C—Sale proceeds subsequently deposited into Court—B and C held entitled to rateable distribution.*

A, B and *C* obtained decrees against *D* and his father *E* who became insolvent. On application of *A* for the execution of his decree, the Official Receiver was permitted by the Court to sell the entire property as an agent of the Court within certain time and deposit into Court the share of *D* who was non-

insolvent. The property was however sold after the period fixed by the Court. *B* and *C* applied for execution of their decrees and subsequently the Official Receiver paid into Court *D's* share in the sale proceeds *B* and *C* applied for rateable distribution:

Held, that the receipt by the Official Receiver in contravention of the rules under which he should have been operating, could not by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court. It could not be said that there had been, at the time when these two execution petitions of *B* and *C* were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorized and irregular sale by the Official Receiver and an unauthorized receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from this sale and there was at the time when these execution petitions were filed no subsisting authority to the Official Receiver to sell. Hence the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. *B* and *C* were therefore entitled to rateable distribution.—V. S. A. R. M. ANNAMALAI CHETTIAR *v.* VELLAYAN CHETTIAR *Mad.* 536

———s. 80—*Co-operative society in liquidation—Liquidator appointed under Bihar and Orissa Co-operative Societies Act (VI of 1935)—Plaintiff's suit against him claiming that he being agriculturist his house could not be attached—Notice under s. 80, if essential.*

Section 80, Civil P. C., bars the institution of a suit unless notice has been given only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under s. 80. For instance, when an Official Assignee or a Receiver is impleaded in a suit to realise a charge on the property of the insolvent which is vested in him, and no act or omission on the part of the Receiver is alleged, notice is not necessary where no relief is claimed against the liquidator of a co-operative society, the object of the plaintiff in the suit being to obtain a decision as to whether his house is liable to be attached. He being an agriculturist no notice under s. 80 is required, assuming that the liquidator appointed under the Bihar and Orissa Co-operative Societies Act is a public servant within the meaning of the section. LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE SOCIETY *v.* DOMI RAM CHAUDHARY *Pat.* 142

———s. 92. SEE Court Fees Act, 1870, Sch. II, Art. 17 (*vi*) 641 F B

———s. 92—*Suit by person calling himself trustee against defendant alleged to be trespasser for possession of waqf property and office of mutwalli by dispossession of defendant—Competency—S. 92, if bar.*

Where an ordinary suit for ejectment is filed by a plaintiff who calls himself a trustee against a defendant who is alleged to be a trespasser, the plaintiff can ignore s. 92, Civil P. C., and can sue for possession of *waqf* property and of the office of *mutwalli* and *amin* of the *waqf* by dispossession of the defendant. DHARAM NARAIN *v.* SURAJ NARAIN *All.* 697

———s. 99. SEE Civil Procedure Code, 1908, s. 50 245

———s. 100—*Lower Appellate Court agreeing with trial Court, if bound to take every sentence of trial Court judgment and say that it agrees with it.*

There is no magic in any special formula of words, nor is the first Appellate Court bound to take every sentence of the trial Court's judgment and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. Where the lower Appellate Court while agreeing with the trial Court's finding of fact uses in a part of his judgment the phrase "it is not unreasonable to presume", with reference to lower Court's finding of fact, it means no more than that he was satisfied that the trial Court was right in the conclusion at which he arrived, or at least that he was unwilling to disturb it. Such a finding of fact is binding in second appeal. DEOKALI PATTAH *v.* RAMDEVI *Rang.* 286

———s. 102—*Suit for refund of amount recovered as tax with prayer for declaration of plaintiff's non-liability—Second appeal does not lie.*

A suit for refund of amount recovered as a tax with a prayer for declaration of plaintiff's non-liability to pay the tax, is a suit of Small Cause nature and hence no second appeal lies under s. 102, Civil P. C. BANSI LAL *v.* CHAIRMAN, TOWN AREA COMMITTEE, SAIDPUR *All.* 633

———s. 107, O. XLI, r. 23—*Unsuccessful litigant in lower Court cannot be allowed to patch up weak parts in case and fill up omissions.*

The provisions of s. 107, Civil P. C., as elucidated by O. XLI, r 23 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Court to patch up the weak part of the case and fill up omissions in the Court of Appeal. MOTAI *v.* SIR AKBAR KHAN *Pesh.* 871

——— ss. 109, 110—*Leave to appeal for raising for first time question before Privy Council, not raised in any Courts in India cannot be granted.*

Where leave to appeal to the Privy Council is asked for, for the purpose of raising for the first time before the Privy Council a question which was not raised at any time while the litigation was pending in India, that is either in the trial Court or in the High Court, such leave cannot be granted. *Haji* MUHAMMAD SHADAK KOYI *v.* BURRA VENKATA KOMARAJU KOYI *Mad.* 353

———ss. 109, 110—*Limitation Act (IX of 1908), s. 12—Application for leave to appeal to Privy Council—Time requisite for obtaining copy of decree and copy of judgment, if can be excluded in computing limitation.*

Section 12 (3), Lim. Act, is to be read as enabling an applicant for leave to appeal, to exclude in computing the period of limitation for his application, the time requisite for obtaining a copy of the judgment on which it is founded. A party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment.

MR. H. HUNTER *v.* EHSAN HUSAIN *Oudh* 295

——— s. 110. SEE Civil Procedure Code, 1908, s. 109 292

——— s. 110, para. 2—*Test laid down by, for granting leave—Decretal amount with interest amounting to less than Rs.* 10,000—*Property attached in execution value at Rs.* 15,000 *held to be* waqf

property not liable to attachment and sale—Leave to appeal, held could not be granted.

Paragraph 2 of s. 110, Civil P. C., is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs 10,000 and upwards.

Where therefore in execution of his decree a decree-holder attached certain property of the judgment-debtor valued at Rs. 15,000, for recovery of the decretal amount with interest amounting to Rs. 9,957-5-3, and an objection under s. 47, Civil P. C. that the property being *waqf* property was not liable to attachment and sale being successful applied for leave to appeal to the Privy Council :

Held, that leave could not be granted as the test laid down by para. 2 of s 110, Civil P. C., had not been satisfied. SUDAMAN PRASAD v. MOHAMED ABDUL ALIM *Oudh* 639

———s. 111-A—*Object of s.* 111-*A.*

The object of s. 111-A, Civil P. C, is to bring the Civil P. C., into line with s 205, Govt. of India Act. The two provisos make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-s. (1) of s. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Govt. of India Act is involved. A. L. S. P. P L. SUBRAMANIAN v. MUTHUSWAMI GOUNDAN *Mad.* 865

——— s. 115. SEE Civil Procedure Code, 1908, s. 2 (2) 276

——— s. 115. SEE Court Fees Act, 1870, s. 6 (4) 133

——— s. 115—*Court taking erroneous view of law acts illegally in exercise of jurisdiction—Revision, if maintainable.*

Where the Courts below have taken an erroneous view of the law with regard to a matter and have acted illegally in the exercise of their jurisdiction it is open to the High Court, to interfere in the exercise of its revisional jurisdiction under s. 115, Civil P. C. TAMIZALI v. MD. NASARALI BHUIYA *Cal.* 451

——— s. 115—*Jurisdiction under, if can be exercised with reference to order under s.* 45 (2) *or order under s.* 46, *U. P. Encumbered Estates Act* (*XXV of* 1934).

The revisional jurisdiction vested in the High Court by s. 115, Civil P. C, can be exercised with reference to appellate orders, passed under sub-s. (2) of s 45, U. P. Encum. Estates Act or revisional orders, passed under s. 46 of the Act by a District Judge. ACHRAJ SINGH v. HARDWAR NATH *All.* 464 F B

——— s. 141, Sch. II—*Sch II deals with procedure only—If covered by s.* 141.

Schedule II, Civil P. C., is procedure and nothing else but procedure. The right to arbitrate is not conferred by Sch. II. This right is a common law-right which is part of the right of contract. Schedule II, merely provides for the manner in which after a suit has been instituted the right may be exercised. Schedule II, is therefore covered by s. 141. MAHA RAM v. HARBANS *All.* 17 F B

——— s. 144. SEE Execution sale 411

——— s. 144. SEE Limitation Act, 1908, Art. 181 387

——— s. 144—*Proceedings against person not party to suit.*

Proceedings under s. 144, Civil P. C, cannot be taken against a person who was not a party to the suit. UJAGAR SING v. LIKHA SINGH *All.* 387

——— s. 146, O. XXII, r. 10—*A's suit for recovery of property decreed against B—During pendency of suit A's son S acquiring suit property by final partition decree—Appeal by B—S applying to be impleaded as respondent—Neither s.* 146 *nor O. XXII, r.* 10 *held applied.*

A obtained a decree against *B* in a suit for the recovery of property. During the pendency of the suit *A's* son *S* acquired *A's* interest in suit property by a final partition decree. On an appeal by *B* against decree passed against him, *S* applied under O. XXII, r. 10 to be impleaded as supplemental respondent to the appeal:

Held, that s. 146, Civil P C., did not apply as *S* could not be regarded as claiming under *A* as he got the suit property by virtue of the partition decree and not by reason of any assignment or devolution from his father;

Held, further that O. XXII, r. 10, also did not apply as *S* acquired the property before the appeal and not during its pendency. *S* was therefore not entitled to be impleaded as respondent. RATNASABAPATHI PILLAI v. GOPALA IYER *Mad.* 637

——— s. 151—*Ambiguous decree of first Court affirmed by High Court—Subsequent removal of ambiguity by reviewing its own judgment—Decree not embodying directions in final judgment passed on review—Decree, if can be brought into conformity with final judgment—High Court, power of, to order necessary amendment.*

High Court affirmed an ambiguous decree of the Court of first instance but by reviewing its own judgment, subsequently removed the ambiguity. But the judgment which was final between the parties, passed on review contained the directions which had not been embodied in the decree;

Held, that there was no bar in subsequently bringing the decree into conformity with the final judgment where the rights of third parties had not been intervened. The High Court could, if necessary, itself order the aforesaid amendment of the decree. RAJENDRA KISHORE BASU ROY v. PROMOTHA NATH ROY *Cal.* 842

——— s. 151—Interim *order—Suit for recovery of certain property alleged to be allotted to plaintiff under agreement—Defendant not admitting that plaintiff is entitled to such property—Court, if can pass* interim *order of maintenance.*

There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some *interim* relief pending disposal of the suit. Where therefore a plaintiff brings a suit for certain property alleging it to have been allotted to him in accordance with certain agreement and the defendant does not admit that the plaintiff is entitled to the property claimed by him, the Court has no jurisdiction to pass an *interim* order of maintenance in favour of the plaintiff. YENUMALA LATCHANNA DORA VARU v. YENUMALA MALLU DORA VARU *Mad* 175

——— s. 151—*Remedy provided by code not availed of by party—Inherent powers cannot be invoked.*

A party who had an appropriate remedy under a specific provision of the Code but of which, however, he failed to avail himself, cannot be allowed to

invoke the inherent powers of the Court S. RATNASABAPATHI PILLAI *v.* GOPALA IYER *Mad.* 637

——— ss. 151, 152—*Amendment—Lapse of time, if bar.*

It is well-settled that lapse of time, however, considerable, is no bar to the correction of errors either under s. 151 or under s. 152 of the Civil P. C. SANWALAY RAI *v.* SANT RAI *Oudh* 727

——— ss. 151, 152, 153—*Case decided and decree satisfied — Power of Court to allow amendment subsequently.*

Although after the case has been decided and the decree has been satisfied the Court becomes *functus officio*, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval. SANWALAY RAI *v.* SANT RAI *Oudh* 727

——— ss. 151, 152, 153—*Redemption suit—Misdescription of property in plaint, judgment and decree—Mortgage amount paid in full—Mistake held could be treated as clerical one and plaint, judgment and decree could be amended*

A mistake in the description of the mortgaged property, had crept into the plaint, judgment and decree of the redemption suit. The mortgagor, however, paid to the mortgagee the entire amount of the mortgage money, including the amount due on the further charge and obtained possession of the entire property. The mortgagee subsequently attempted to take advantage of the mistake. The mortgagor applied for amendment of the plaint, judgment and the decree under ss. 151, 152 and 153, Civil P. C.

Held, that under these circumstances the mistake could be treated as one of a clerical nature arising from an accidental slip or omission. The Court could therefore amend the plaint, judgment and the decree. SANWALHY RAI *v.* SANT RAI *Oudh* 727

——— s. 152—*Decree of trial Court merging into decree of Appellate Court—Jurisdiction of trial Court to amend decree under s. 152 as to its order of costs.*

In matters of amendment of the decree under s. 152, Civil P. C., the trial Court has ordinarily no jurisdiction left in cases where the decree of that Court has merged in the decree of the Appellate Court. The principle that notwithstanding the fact that the decree of the trial Court has merged in the decree of the Appellate Court, the former Court has power under s. 152 to make an amendment if the amendment is merely of a clerical or arithmetical mistake cannot be extended where amendment sought relates to costs and there is a dispute between the parties as regards the interpretation to be placed on the order of the trial Court in regard to proportionate costs, which cannot be said, to be a clerical or arithmetical mistake apparent on the face of the record. KHAIRATI KHAN *v.* MUNNEY KHAN *Oudh* 53

——— ss. 152, 153. See Civil Procedure Code, 1908, s. 151 727

——— O. I, r. 8—*Suit by reversioner to restrain alienation by limited owner—Procedure under O. I, r. 8, if must be followed—Other reversioners, if necessary parties.*

Order I, r. 8, Civil P. C., is applicable only when two conditions co-exist, *viz.*: (1) where the parties are numerous and (2) where one of such numerous parties desires to be considered as a representative of the others for the purposes of the

suit. It has no application where the parties are not numerous as here, nor has it any application where a person is vested with a representative character by virtue of his status. Order I, r. 8, applies where a person does not normally represent any one else but seeks to be clothed with a representative capacity only for the purposes of the suit. There is, therefore, nothing to prevent a single reversioner from instituting a suit to restrain a limited owner from alienating property without having recourse to the provisions of O. I, r. 8, and without making the other reversioners parties even though there may be other reversioners entitled to, the same reliefs. MITTULAL SINGHANIA *v.* PURSOTOME DEBI BAGLA *Cal.* 193

——— O. I, r. 10. See Civil Procedure Code, 1908, s. 2 (2) 276

——— O. III, r. 1—Vakalatnama *in Form IV prescribed by Sind Civil Courts Circulars, whether empowers Advocate to enter into compromise in the case, on behalf of, client—Specific authority for specific compromise necessity of.*

A *vakalatnama* in Form IV prescribed by Sind Civil Courts Circulars authorising an Advocate or a Pleader to appear and act in a case does not give, him power to compromise the case on behalf of his client. Form IV does not warrant the *vakalatnama* to contain the power to compromise This power is inadequate to validate a compromise made by the Advocate or the Pleader. Specific authority for specific compromise is essential. HUSSAIN HABIBULLAH *v.* VALI MAHAMMAD *Sind* 45

——— O. III, r. 1, O XI, r. 1, Appendix Form No. 3, s. 115 (c)—*Interrogatories—Defendant not entitled to answer personally — Defendant, if can answer it through recognised agent — Adjournment costs — Court, if can order, against party, on non-compliance—Court wrongly rejecting interrogatories — Interference in revision.*

On the whole, O. III, r. 1, governs O. XI, r. 1. The former order is a general one and has general application. Therefore unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought to be applied.

In O. III, r. 1, the expression "except where otherwise expressly provided by any law for the time being in force" refers to laws other than the Code.

When a party to a suit is ordered to answer interrogatories, he is not bound in the absence of a special direction to that effect to answer personally, and he can answer through some recognised agent who knows the facts; that is to say, an affidavit need not be sworn to by the party himself but this can be done by a recognised agent. As a general rule it is salutory and wholesome that the defendant himself should be made to swear to what he says. But there will always be exceptions, and in any case as the Code allows an alternative a party cannot be penalised for following it, unless he has been expressly ordered to do the contrary.

Where by an order of the Court the interrogatories ought to have been answered in person within the ten days but they were not answered, it is within the competence of the Court to order adjournment cost against the person (defendant) though he had given a reasonable explanation as to why this was not done.

When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person

Civil Procedure Code—contd.

the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do. If the Court rejects the act, it is a material irregularity on a question of procedure and justifies interference in revision under s. 115 (c) K. C. MAJUMDAR *v* SURAJSINGH *Nag.* 707

——— O. VI, r. 15. SEE Patna High Court Rules, Chap. XIII, r. 10 12

——— O. VII, r. 10. SEE Civil Procedure Codd, 1908, O. XLVI, r. 1 242

——— O. VIII, r. 2. SEE Limitation Act, 1908, s. 361

——— O. VIII, r. 5—*Contention that allegation needs no reply whether amounts to denial by necessary implication.*

There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. U LUN *v.* U CHIT HLAING *Rang* 114

——— O. IX. SEE Civil Procedure Code, 1908, O. XVII, rr. 2, 3 768

——— O. XI, r. 1. SEE Civil Procedure Code, 1908, O. III, r. 1 707

——— O. XV, r 2. SEE Civil Procedure Code, 1908, O XVII, rr. 2, 3 768

——— O. XVI, r. 1—*(Lahore amendment)—Court has discretion to allow examination of witness even if he is not mentioned in the list.*

Rule 1 of O. XVI, Civil P. C, is a technical one and in the absence of any prejudice to either party the Court is not justified in refusing to examine the witnesses on the ground that they were not mentioned in the list. The rule gives the Court discretion to allow witnesses to be examined even if they are not mentioned in the list if it is satisfied that there are sufficient reasons for doing so. KARIM BAKHSH *v.* FIRM THAKUR DAS-RAM LAL *Lah.* 166

——— O. XVII, rr 2, 3, O XV, r. 2, O. IX—*Discretion conferred by O. XVII, r. 2 to be exercised judicially — Court, when can pass order on merits under O. XVII, r. 2 or r. 3 —Case adjourned for production of evidence under O. XV, r. 3—Plaintiff not appearing on adjourned date—Order on merits cannot be passed—Case falls under O. XVII, r. 2 and not r. 3—Court must proceed under O. IX, r. 8 or grant adjournment.*

The last words of r. 2 of O. XVII, Civil P C., confer a discretion, but it is a discretion which must be exercised judicially. A Judge, in exercising such discretion, may grant a further adjournment, or, if the circumstances justify such a course, he can pass an order on merits, but he must have material before him to justify that course. If there is no evidence before him, he cannot in the exercise of judicial discretion proceed to deal with the case on merits Hence where a case is adjourned under O. XV, r 3 for the production of evidence and the plaintiff fails to appear on the adjourned date, the Court is under O. XVII, r 2 bound to dispose of the matter under O. IX, r. 8, or else to grant an adjournment. The Court cannot dispose of the case on merits as in such a case there is no evidence before the Court to do so. Order XVII, r. 3, does not apply to such a case :

Held, that the case was dealt with on merits and appeal therefore lay.

Held, further that the case fell under r. 2 and not under r. 3 of O. XVII and as the Court had no material before it to justify a disposal on merits the order passed by it should be modified so as to fall under

Civil Procedure Code—contd.

O. IX. RUKMANSA JAJANSA HOSMANI *v.* SHANKARGOUDA BASANGOUDA LAKBYAL *Bom* 768

——— O. XXI, r. 15—*Application by one decree-holder stating that other decree-holder will be produced at time of recovery of money—Application, if on behalf of both—Where other decree-holder is produced at time of payment of money, the payment is binding on him — Fact that payment was made out of Court is immaterial.*

Rule 15 of O XXI, Civil P. C, does not require that any particular form of words should be used to express the undertaking required by cl. 1 of that Rule.

Where one of the two decree-holders make an execution application stating that the other decree-holder will be produced at the time of the recovery of the money the application must be held to be on behalf of the both. If that undertaking is observed, and if the other decree-holder produced when the money is paid, all necessary protection of his interest would be secured. It would make no difference if payment under these conditions is made out of Court ; and provided that the other decree-holder is produced at the time of any payment or adjustment and is aware that the payment or adjustment is made in satisfaction of the decree, the payment or adjustment would be binding upon him. WADERO SHAHBAZ KHAM WADERO FATEHKHAN *v.* KAKALMAL BUDHUMAL *Sind* 183

——— O. XXI, r. 15 (1) and (2)—*Execution application by one of two, joint decree-holders — Adjustment binding on both decree-holders, if can be recorded where executing decree-holder proves express authority — Absence of authority —Provisions of O. XXI, r. 15 must be looked into.*

In the case of an execution application by one of the joint decree-holders if express authority of the executing decree-holder to receive the decretal amount on behalf of all joint decree-holders is proved or if it is established that in fact all decree-holders have received their shares of the amount then an adjustment binding all decree-holders can and should be recorded. But when no express authority or receipt by other joint decree-holders has been established then the provisions of O. XXI, r. 15, Civil P. C., have to be looked to. WADERO SHAHBAZ-KHAN WADERO FATEHKHAN *v.* KAKALAL BUDHUMAL *Sind* 183

——— O. XXI, rr. 17, 57 — *Rejection of application under r. 17—Application must be deemed not in accordance with law — Rejection whether dismissal under r. 57—Application not numbered as execution petition—Inference*

When the Court exercises its power of "rejection" under r. 17, O. XXI, Civil P. C., the legal position is that no execution petition in accordance with law must be deemed to have been filed. This is made clear by cl. 2 of r. 17. There can therefore be no scope for the application of O XXI, r. 57. The circumstance that the application was not even numbered in the ordinary course as an execution petition clearly indicates that the executing Court had not decided to admit the execution petition at all, but merely rejected it *in limine* as not complying with the formal requirements of law. P. S. SATHAPPA CHETTIAR *v.* N. K. PR S PR. CHOCKALINGAM CHETTIAR *Mad.* 204

——— O. XXI, r. 19, s. 50—*Suit against father and son — Plaintiff getting money decree against father—Son awarded decree for costs against plaintiff — Son's execution application against plaintiff dismissed on ground that sum due against him as legal representative of his deceased father was larger — No enquiry under s. 50 as to extent*

Civil Procedure Code—contd.

of assets in hands of son—Dismissal held illegal—O XXI, r. 19 held applicable.

Order XXI, r. 19, Civil P. C., applies even to a case of a claim by a defendant against a plaintiff personally and a claim by a plaintiff against the defendant as legal representative of another deceased defendant. The mere fact that there has to be some inquiry under the provisions of s 50, Civil P. C., as to the extent of the property of the deceased in the hands of his legal representative, or that the sum may be limited by the provisions of s. 50, Civil P. C., does not remove a case out of the scope of r. 19 of O. XXI, Civil P. C.

The plaintiff in a suit against father and son obtained a money decree against the father. The son was awarded a decree for his costs. Applications for execution by the son were dismissed on the ground that the amount due to the plaintiff from the son as legal representative of his deceased father was longer. No enquiry, however, under s. 50 was made as to the extent of the deceased father's assets in the hands of the son:

Held, that the order of dismissal was illegal. The Court should have ordered an enquiry under s. 50. Then the sum recoverable by the plaintiff from the son would be set off against the sum recoverable by the son from the plaintiff within the meaning of O. XXI, r. 19 which applied to the case.

Held, also that the plaintiff could demand a set off and need not have filed his own execution application against the son as a legal representative of his deceased father of his money decree which the plaintiff held against the father inasmuch as the object of O. XXI, r. 19 was to avoid multiplicity of proceedings. SOBHOMAL THAOOMAL *v.* DULAHDINOMAL TILUSING *Sind* 783

——— O. XXI, r. 22—*Notice under r. 22 signed by judgment-debtor—He cannot contend that he was unaware of the notice.*

Where the judgment-debtor had signed the notice under O XXI, r. 22, Civil P. C., he cannot afterwards say that he was not aware of the notice. CHANDRA SEKAR DHAR *v.* BHAGWAN DAS *Pat.* 124

——— O. XXI, r. 35 (2)—*Proceedings under—Failure to affix warrant or to proclaim by beat of drum whether fatal.*

The conditions precedent for effecting delivery of possession under O. XXI r. 35 (2), Civil P. C., are the affixing of the warrant to the property and the beat of drum. The omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. RAMESHRI *v.* VAISHNO DITTI *Pesh.* 819

——— O. XXI, rr. 46, 47—*Applicability—Stranger in possession of property in which judgment-debtor has share—R. 46, if applicable—Prohibitory order, if can be issued against stranger.*

Where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, r 46 as well as r. 47 of O. XXI, Civil P. C, must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. If, r. 46 were not to apply to such a case the result would be stultification of the attachment. While the judgment-debtor will have the prohibitory order served on him the property of which the transfer is forbidden will be sold with impunity by the person in whose possession it happens to be. That will defeat the very purpose of the attachment. Such a result could not be intended by the Legislature. GOVINDRAM JIWANRAM *v.* HARASAYA GANASAYA MARWADI *Nag* 788

——— O. XXI, r. 47. See Civil Procedure Code, 1908, O. XXI, r. 46 788

——— O XXI, r. 48. See Civil Procedure Code, 1908, s 63 38

——— O. XXI, r. 48—*Attachment of salary of employees of Post and Telegraph—Procedure.*

In cases of attachment of salaries of employees of Post and Telegraph department, it would be better for the Court in the interests of all concerned, to obtain on the application of the decree-holder the relevant materials from the Postmaster-General in order to work out the figures itself and then issue an attachment for a definite, specified amount, so that the parties and the Postmaster-General may be under no misapprehension. BHAGWAN DASS RAMPROSAD *v.* SECRETARY OF STATE *Pat.* 360

——— O XXI r. 57. See Civil Procedure Code, 1908, O. XXI, r. 17 204

——— O. XXI, r. 57—*Application by Receiver under s 52, Provincial Insolvency Act (V of 1920)—Sale stopped and execution struck off by executing Court—Attachment, if ceases.*

Where as a result of an application by the Official Receiver under s. 52, Prov. Insol. Act, the executing Court stops a sale in execution of a decree and strikes off the execution petition the dismissal cannot be said to be due to default of the decree-holder and hence the attachment of property before judgment does not cease. P S. A. R. A. K. ARUNACHALAM CHETTIAR *v* OFFICIAL RECEIVER, COIMBATORE *Mad.* 138

——— O. XXI, r. 57—*R. 57, applicability—Deals with case where on petition ultimately dismissed attachment has taken place.*

In interpreting r. 57, O XXI, Civil P. C, it must be remembered that it deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such a case the execution petition must *ex hypothesi* have been taken cognizance of an execution ordered and it is only at a later stage that it must be dismissed as contemplated by r. 57. The words of the rule must be applied with caution to cases in which the attachment has taken place before judgment or on a prior execution application. It is in this latter class of cases that the distinction between a "rejection" under r. 17 and a "dismissal" under r. 57 will become material. P. S. SATHAPPA CHETTIAR *v.* N. K. PR. S. PR. CHOKALINGAM *Mad* 204

——— O. XXI, r. 63—*Suit under r. 63 for declaration of title and injunction restraining defendant from taking possession of suit property and preventing him from taking illegal action to plaintiff's detriment falls under Sch II, Art. 17 (1), Court Fees Act (VII of 1870).*

A suit brought under O. XXI, r. 63, Civil P. C., by a claimant whose claim was rejected in proceedings under O. XXI, r. 58, for a declaration of his title and a permanent injunction restraining the defendant from taking delivery of possession of the suit property and preventing him from taking any illegal action to the detriment of the plaintiff, falls within the purview of Sch. II, Art. 17 (1), Court Fees Act and no *ad valorem* court-fee is necessary. UDAI CHAND LAL *v.* FIRM PANNALAL CHAMPALAL *Pat.* 78

——— O. XXI, rr. 17, 87—*Application for re-sal can be made at any time within three years—Delay of eleven months cannot justify Court in*

rejecting decree-holder's application for payment of deficit.

The Civil P. C., contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Lim. Act, applies. Delay of eleven months does not justify the Court in rejecting the application for an order directing the payment of the amount of the deficit. SIVASUBRAMANIAM CHETTIAR *v* MURUGESA MUDALIAR *Mad.* 325

——— O. XXI, r. 85—*Default by purchaser to pay balance—Sale becomes a nullity.*

Whether the deposit made under r. 85, O XXI, Civil P. C., be forfeited or not, the purchaser shall forfeit all claim to the property if he makes default of payment of the balance of the purchase money and the sale becomes a nullity. ANNAPURNA DASI *v* BAZLEY KARIM FAZLEY MOULA *Cal* 390

——— O. XXI, r. 89, s. 47—*Application under O. XXI, r. 89, if falls under s. 47.*

An application by a person interested under O. XXI, r. 89, does not fall under s 47, for there is now special provision for an appeal against such an order under O. XLIII, (1) (*j*), and the controversy on the question as to whether an appeal did or did not lay in the case of a dispute between the judgment-debtor and the auction-purchaser, is now set at rest. KHIALMAL CHOITHRAM PUNJABI *v.* POHUMAL CHOITHRAM PUNJABI *Sind* 247

——— O. XXI, r. 90. SEE Bihar Money-lenders Act, 1938, s. 16 124

——— O. XXI, r. 90—*Sale, when can be set aside.*

In order to entitle the jungment-debtor to have the sale held in execution of a decree against him, set aside, it is to be established that there had been some illegality or irregularity in the publication and conduct of the sale which had resulted in the property being sold at an inadequate price to the prejudice of the judgment-debtor. CHANDRA SEKHAR DHAR MISRA *v.* BHAGWAN DAS *Pat.* 124

——— O. XXI, r. 100. SEE Oaths Act, 1873 s. 11 591,

——— O. XXII, r. 4—*Application under s. 4, U. P. Encumbered Estates Act (XXV of 1934)—Some of creditors opposing—Application dismissed—Appeal—One of creditors respondents dying—Legal representatives not brought on record — Appeal, held abated as whole.*

An application under s. 4, U. P. Encum. Estates Act was opposed by some of the creditors on the ground that the applicants were not "landlords" within the meaning of the Encum. Estates Act. The Special Judge upheld this objection and dismissed the application. During the pendency of the appeal one of the creditors who opposed the application and who was one of the respondents died and his legal representatives were not brought on record within limitation :

Held, that the interests of the creditors in defeating the application of the appellants were joint and indivisible and the interests of the deceased creditor could not be separated from those of the rest and the heirs of the deceased creditor were necessary parties. The appeal therefore abated as a whole as otherwise it would lead to conflicting and inconsistent decisions with regard to the same subject-matter. GHULAM ABBAS *v.* PRINCE SAFDAR JAH ZAHID ALI MIRZA *Oudh* 1 F B

——— O XXII, r. 4—*Death of defendant during pendency of suit—Person brought on record not real legal representative of deceased defendant—Decree passed against such person — Whether binding on real legal representative — Conditions necessary for making such representation effective against true representative stated.*

When a person who is impleaded in a suit as a legal representative of another, which he is not sufficiently represents the estate the result is that a decree passed against him in an assumed representative character is binding on the true representative though the latter was no party to the same. The conditions necessary for making such representation effective against the true representative are that the plaintiff must have acted *bona fide*, the decree obtained must be free from fraud or collusion, and the person wrongly impleaded must have been impleaded in a representative capacity and the decree must have been passed against him as representing the estate of the deceased; the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative and the person having the real title must not have intervened during the pendency of the suit.

Where in a suit for ejectment, on the death of the defendant, the plaintiff instead of bringing on record the deceased's daughter who was the real legal representative of the defendant, has brought on record the daughter's son without attempting to give any explanation of his act in not impleading the daughter of the deceased defendant, he cannot claim to have acted *bona fide* in this matter and the decree passed in his favour is not binding upon the daughter of the deceased defendant who is found in possession of the property in question and cannot be executed against her. KRISHNA VATI BABU *v.* GUNJARI *Pat.* 331

——— O. XXII, r. 4—*One of respondents dying—His legal representatives not brought on record in time—Test whether appeal abates as whole, stated.*

The question whether an appeal has or has not abated as a whole on the failure of the appellant to bring on record the legal representatives of one of the deceased respondents depends upon the nature and circumstances of each case. The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter. GHULAM ABBAS *v.* PRINCE SAFDAR JAH ZAHID ALI MIRZA *Oudh* 1 F B

——— O. XXII, r. 9, O. XLIII, r. 1 (k)—*Appeal, if lies from order refusing to set aside abatement of appeal.*

The use of the word "suit" in cl. (*k*) of r 1, O. XLIII, Civil P. C, does not exclude the word "appeal," The expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of O. XXII, r. 9. An appeal, therefore, lies from an order under O. XXII, r. 9 refusing to set aside abatement of appeal RAJU MUDALI *v.* CHINNARAJU NAIDU *Mad.* 832

——— O. XXII, r. 10. SEE Civil Procedure Code, 1908, s. 146 637

——— O. XXIII, r. 1—*Appeal against dismissal of suit—Appellate Court after dismissal of appeal, if*

can allow plaintiff to withdraw suit with permission to file fresh one.

After dismissing an appeal preferred against the dismissal of a suit, the Appellate Court has no jurisdiction to allow the plaintiff to withdraw the suit with permission to file a fresh suit. LAL DEVI *v.* NATHU RAM *Lah.* 137

——— O. XXIII, r. 1—*Order allowing application to withdraw suit with liberty to bring fresh suit—Whether appealable*

No appeal lies against an order allowing an application under r. 1 of O. XXIII, Civil P. C, for permission to withdraw the suit with liberty to sue afresh. An application in revision, however, lies against such an order where the Court has been guilty of material irregularity in passing the order. RAM PADARATH MISIR *v.* DATA DIN MISIR *Oudh* 892

——— O. XXXII, r. 3 (C. P. Amenment). SEE Limitation 805

——— O. XXXII, r. 7 — *Applicability to agreements made during execution proceedings.*

Execution proceedings are a continuance of the suit, and O. XXXII, r. 7, Civil P. C., is applicable to an agreement or compromise made in the course of proceedings for the execution of the decree obtained in the suit. MA KALEMA *v.* MA KYAING *Rang.* 619

——— O. XXXII, r. 7—*Minor seeking to avoid compromise voidable at his instance—Compromise must be declared void against all parties to compromise.*

It is clear from the provisions of sub-r. (2) of r. 7, O. XXXII, that when a minor desires to avoid a compromise, which is voidable at his instance, it is voidable against all parties, and therefore must be declared void against all parties and not against some of them only. MA KALEMA *v* MA KAYING *Rang.* 619

——— O. XXXIII, r. 1—*Omission to plead alternative case or implead party, if 'formal defects'—Failure to produce documents at proper time, whether "sufficient ground."*

An omission to put forward an alternative case or to implead certain parties is not a formal defect. The failure to produce documents at the proper time is not a sufficient ground within the meaning of r. 1 of O. XXIII, Civil P. C, and in permitting the plaintiff to withdraw the suit with liberty to sue afresh on these grounds the Court acts with material irregularity and its order can be revised. RAM PADARATH MISIR *v.* DATA DIN MISIR *Oudh* 892

——— O XXXIV. SEE Transfer of Property Act, 1882, r. 100 740

——— O. XXXIV, r. 1—*Pusine mortgagee not impleaded in previous suit by prior mortgage, if can disregard decree made in previous suit.*

A pusine mortgagee, who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only. UDAO DASS *v* GIRDHARI LAL *Lah.* 666

——— O. XXXIV, r. 6—*Lessees of minerals hypothecating property to secure sums due by way of royalty—Suit for royalty against lessees and sub-lessees by sale of property—Decree passed—Sale not recovering full amount of royalty—Personal decree for balance, if can be passed against both the lessees and sub-lessees.*

Where the lessees of minerals had hypothecated certain property to secure sums due by way of royalty, and the lessor in his suit asks that the amount due for royalty should be recovered by sale of the properties hypothecated and impleads the sub-lessees, a mortgage decree can be passed against the sub-lessees together with the lessees because they are interested in the property sought to be sold. But where the amount recovered by the sale does not prove sufficient, a personal decree under O. XXXIV, r. 6, Civil P. C. cannot be obtained against the sub-lessees merely because they are interested in the property. They were in no way personally liable to the plaintiff and, therefore, a personal decree cannot be passed against them. JOYRAM NARAYAN *v* SHIVA PRASAD SINGH *Pat.* 32

——— O. XXXIV, rr. 11, 2, 4—*Mortgage suit—Interest up to date of preliminary decree—Interest for period subsequent to such date—Option given to Court.*

Rule 11 of O. XXXIV, Civil P. C., must be read with rr. 2 and 4, O. XXXIV, r. 11 gives a discretion to the Court to allow interest up to the date fixed for redemption under the preliminary decree, and this interest is payable "on the principal amount found or declared due on the mortgage". This latter amount is obviously the amount found or declared due by the preliminary decree. Where the mortgage bond carries compound interest, the preliminary decree, according to the provisions of O. XXXIV, r. 2 and r. 4, shall allow compound interest from the date of the bond up to the date of that decree. The Court has no option to disallow interest at the contract rate up to the date of the preliminary decree, unless, of course, the rate of interest is found penal or excessive. For the period subsequent to the date of the preliminary decree, however, the Court has under O XXXIV, r. 11, the option either to allow or refuse interest. MADHO PRASAD SINGH *v.* MUKUTDHARI SINGH *Pat.* 661

——— O. XLI, r. 5. SEE Civil Procedure Code, 1908, O XLI, r. 6 109

——— O XLI, rr. 6, 5—*Stay under O. XLI, r. 5 refused—Court, if justified in refusing jurisdiction under r. 6.*

If an order has been made for sale and an application under O. XLI, r. 6, Civil P. C., has been made to the Court, the Court should stay the sale on suitable terms and the Court must consider what terms are suitable. The fact that the stay has been refused under O. XLI, r. 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under O. XLI, r. 6. DHIRENDRA NATH ROY *v.* SAILAJ KUMAR BOSE *Cal* 109

——— O. XLI, r. 6 (2) — *Appeal from mortgage decree directed only against interest decreed, pending—Executing Court, if can stay sale of mortgaged property on taking security from judgment-debtor.*

An order passed by the executing Court under O. XLI, r. 6 (2), Civil P. C, in execution of a mortgage decree which is not separable, staying the sale of the mortgaged property pending disposal of the appeal directed only against the interest decreed by the trial Court, on condition that the judgment-debtor should furnish security for further interest, is not without jurisdiction and cannot be interfered with in revision. JUGAL PRASAD *v.* JADUBANS NARAYAN *Pat.* 592

——— O. XLI, rr. 23. SEE Civil Procedure Code, 1908, s. 107 871

——— O. XLI, r. 27 (1) (b)—*Additional evidence—Appellate Court, when can allow.*

Under O. XLI, r. 27 (1) (*b*) it is only where the Appellate Court "requires" (*i e*, finds it needful) that additional evidence can be admitted. It may be

Civil Procedure Code—contd.

required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna becomes apparent." Where there is no inherent lacuna or where the Court does not require it to pronounce the judgment, the additional evidence cannot be allowed. BALMUKUND RAM *v.* JANARDAN PRASAD NARAIN SINGH *Pat.* 129

——— O. XLIII, r. 1 (k). SEE Civil Procedure Code, 1908, O. XXV, r. 9 832

——— O. XLIII, r. 1 (u)—*Property mortgaged for Rs.* 8—*Equity of redemption sold for Rs.* 25,000—*Redemption suit—First Appellate Court's order of remand—Second appeal, if competent.*

Where the mortgagor mortgaged his immovable property for Rs. 8 and subsequently sold the equity of redemption for Rs. 25,000, in a suit for redemption by the purchaser:

Held, that a second appeal being competent under s. 31 (1) (*b*), N.-W. F. P. Courts Regulation, the first Appellate Court's order of remand was appealable under O. XLIII, r. 1 (*u*), Civil P. C. MOTAI *v* SIR MOHAMMAD AKBAR KHAN *Pesh.* 871

——— O. XLV, r. 17, Proviso (a)—*Construction of Proviso* (a) *to O. XLV, r.* 17.

The addition of the words to r 3 of O. XLV, Civil P. C., effected by proviso (*a*) to r. 17 makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. XLV, r. 2 the question whether there is a substantial question of law involved as to the interpretation of the Govt of India Act, 1935. A. L. S. P. P. L. SUBRAMANIAN *v.* MUTHUSWAMI GOUNDAN *Mad.* 865

——— O. XLVI, r. 1, O. VII, r. 10, s. 24—*Suit valued at Rs.* 205 *filed in First Class Sub-Judge's Court allocated to joint First Class Sub-Judge—Case sent to Second Class Sub-Judge by District Judge's order—Latter allowing amendment—Suit becoming beyond his pecuniary jurisdiction and sent by him to First Class Court—Action reported to District Judge—District Judge informing grant of sanction—Reference by First Class Sub-Judge under O. XLVI, r.* 1—*Neither O. XLVI, r.* 1, *nor O. VII, r.* 10 *held applied—High Court held could transfer case under s.* 24.

A suit for a declaration and injunction valued at Rs. 205 was instituted in the First Class Subordinate Judge's Court. According to the practice the case was allocated to the joint First Class Subordinate Judge for disposal. Subsequently, by order of the District Judge the case was sent to the Court of the extra joint Second Class Subordinate Judge, who was one of the subordinate Judges attached to the First Class Court. While the case was pending in the Court of the joint First Class Subordinate Judge, an application was made to amend the plaint by including additional properties in the list of suit properties and asking for partition. This application for amendment was granted by the Second Class Subordinate Judge after the case had been taken up by him. The result was that the suit became one beyond his pecuniary jurisdiction and so he sent the case to the First Class Court and reported the action taken by him to the District Judge. In a letter sent by the clerk of the Court of the District Judge by order of the District Judge, the First Class Subordinate Judge was informed that the sanction applied for, had been granted. When the case was taken up by the First Class Subordinate Judge, the defendants objected that he had no jurisdiction and that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have returned the plaint for presentation to the First Class Subordinate Judge under O. VII, r. 10. The First Class Subordinate Judge doubted whether the District Judge had power to transfer the case under s. 24, Civil P. C., and also whether any order of transfer under that section had in fact been made. He submitted several questions for the opinion of the High Court under O. XLVI, r. 1:

Held, that O. XLVI, r. 1 had no application, nor did O. VII, r. 10 apply as the suit was properly instituted in the first instance.

Held, further that the High Court could properly take action under s. 24, of its own motion and in order to save difficulty and delay, transfer the suit to the First Class Court for disposal, since, the suit was properly filed in the First Class Court and the Second Class Subordinate Judge to whom it was transferred for disposal by administrative order had jurisdiction to entertain it and to deal with it up to the date of amendment. Hence there was no legal objection to the High Court passing an order under s. 24 transferring the case to the Court of the First Class Subordinate Judge.

[The High Court in this case passed an order under s. 24, Civil P. C., *ex majore cautela*, with drawing the suit from the Court of the extra joint Second Class Subordinate Judge and transferring it for trial to the First Class Subordinate Judge.] BABUBHAI VAMALCHAND KAGHRA *v.* HIRALAL VAMALCHAND KAGHRA *Bom.* 242

——— Sch. II.

SEE Agra Tenancy Act, 1926, s 271 17 F B
SEE Civil Procedure Code, 1908, s 141 17 F B
SEE Companies Act, 1913, s. 152 553

——— ——— paras. 5, 17—*Agreement for reference to arbitration—Persons to be arbitrators specified—Some of them refusing to act—Court, if can substitute other persons.*

There is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case, the Court obviously cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot under para 5, Sch. II, Civil P. C., substitute in the place of the named arbitrators certain other persons TARA PRASAD BALIARSEY *v* BAIJNATH PRASAD BALIARSEY *Pat.* 756

Companies Act (VII of 1913), s. 73 — *Strict construction — Burden to establish infringement of law is on prosecution—"Outside the office" in s.* 73 (a), *if mean outside premises—S.* 73, *object.*

Section 73 of the Companies Act, being a penal provision has to be construed strictly, and therefore the burden is very strongly on the prosecution, to show that there really has been an infringement of the law and that in circumstances in the case a meaning must be given to the section which is not the literal one. By s. 73 the Legislature desired to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its

Companies Act—concld.

place of business. The requirements of the Act would be satisfied by a board of the necessary conspicuousness and legibiliiy outside the office room inside the building in which it is situated. It cannot be held that when an office is situated within a compound the law requires the name of the company to be painted or affixed outside the compound as well as outside the office. The words "outside the office" in s. 73 (*a*) do not mean outside the premises. H. L. BATLIWALLA SONS & Co. LTD. *v.* EMPEROR *Bom.* 620

——— s. 152—*Arbitration Act* (*IX of* 1899), *applicability of—Arbitration with Court's intervention and in which company is interested—Arbitration Act* (*IX of* 1899), *does not apply but is governed by Sch. II, Civil Procedure Code* (*Act V of* 1908).

The Arbitration Act, applies in a case falling within the scope of the Act even when the locus of the subject-matter was outside a presidency town, provided, one of the parties or both of them were companies registered under the Companies Act. The Preamble of the Act makes it clear that that Act has application only to arbitrations without the intervention of the Court. Where, therefore, a reference to arbitration, in which a company is interested, with the intervention of the Court is governed by Sch II, Civil P. C, relating to arbitrations with the intervention of the Court. The Arbitration Act has no application to such a case. EAST BENGAL BANK, LTD. *v.* JOGESH CHANDRA BANERJEE *Cal.* 523

——— s. 195. SEE Criminal Procedure Code, 1898, s. 476 170

——— s. 229. SEE Companies Act, 1913, s. 230-A 818

——— ss. 230-A, 229—*Winding-up of insolvent company—General law of insolvency, if applies—Application by customer of Bank after passing of compulsory winding up order, for rescinding contract with Bank and for damages — Applicant, if entitled to be heard.*

The general law of insolvency applies to the winding-up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the Official Assignee. If he claims to be a creditor he must file a proof of his debt with the Official Assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the Official Assignee's decision. Hence a customer of a Bank who has filed an application under s. 230-A, Companies Act, for an order rescinding the contract with the Bank and awarding him damages, subsequent to an order of compulsory winding-up of the Bank is passed, is entitled to be heard. If the Court then came to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application and the appellant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding-up. The applicant cannot be relegated to the procedure of filing a suit unless he is heard. R. O. Bhide *v.* TRAVANCORE NATIONAL AND QUILON BANK LTD., (IN LIQUIDATION), *Mad.* 818

——— s. 282-B. SEE Banker and Customer 821

Company—*Payment of gratuity to ex-servant — By-laws not providing for such payment — General Body, if can sanction it—Mere fact that Board of management is delegated power to frame by-laws, whether takes away General Body's power to sanction gratuity.*

The payment of gratuity to an ex-servant is a matter only relating to the administration and management of the affairs of a company and so long as the General Body acts within the ambit of the Articles of Association, any act done by them in regard to the management of the company will be *intra vires* and not *ultra vires*. Even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. The fact that the board of management is delegated the power to frame by-laws does not take away the power of the general body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the board of management. This power is always vested in the General Body and by the mere fact of delegation, it cannot be taken away. R. K. PRESANNA VENKATESA RAO *v.* TRICHINOPOLY DISTRICT CO-OPERATIVE CENTRAL BANK, LTD. *Mad.* 89

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Confession.

SEE Criminal trial 14, 284, 873

SEE Evidence Act, 1872, s. 30 14, 465

——— *Co-accused—Confession by co-accused if can be made basis of conviction.*

The very existence of s. 30, Evi. Act postulates that the confession of the co-accused may be used in cases where the evidence afforded—and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. ABDUL GAFOOR, *In re* *Nag.* 265

———*Retracted confession—Value and use of—Self-inculpatory confession—How far can be acted upon.*

The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—where such a confession is self-inculpatory in respect of the person who made it and the person implicated therein. Merely because these confessions have been retracted in the Court of Session, it cannot be said that they were involuntarily made. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence, and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuation by their fellows who have not confessed.

No doubt when a confession is retracted and the truth of it denied, the person retracting has lied on one occasion or the other, and although in the case where the retractions are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance, it must be presumed that if these accused had been asked by the Magistrate, as they should have been, whether the confessions were false in substance or no, they would have replied in the affirmative. This does not, absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence.

Retracted confessions must be used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or no. ABDUL GAFOOR, *In re.* *Nag.* 265

Consent decree. SEE Decree 217 F B

Construction. SEE Lease. 407

Contempt—*Contempt of Court—Essence of offence—Insolvency application by L against N containing statements defamatory of N—Complaint by N against L under s. 500, Penal Code (Act XLV of 1860), to vindicate his character and integrity—N held not guilty of contempt of Court.*

It is of great importance to the administration of justice that it should be allowed to take an unfettered course and not be sullied and besmirched in any manner. The essence of an offence of contempt of Court lies in the fact that the person complained of has done something which might have the effect of prejudicing the fair trial of a pending case.

L applied to the Insolvency Court praying that *N* should be adjudged insolvent and in this application made certain statements defamatory of *N*. *N* instituted a complaint against *L* under s. 500, I. P. C., in order to vindicate his character and integrity;

Held, that *N* was not guilty of contempt of Court, as nothing was done by *N* from which it could be gathered that if *L* withdrew the allegations which he had made against *N*'s character in the insolvency proceedings *N* would drop the complaint which he had preferred under s. 500, I P. C.

Held, also that threat by *N* before the institution of the insolvency proceedings that if *L* filed insolvency proceedings against *N*, he would file a complaint for defamation against *L* amounted only to a warning so that an unguarded action may not be taken and did not amount to contempt of Court. RADHEY LAL *v.* NIRANJAN NATH *All.* 260

Contempt of Court. SEE Contempt 260

Contract—*Minor—Minor entering into contract representing to be major—If estopped from proving his minority at date of contract.*

Where a minor misrepresents his age and claims to be a major, and enters into a contract he is not estopped from proving that he was really a minor on the date of the contract. TIKKI LAL *v.* KOMALCHAND *Nag.* 178

———Pakka adatya—*Forward contract—Held, that suit by constituent against* pakka adatya *was for unpaid claim and fell within bye-law* 38 *of the East India Cotton Association.*

There was an initial sale of 200 bales of cotton by the defendant who was *pakka adatya*, for the plaintiff and a contract note dated November 6, 1939, was sent by the defendant to the plaintiff and signed by the plaintiff. Thereafter, owing to fluctuations in the market, the defendant demanded margin money but the plaintiff failed to pay the same. Thereupon the defendant closed the transaction on February 3, 1940. On receipt of intimation thereof the plaintiff repudiated this closing transaction. The defendant thereupon offered to resell, if the margin, as demanded, was paid. To that there was no reply. The defendant thereupon sent a contract note with his letter of February 6, 1940, to the plaintiff. The plaintiff retained the same. On March 19, 1940, the plaintiff sent a telegram to

the defendant as follows: "Kindly settle 200 bales cotton; *vide* your contract note C 694 purchasing market price to-day wire settlement." The defendants sent a reply intimating that the purchase had already been effected on February 3, under contract No. 15.3 which was already sent and there was no outstanding business Contract note No. C. 694 was the contract dated November 6, 1939. The plaintiff then filed a suit to recover the amount due to them on the footing of the difference between the price noted in the contract, dated November 6, 1939, and the current price in the market on March 19, 1940:

Held, that the suit was in respect of an unpaid claim in relation to the contract dated November 6, 1939, and clearly fell within the words of bye-law 38 as of the East India Cotton Association, Ltd., subject to which the contract note dated November 6, 1939, was accepted by the plaintiff. SUKHANANAN RAMDHIN *v.* MANIKLAL KANHIALAL FIRM. *Bom.* 779

———*—Public policy—Marriage performed outside British India to evade provisions of Sarda Act, whether opposed to public policy—Contribution towards such marriage if can be recovered in execution of decree.*

The power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. Clearly the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But I see no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal. A marriage, therefore, performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act, is not one opposed to public policy and contribution towards it can be recovered in execution of a decree. CHADALAVADA ANAND ARAMAYYA *v.* CHADALAVADA SUBBAYYA *Mad.* 112

———*—Sale of goods—Vendee paying earnest money but committing default—Earnest money, if can be recovered—Contract falling through vendee's default—If can claim balance of purchase money paid excluding earnest—Vendor's right to set-off claim for damages suffered by him—What vendor must prove.*

Even in respect of sale of goods it is customary in India to receive sums of money by way of deposit or earnest and such sums are forfeited when default is committed by the vendee.

Where a contract for sale of goods has failed through default of the vendee, he is entitled to recover the balance of the purchase money paid by him (excluding the earnest money) and the vendors can only resist the claim by seeking to set off against the said sum any damages which they might have incurred by reason of the vendee's non-performance of the contract. But before they substantiate their claim they should prove their readiness and willingness to perform their part of the contract and that they were in a position to perform the contract on the date fixed for its performance. SANAM NARAYANAMURTHI *v.* MANAPALLI NAGESWARA RAO *Mad.* 751.

Contract Act (IX of 1872), s. 2 (d). SEE Contract Act, 1872, s. 126 51

——— **ss 23 and 30.** SEE Insurance 155

——— s. 25—*Promise to pay portion of barred debt —If can be sued for whole debt.*

If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt. PULIYATH GOVINDA NAIR *v.* PARBMALATHIL ACHUTHAN NAIR *Mad.* 339

——— s. 25—*Words "by the person to be charged therewith", scope of — Whether limited to person who was indebted from beginning.*

The words "by the person to be charged therewith" in s. 25, Contract Act, are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. PULIYATH GOVINDA NAIR *v.* PAREKALATHIL ACHUTHAN NAIR *Mad.* 399

——— s. 25 (3)—*Agreement by* A *to release* B's *brother from liability which is enforceable at time of agreement is good consideration for new agreement between* A *and* B.

An agreement by the plaintiff to release the defendant's brother from liability if it was legally enforceable at the time when the agreement was reached is quite a good consideration for the new agreement between the parties to the suit. But if the plaintiff's claim against the defendant's brother was barred by limitation on the date on which this agreement was arrived at and the contract was not reduced to writing as required by s. 25 (3), Contract Act, it would remain unenforceable. PULIYATH GOVINDA NAIR *v.* PAREKALATHIL ACHUTHAN NAIR *Mad.* 399

——— s. 25 (3)—*Promise referred to in s.* 25 (3) *must be express.*

The promise referred to in s. 25, sub-cl. (3) of the Contract Act must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a distinct promise to pay before the document can be said to fall within the provisions of this section. PULIYATH GOVINDA NAIR *v.* PAREKALATHIL ACHUTHAN NAIR *Mad.* 399

——— s. 30—*Broker acting for customer—Customer gambling — Whether can set up plea of gaming and wagering against broker's claim.*

Where a broker acts on behalf of his customer and the customer gambles the customer cannot set up a plea of gaming and wagering against the broker's claim. GOALDAS DAGA *v.* MANICKLAL BAITY *Cal.* 603

——— s. 60—*Principal and surety — Option exercised by creditor — Appropriation of repayments in principal's independent account—Surety if can claim benefits.*

Where a creditor has exercised his option under s. 60, Contract Act and has appropriated the repayments in the account which he had with the principal debtor independently of the contract of guarantee, the surety cannot in law raise any objection to this appropriation and is not entitled to the benefit thereof. KUCKREJA LTD. *v.* SAID ALAM *Lah.* 206

——— s. 65—*Applicability—Essentials.*

Section 65 Contract Act cannot be held to apply to a case of a contract void as being contrary to the statute law which the parties must be presumed to have known at the time when they entered into the contract. The section has no application when the object of the agreement is illegal to the knowledge of both parties at the time when it was made. DHANNA MUNDA *v.* KOSILA BANIAN *Pat.* 851

——— ss. 65, 68—*Cash payment made under contract with minor, if can be recovered.*

A contract with a minor being void *ab initio* no cash payment made under such a contract is recoverable from him. TIKKI LAL *v.* KOMALCHAND *Nag.* 187

——— s. 68—*Funds advanced to Hindu male minor for his own marriage do not fall under s.* 68 *and cannot be recovered from minor's property —Funds supplied to minor for minor female's marriage can, however, be recovered from his ancestral property.*

Advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with necessaries suited to his condition in life within the meaning of s. 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor. The Hindu Law does not enjoin the marriage of a Hindu male before the age of majority. The case of Hindu females is, however, different. If funds are supplied to a minor owning ancestral property, for the marriage of a minor female in the family the person who supplies may be able to get himself reimbursed from the estate of the minor. TIKKI LAL *v* KOMALCHAND *Nag.* 178

——— s. 69—*Court of Wards paying off creditors of deceased Muhammadan from his pensions and* jagirs—*Partition suit by some of deceased's heirs not entitled to pensions and* jagirs—*Heirs if bound to re-imburse Court of Wards to the extent of amount paid*

The Court of Wards assumed superintendence of the deceased Muhammadan's property and paid off his creditors from out of his pensions and *jagirs*. The heirs who instituted the suit for partition of their shares were held not entitled to the pensions and *jagirs*:

Held, that the payments made by the Court of Wards could not be taken advantage of by the heirs who were bound to recoup the Court of Wards to the extent of the payments made by it and the fact that the pensions and the *jagirs* did not belong to the Court of Wards was a question entirely between it and the head of the deceased's family appointed by the Govt. QAISAR JAHAN BEGAM *v.* DEPUTY COMMISSIONER DELHI PROVINCE *Lah.* 829

——— s. 72—*Tax paid under misapprehension as to liability for it—If can be recovered back.*

A person who makes payment under a mistake of law cannot recover it back again. Hence, a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of Law, either under s. 72, Contract Act or under equitable principles. VEMURI RAMJEE RAO *v.* MUNICIPAL COUNCIL MASULIPATAM *Mad.* 559

——— ss. 126, 134, 2 (d)—*Relative of judgment-debtor offering cheque to decree-holder in satisfaction of his claim—Relative, if surety, if can take advantage of s.* 134 *— Consideration for the transaction—Liability of relative.*

Where a decree-holder has attached his judgment-debtor's property and a relative of the judgment-debtor offers a cheque to the decree holder in satisfaction of his claim, the relative is not a surety for the judgment-debtor and if he stops payment of the cheque, the decree-holder has an independent cause of action against the relative and the relative cannot take advantage of s. 134 Contract Act.

And where the relative pays certain amount in satisfaction of the decree-holder's claim against the judgment-debtor, the consideration for the payment consists in the decree-holder not insisting on attachment of the judgment-debtor's property. If

therefore the relative withholds the payment, he is liable to the decree-holder. KARM DIN NAWAB DIN *v* ANANT RAM LALA HUKUM CHAND *Pesh.* 51

——— s. 134. SEE Contract Act, 1872, s 126 51

——— — s. 134 SEE Contract Act, 1872, s. 137 344

——— ss. 37, 134—*Surety—Discharge of—Claim against principle debtor allowed to be time-barred —Remedy against surety, if lost.*

A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. JAGDAMBIKA PRATAP NARAIN SINGH *v.* TIR SINGH BAHADUR SINGH *Oudh* 344

——— s. 213—*Demand should be made on agent at his place of business.*

Section 213, Contract Act imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. KOKA ANDINARAYANA *v.* BRAVARAJU LAKSHMINARAYANA RAO *Mad.* 81

Conversion—*Principal and agent—Relief on ground of conversion, when can be had—Agent advancing purchase money for goods purchased on account of principal—Principal has neither title to nor right to present possession of goods until he pays price—No question of conversion arises.*

To entitle a person to claim relief on the ground of conversion or trover, he must show not only title to the property concerned but also a right to the present possession thereof.

Where the agent himself advanced the purchase moneyr in respect of the goods purchased by him on account of the principal, the property in the goods cannot be said to have passed to the principal until the amount advanced by the agent for the purchase of the goods is paid to him. No question, therefore can arise, of conversion by the agent in respect of property title to which remains vested in him. Moreover, the agent by reason of his having purchased the goods on his own responsibility, though on account of the principal is *vis-a-vis* the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The principal is not, therefore, entitled to possession of the goods even if the agent notwithstanding the non-payment of the balance of the purchase money, had intended that the property in the goods should pass to the principal. YARLAGADDA VENKATASUBBAYYA *v.* GAJJALA SATYANARAYANAMURTY *Mad.* 365

Co-operative Societies Act (II of 1912), s. 23—

—Scope—Section, if has reference to debts of outgoing members due to Society.

The words "the debts of a registered society as the existed at the time when he ceased to be a member in s. 33, Co-operative Societies Act refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. BELAHRI CO OPERATIVE SOCIETY *v.* FUTTU LAL *Oudh* 524

——— s. 43—*Rules under r.* 20 (12) (ii)—*Bar of jurisdiction of Civil Court, if absolute—Reference to arbitration pending—Fresh reference to another arbitrator is incompetent and of no legal effect.*

The bar of jurisdiction of a Civil Court created by r. 20 (12) (ii) of the Co-operative Societies Rules is not absolute but limited only. A Civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction.

Where a dispute referred to arbitration is still pending a fresh reference to another arbitrator is not competent and must be disregarded as of no legal effect upon the rights of the parties. BELAHRI CO-OPERATIVE SOCIETY *v.* FUTTU LAL *Oudh* 524

——— s. 43—*Rules under—U. P. Co-operative Societies Rules, rr.* 20 (7), 20 (12) (ii), 20 (i)—*Violation of r.* 20 (7)—*Effect—Award, if invalid—Award invalid—Failure to appeal—Award, whether become final and conclusive.*

The provisions of rr. 20 (7) (i) (ii) and (iii) of the Rules framed by the U. P. Govt under the Co-operative Societies Act, refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities.

Even if the award is invalid on the ground that it was ante-dated or had been made after the expiration of the time fixed for making the award and without obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting aside the award is by means of an appeal to the Assistant Registrar as provided by r. 20 (12) (i). If no such appeal is preferred within limitation the award becomes final and conclusive between the parties. BELAHRI CO-OPERATIVE SOCIETY *v.* PUTTU LAL *Oudh* 524

Co-owners—*Suit by one co-owner alone without joining others, to eject trespasser—Maintainability.*

One of several co-owners is entitled to maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. Where the plaintiff is the owner of a share of one of the mortgagors in principle there is no bar to his obtaining possession of the mortgaged property. SAMBHU GOSAIN *v* PIYARI MIAN *Pat.* 253

Co-sharers—*Decree for possession not executed—Decree-holder does not become co-sharer with judgment-debtor is not entitled to share profits.*

Without executing a decree for possession a decree-holder cannot become a share-holder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. RAMESHRI *v.* VAISANO DITTI *Pesh.* 819

——— *No partition of village among co-sharers by metes and bounds but co-sharers in possession of specific plots of* bakasht *land—Exchange of plots between plaintiffs and defendants—Under deed plaintiffs entitled to be in possession of house standing on part of land given by defendants—Defendants remaining in possession—Suit by plaintiff alleging that they rented out house to defendants, for arrears of rent, ejectment and mesne profits—Transaction held binding upon defendants —Mesne profits held could not be awarded, as according to plaintiffs, defendants were lawfully in possession.*

There had been no partition of the village among the co-sharer landlords by metes and bounds, but the co sharers were in possession of specific plots of *bakasht* lands. Out of the lands in possession of the plaintiffs they had given 14 decimals to the defendants for building a *canana* house, and the defendants gave in exchange certain lands to them in lieu of the land which they had got. The deed of exchange clearly stated that the plaintiffs were entitled to be in possession of the house standing on 3½ decimals of land. The plaintiffs brought a suit alleging that they had after the exchange, let out the house standing

Co-sharers—concld.

on 3½ decimals of land to the defendants and that the defendants had not paid the rent for the house and asked for the following reliefs: (1) a decree for the arrears of rent, and (2) a decree for ejectment and mesne profits:

Held, that the transaction was nothing but a mutual arrangement between two landlords who were in possession of specific plots of *bakasht* land in the village. This arrangement might not be binding on the other co sharer landlords who were not parties to it and might be disregarded when there would be a partition of the village by metes and bounds; but so long as the village was not partitioned, it must bind the plaintiffs as well as the defendants.

Held, further, that their suit was rightly dismissed in so far as their claim for the rent of the house was concerned as this story was found to be untrue.

Held, also, that as the plaintiffs' case was that the defendants were lawfully in possession of the house as tenants, their claim for mesne profits must be disallowed. KHAKHAN SINGH *v.* RAM ISHWAR SINGH *Pat.* 345

Costs—*Lower Court wrongly passing decree against appellant at invitation of respondent—Appeal by appellant to rectify mistake—Respondent not contesting appeal—His liability for costs of appellant.*

Where the fact that the Court passed the decree at the invitation of the plaintiff-respondent and has compelled the appellants to bring proceedings in appeal and to incur costs in order to have the matter rectified, it would be inequitable to make the defendants appellants, who were clearly right, liable to pay the whole of the costs of the appeal, merely on the ground that the plaintiff-respondent did not contest the appeal. JOYRAM NARAYAN *v.* SHIVA PRASAD SINGH *Pat.* 32

——— *Matters arising in several suits substantially same—All cases heard together—One set of costs for all cases together.*

Where the matters arising in several suits are substantially the same and all the suits are heard together, the Court should allow one set of costs for the three cases together in fixing the special Advocate's fee. OFFICIAL TRUSTEE *v.* RAKHUBN *Rang.* 61

——— *Trial Court's discretion—Interference with.*

The discretion exercised by the trial Court in allowing the defendant his costs on the ground that he was not necessary party cannot be interfered with in the absence of sufficient grounds. SECRETARY OF STATE *v.* MALRAJU VENKATA NARASIMHARAO BAHADUR *Mad.* 37

Court-fee—*Appeal—Appeal arising out of suit under s. 33, U. P. Agriculturists' Relief Act (XXVII of 1934)*—Ad valorem *court-fee is payable on amount involved therein.*

An *ad valorem* fee should be charged on an appeal in a suit under s. 33, U. P. Agri. Relief Act, on the amount involved therein.

Where, therefore, in an appeal arising out of a suit brought under s 33, Agri Relief Act the appellant challenges the amount awarded against him by the trial Court and further claims that he should himself have been awarded a certain amount, he is liable to pay a court-fee on an *ad valorem* basis on the total amount, that is, the amount decreed against him and the amount claimed by him. GIRJA WATI *v.* QUDRATULLAH KHAN *Oudh* 300

——— *Suit for declaration that sale-deed was fictitious and did not affect plaintiff in realising his decree—No prayer for cancellation of deed—Suit is mere declaratory and involves no consequential relief.*

A suit was brought by the plaintiff for a declaration that a sale deed was fraudulent and fictitious and does not stand in his way in realising the amount due in respect of a decree obtained by him, without any request for the cancellation of the deed, is merely of a declaratory character and involves no consequential relief. No *ad valorem* court-fee is therefore, payable on the amount for which the deed was executed. SWAMI DAYAL *v.* RAM BAHADUR SINGH *Oudh* 343

Court-fee—concld.

Court Fees Act (VII of 1870) s. 6 (4) (as amended by U. P. Court Fees (Amendment) Act XIX of 1938)—*Suit for partition—Point as to deficiency in court-fee raised—Court not following procedure under s. 6 (4) but deciding issue with other issues—Court ordering plaintiffs to make good deficiency and preparation of decree to be deferred till deficiency was made good—Deficiency not made good within time allowed—Appeal preferred styling it as under s. 96, Civil Procedure Code (Act V of 1908), and s. 6(4), Court Fees Act (VII of 1870)—Appeal, held could not be treated as revision under s. 115, Civil Procedure Code (Act V of 1908), nor as appeal from decree but as appeal from under s. 6 (4).*

The necessity of faithfully following the provisions of cls. 2, 3 and 4 of s. 6, Court Fees Act is imperative in order to avoid anomalies.

In a partition suit one of the points raised in defence was that the plaint was insufficiently stamped. The Judge did not follow the procedure enjoined by s. 6 (4), Court Fees Act, and decided the issue as regards the court-fee along with the other issues framed in the case. He held that the court-fee paid was insufficient and, by the operative portion of his judgment, directed the plaintiff to make good the deficiency in the court-fee and further ordered that the preparation of the decree be deferred till the deficiency in the court-fee was made good. The plaintiff, however, did not pay the deficiency within the time allowed, and filed an appeal styling the same as a first appeal under s. 96, Civil P. C., and s. 6-A, Court Fees Act:

Held, that as the decision of the Court would be appealable to the High Court as a decree, s. 115, Civil P C, could have no application to the case and, therefore, the memorandum of appeal filed by the plaintiff could not be treated as an application in revision Nor could the appeal be considered as an appeal against a decree because no decree had been prepared in the case The plaintiff was, however, entitled to assail by appeal the order of the Court below calling upon him to make good the deficiency in the court-fee and the appeal must, therefore, be regarded as an appeal from order in accordance with the provisions of s. 6-A; Court Fees Act. BAIJNATH PRASAD *v.* TEJPAL *All.* 133

——— **s. 7 (IV-B) and Proviso**—*Under Proviso, court-fee to be calculated upon market value at date of presentation of plaint—Suit for injunction filed before proviso came into force—Valuation of suit at Rs. 5 was proper—Court-fee on Rs. 5 is proper for purposes of appeal.*

Under the proviso to s. 7 (IV-B) it is the amount mentioned in the plaint which is the basis of the valuation and, therefore, the Court must look back to the date of the institution of the suit and calculate the court fee upon the market value at the

Court Fees Act—contd.

date of presenting the plaint. Hence, a suit for injunction must be deemed to have been correctly valued at Rs. 5 when at the date of the presentation of the plaint s 7 (IV-B) proviso was not in force and court-fee paid on memorandum of appeal on such valuation is correct. CHHAKAURI SINGH *v* SRI KRISHNA PANDE *All.* 747

——— s. 7 (iv) (c). SEE Court Fees Act, 1870, Sch II, Art. 17 (*iii*) 641 F B

——— s. 7 (iv) (c) — *Consequential relief in s 7 (iv) (c).*

The expression 'consequential relief' in Art 7 (*iv*) (c), Court Fees Act, means some relief, which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a 'substantial relief'. It follows therefore that if the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere 'consequential relief' in the above sense, the plaintiff must pay court-fee on the substantial relief. ZEB UL NISA *v* DIN MOHAMMAD *Lah.* 641 F B

——— s. 7 (iv) (c)—*Ss. 8 and 9, Suits Valuation Act (VII of 1887), interpretation of.*

All that s. 7 (*iv*) (c), Court Fees Act, requires is that the plaintiff should state the value of the relief in the plaint. It could scarcely have been intended that the plaintiff should value the relief at one figure for jurisdiction and at another for court-fee. Sections 8 and 9, Suits Valuation Act, show that except when specific rules to the contrary have been framed under s. 9, the value for purposes of court-fee and jurisdiction must be the same. ZEB-UL-NISSA *v.* DIN MOHAMMAD *Lah* 641 F B

——— s. 7 (iv) (c)—*Suit by Hindu widow for possession of husband's property, against his relatives, whether for declaration and consequential relief.*

On the death of a Hindu leaving his property in possession of members of another branch of his family, his widows brought a suit on the allegation that he died in a state of separation and that they as his widows were entitled to possession of the property left by him:

Held, that the suit was one for possession and not for a declaration and consequential relief namely possession of the property following the declaration. BESAR KUAR *v.* RAMBHIT SINGH *Pat.* 538

——— s. 7 (iv) (c), Sch. II, Art. 17 (iii)—*Declaration held could not be granted as suit did not fall under s. 42, Specific Relief Act—Result is dismissal of suit and not assessment of higher court-fee—Declaratory relief found to involve consequential relief within meaning of s. 7 (iv) (c)—Plaintiff can state his valuation of relief.*

If it is held that the declaration asked for cannot be granted because it does not fall under s. 42, Specific Relief Act, the result, should be dismissal of the suit on that ground, and not assessment of a higher court-fee. If, on the other hand, it is found that the declaratory relief claimed involves a consequential relief within the meaning of s. 7 (*iv*) (c), Court Fees Act, it will be for the plaintiff to state the amount at which he values the relief as provided in that section. ZEB UL NISSA *v.* DIN MOHAMMAD *Lah.* 641 F B

——— s. 7 (iv) (c), Sch. II, Art. 17 (vi), Sch I, Art. 17—*Suit for declaration that property is waqf and alienations thereof are ineffectual against waqf property — Nature of — Relief — Court-fee payable.*

Court Fees Act—contd.

Where the plaintiff sued for a twofold declaration that the property described in the plaint was *waqf* and that certain alienations thereof by the *mutwalli* and his brother were null and void and were ineffectual against the *waqf* property:

Held, that the first part of the relief *viz.*, that it be declared that the property in dispute was *waqf* was purely declaratory and it involved no consequential relief. Had it stood by itself a court-fee of Rs 10 would undoubtedly have been sufficient. The second part of the declaration however stood on a different footing. The plaintiff wished to have the alienations of the *waqf* property to be declared null and void and ineffectual as against the *waqf* property. In substance, the second part of the relief as claimed was tantamount to the setting aside or cancellation of the alienations referred to in the plaint In the circumstances the relief claimed by the plaintiffs could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief. The relief claimed in this case could not be treated as a declaration with a 'consequential relief' falling within s. 7 (*iv*) (c), Court Fees Act. The relief claimed fell neither under s. 7 (*iv*) (c) nor under Sch. II, Art. 17 (*iii*) but under the residuary article, Sch. I, Art. 17 and a court-fee of Rs. 10 was sufficient for the first relief as to declaration that the property was *waqf*, but the second relief which was a substantive one in the shape of setting aside of alienations required *ad valorem* court fee on the value of the subject-matter of the sales.

Held, also that even if the suit were held to fall under s. 7 (*iv*) (c), it was doubtful whether that would help the plaintiffs in this case. The plaintiffs had themselves valued the relief in the plaint at rupees ten lacs. They did so, for purposes of jurisdiction but they were bound to fix the same for the purposes of court-fee in view of ss, 8 and 9, Suits Valuation Act.

Held, further that the suit did not fall within the purview of s 42, Specific Relief Act. ZEB-UL-NISA *v.* DIN MOHAMMAD *Lah.* 641 F B

——— s. 7 (iv) (f)—*Suit for accounts dismissed —Appeal must be stamped according to full amount of valuation in plaint.*

The plaintiff whose suit for accounts is dismissed is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint MIDDE SAMPATIRAYUDU *v* SONTI VENKATARATNAM *Mad.* 597

——— s. 8-B 3)—*Deficit court-fee not paid within time fixed—Proper order to be passed.*

Proper order for the Court to pass, when the deficit court-fee is not paid within time fixed by the Court, is an order for dismissal under the provisions of s 8-B (3), Court Fees Act, and not an order rejecting the plaint under the provisions of O. VII, r. 11, Civil P. C. JARIMON KHATOON *v.* SECRETARY OF STATE *Cal.* 144

——— s 8-C—*S. 8 C, applicability*

Section 8-C, Court Fees Act, is inapplicable to a case falling within s. 7 (*iv*), cl. (c). JARIMON KHATOON *v.* SECRETARY OF STATE *Cal.* 144

——— s. 12 (as amended in Bengal in 1935) —*No question as to class of suit—Valuation of Court of first instance is final.*

Section 12, Court Fees Act has no application when the question for decision is as to the class under which a suit fell and not merely of valuation in that class. If there is a question of valuation, there being no question as to the class in which the suit fell, the valuation made by the Court of

first instance is final. JARIMON KHATOON v. SECRETARY OF STATE *Cal.* 144

——— s. 12 (2) — *Applies to all parties to appeal where deficient court-fee is paid whether by appellant or by any other party.*

Section 12 (2), Court Fees Act, applies to all the parties to the appeal. Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. It cannot be intended to apply only to a case where the deficiency was by the appellant. VENKATARAMASASTRI v. VENKATASUBRAMANIA DIKSHITAR *Mad.* 758

——— s. 12 (ii)—*Power of Appellate Court to correct mistake made by lower Court in respect of court-fees.*

Where a Court accepts a plaint or memorandum of appeal bearing a stamp of certain value, it must be deemed to have decided that that was the proper court-fee. Section 12 (*ii*), Court Fees Act gives an Appellate Court power when an appeal comes before it to correct a mistake made below in respect of court-fees. CHIDAMBARAM CHETTIAR, *In re* *Mad.* 490

——— s. 17 — *Section, if controlled by s. 67-A, Transfer of Property Act (IV of 1882) — Suit embracing two or more mortgages—Court-fees should be paid on each mortgage and not on aggregate amount of claim.*

What s. 17, Court Fees Act, means is that in a suit which embraces two or more distinct causes of action court-fee shall be paid on each cause of action. Each mortgage constitutes a distinct cause of action. Consequently, in a suit which embraces two or more mortgages court-fee shall be paid on each mortgage and not on the aggregate amount of the claim. Section 67-A, T. P. Act, does not control, s 17, Court Fees Act. R. M, P. L. S. CHETTIAR FIRM v. KOORMIAH *Rang.* 711

——— Sch. I, Art, 1 — *Appeal against amended decree of Special Judge passed under s. 14, U. P. Encumbered Estates Act (XXV of 1934)—Court-fee payable*—Ad valorem.

Where an appeal directed against an order of amendment, is to all intents and purposes against the amended decree passed by the Special Judge under s. 14, U. P. Encum. Estates Act, the court-fee payable on the memorandum of appeal is *ad valorem* under Art. 1, Sch. I, Court Fees Act. ABDUL AZIZ v. NAWAB KHAN *Oudh* 354

——— Sch. II, Art. 11. SEE U. P. Encumbered Estates Act, 1934, s. 9 867

——— ——— Art. 17 (1). SEE Civil Procedure Code, 1908, O XXI, r. 63 782

——— ——— Art. 17-A—*Suit filed in District Munsif's Court transferred to Subordinate Judge for being tried along with other suit filed there—Both suits decided by same judgment—Appeal from decree in suit originally filed in District Munsif's Court—Court-fee payable.*

Where a suit for declaration which was originally filed in the Court of the District Munsif is transferred subsequently to the Court of the Subordinate Judge for being tried along with the other similar suit filed in that Court and both the suits are decided by one judgment, the decree passed by the Subordinate Judge in respect of the suit originally filed in the District Munsif's Court is one passed by that Court and not by the Court of the District Munsif and the memorandum of appeal from such decree when the value for the purposes of jurisdiction is less than Rs. 10,000 must bear a court-fee stamp of Rs. 100 and not of Rs. 15. CHIDAMBARAM CHETTIAR, *In re* *Mad.* 490

——— Art 17 (iii), s 7 (iv) (c)—*Declaratory suit in Court Fees Act, whether covered by s. 42, Specific Relief Act (I of 187).*

The Court Fees Act was passed in 1870, while the Specific Relief Act, was passed in 1877. Section 42, Specific Relief Act, was therefore, not in force when the Court Fees Act, was enacted. The declaratory suits referred to in the Court Fees Act cannot therefore be taken to be necessarily those covered by s 42 only. ZEB UL-NISA v. DIN MOHAMMAD *Lah.* 641 F. B.

——— Art. 17 (iii) (c), s. 7 (iv) (c)—*Criterion for determination of question of court-fees in declaratory suits—Deed or decree sought to be declared void — Considerations.*

In a suit for a declaration that a deed or a decree is null and void, neither the answer to the question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of s. 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the court-fee payable. The true criterion for determining the question of court-fee in cases of this description is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple, and involves no other relief, the suit would fall under cl (*iii*) of Art 17 of Sch. II, Court Fees Act, and the court-fee payable would be Rs 10 only. At the initial stage of determining the court-fee on a plaint, the question whether the declaratory suit is liable to be dismissed, either because it does not fall within the purview of s 42, Specific Relief Act, or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise. That question will arise only after the necessary court-fee on the true relief as disclosed by the plaint is paid and the plaint is properly before the Court. ZEB-UL-NISA v. DIN MOHAMMAD *Lah.* 641 F. B.

——— Art. 17 (vi),—*Suit under s. 92 Civil Procedure Code (Act V of 1908) falls under Art. 16 (vi), Sch. II.*

Suits under s 92, Civil P. C., fall under cl. (*vi*) of Art. 17, Sch. II, Court Fees Act, which prescribes a court-fee of Rs. 10. ZEB UN-NISA v. DIN MOHAMMAD *Lah.* 641 F. B.

——— ——— Art. 17 (vi) (iii)—*No consequential relief open or asked for — Declaration asked for is only under s. 42, Specific Relief Act, 1877.*

Section 15, Civil P. C, 1859, was repealed by the Specific Relief Act in 1877 and s. 42 of that Act has widened the scope of the declaratory relief. Under s. 42 a person may sue for a declaration as to his legal character or his right to any property even when no further specific relief is open to him; while before the enactment of that section it was not the practice to grant declaratory decrees unless such further relief was open to the plaintiff. This provision in s. 42 is introduced to enable a person to remove a cloud on his status or title in certain circumstances even when no further relief is open to him at the time. Thus, it is only under s. 42, Specific Relief Act, that Courts in India can grant declaratory relief even when no other specific relief can be claimed by the plaintiff. It is not open to a plaintiff to ask for a purely declaratory decree apart from the provisions of s. 42, when no consequential relief is open to the plaintiff and none is prayed for. In deciding whether a suit is purely

declaratory, the substance and not merely the language or the form of the relief claimed should be considered. ZEB-UN-NISA *v.* DIN MOHAMMAD *Lah.* 641 F. B.

Criminal Procedure Code, (Act V of 1898), s. 46 (1) SEE Evidence Act, 1872 s. 27. 6

——— **s. 54 (1).** SEE Penal Code 1860, s. 332 887

——— **s. 133**—*Nali claimed as part of public way —Its long user by other party, if* bona fide *assertion of claim—Criminal Courts' jurisdiction under s* 133 *whether ousted*

Long user by a person of what is claimed to be a part of the public way *e. g., gairmazrua-am-nali*, may be taken as a *bona fide* assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under s. 133 against him. BHAJOO GOPE *v.* GHOLAM HAIDER *Pat.* 336

——— **s. 139-A**—*S. 139-A not complied with by Magistrate—Effect.*

Where a Magistrate has not complied with the provisions of s 139-A, Criminal P. C., his order should be set aside. NIRSU RAUT *v.* SOMAR NONIA *Pat.* 371

——— **s. 162.** SEE Evidence Act, 1872, s. 27 6

——— **s. 162**—*Statement of witness to which his thumb mark was taken by Police during investigation is inadmissible.*

A statement of a witness to which his thumb-mark was taken by the Police Sub-Inspector during investigation of the case, is inadmissible. WARIS KHAN *v.* EMPEROR *Oudh* 770

——— **s. 164**—*Maker of statement not warned by Magistrate—Defect, if cured by s* 29, *Evidence Act (I of* 1872).

Where a Magistrate has not before recording a confession explained to the person making it that he was not bound to make a confession and that if he did so it may be used as evidence against him, and thus has not complied fully with s. 164, Criminal P. C., the defect is not fatal in view of s. 29, Evi. Act. EMPEROR *v.* NANUA *All* 873

——— **s. 197**—*Port trust estate, whether falls under "village, town or district" within the meaning of s.* 21 (10), *Penal Code (Act XLV of* 1860)—*Prosecution of chief store-keeper and assistant superintendent of machinery employer for port trust estate—Sanction of Central Government, if necessary.*

The port trust estate does not fall within the term "village, town or district" within the meaning of cl. (10) of s. 21, I P. C. The chief store-keeper and assistant superintendent of machinery for the port trust estate entrusted with the keeping and the expending of property by the port trustees of the port on their behalf upon their estate are not public servants. No sanction of the Central Govt therefore, is necessary for their prosecution. S. E. NAYLOR *v.* EMPEROR *Sind* 858

——— **ss. 197, 476**—*Prosecution of M. L. A. under s.* 476—*Sanction is not required.*

No sanction under s 197, Criminal P. C., is required for the prosecution of a Member of Legislative Assembly under s. 476. IMAMDIN *v.* EMPEROR *Sind* 557

——— **s. 200**—*Anticipatory protest petition and petition filed after Police report—Distinction between—Anticipatory protest petitions, if amount to complaints*

The only distinction between anticipatory protest petition, that is to say, petition made to the Magistrate before the receipt of the Police report and that

filed after Police report, is, that an anticipatory protest petition may possibly call for no action at all if the Police report that is received afterwards actually places the accused persons on their trial. This position can of course never arise in connection with petitions of protest filed after the receipt of the Police report But apart from this, the two stand on much the same footing. Petitions amount to petitions of complaint on which the petitioners must be examined under s 200, Criminal P. C. SAIDU KHAN *v.* GAYA PRASAD *Pat.* 255

——— **s. 209.** SEE Criminal Procedure Code, 1898 s. 287 339

——— **ss. 242, 537**—*Object of s.* 242—*Complaint fully giving details of offence—Accused specifically asked to explain case—Non-compliance with s* 242 *held mere irregularity curable under s.* 537.

The primary object of the proceeding prescribed by s. 242, Criminal P. C., is to determine whether the accused pleads guilty to the charge or demands to be tried.

The facts on which the complaint was made were clearly stated in the written complaint. Detailed evidence of the facts alleged by the complainants was given by the prosecution witnesses. The accused himself after the close of the case for the prosecution was specifically asked to explain the case:

Held, that in these circumstances failure to comply with the provisions of s. 242, amounted merely to an irregularity which could be cured under s 537. DOST MUHAMMAD QUTAB DIN *v.* MUNICIPAL COMMITTEE, HARIPUR HAZARA *Pesh.* 365

——— **s. 250**—*Applicability to warrant cases*

Section 250, Criminal P. C., applies to trial of warrant cases as well as summons cases. GOKAL CHAND *v.* SAID ALI *Pesh.* 468

——— **ss. 286, 540**—*Prosecution is not confined to witnesses examined before committing Magistrate —But prosecution is not entitled to have fresh witnesses summoned for purpose of their evidence being taken and considered at trial.*

Under s 286, Criminal P. C, the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Sessions Court but the Crown is not entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses ready and available to them for giving evidence, their evidence can be taken, and there is no legal objection to this course. *In re* B. K. NARAYANA REDDI *Mad.* 342

——— **ss. 287, 209, 342**—*Purpose for which Court is entitled to put questions to accused under s.* 342—*Written statement by accused in lieu of answers to questions to be put by Court under s.* 209, *whether record of examination by or before committing Magistrate within meaning of s.* 287—*Admissibility in evidence.*

The purpose for which the Court is entitled to put questions to the accused under s. 342, Criminal P. C., is identical with the purpose indicated in s. 209, namely to afford the accused an opportunity to explain such circumstances as appear in the evidence against him. The questions which are to be put are questions to be put by the Court and the answers to be recorded are the answers to those questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited

and only to be elicited by questions by the Court. Such a written statement does not come within s. 287, as it cannot be said to be a document containing the examination of the accused duly recorded by or before the committing Magistrate and therefore it cannot be tendered in evidence.. K. KRISHNAN, *In re* *Mad.* 339

——— ss. 289, 298, 299—*Discretion conferred by s. 289—Judicial exercise of—Duties of Judge and jury—Question whether there is evidence to go before jury is one of law, to be decided by Judge—Evidence if believed by jury leading to conviction—Judge must leave case to jury—Defects in evidence to be brought to attention of jury—Evidence even if believed by jury not sufficient to justify conviction—Judge is bound to hold that there is no evidence to be placed before jury—He must withdraw case from jury and direct them to return verdict of not guilty.*

Section 289, Criminal P. C., provides that if the Court considers that there is no evidence that the accused committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty.. That section confers in terms a discretion on the Judge, but it is a discretion which must be exercised judicially. Where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or in other words, direct them to return a verdict of not guilty, because all questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence, and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the attention of the jury, but if the evidence is such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believes the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty. EMPEROR *v.* DAWOOD HASHAM *Bom.* 859 F B

——— s. 297—*Charge held defective and there was misdirection.*

The Judge summarizes the evidence against each of the accused persons and at the end of each summary he made the following observation: "This is the evidence against the accused. Do you think that he has been falsely implicated?" He used these very words three times at the end of each summary.

Held, that this was wrong method of approach in a criminal case. The issue before the jury was not whether the accused were being falsely implicated but whether the prosecution had proved beyond reasonable doubt that the accused were guilty. A question like this repeated at intervals at the end of the summary of the evidence against each of the accused was very likely to misguide the jury into thinking that unless they were satisfied that the case was false, they should find the accused guilty and

amounted to misdirection. EMPEROR *v.* MUJJAFFAR SHEIKH *Cal.* 302

——— s. 297—*Charge to jury—Case depending on circumstantial evidence—Duty of Judge pointed out—Charge, held defective.*

In a case in which the guilt of the accused is sought to be established by circumstantial evidence. A theoretical discourse of what is circumstantial evidence couched in language which is unintelligible to a *mufassil* jury is quite worthless. The Judge should tell the jury that if the circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused are entitled to be acquitted even if the circumstances raised a strong suspicion against them. He should summarize the circumstances alleged against the accused and ask the jury to decide whether from these circumstances the only reasonable inference to be drawn is the guilt of the accused and should tell them that if that was not the only reasonable inference, they should acquit the accused.

The Sessions Judge while concluding the charge said: you should, therefore, consider whether you are prepared to accept the same as showing the guilt of the accused persons:

Held, that these directions in a case depending on circumstantial evidence were quite inadequate. EMPEROR *v.* MUJJAFFAR SHEIKH *Cal.* 302

——— s. 297—*Defective charge.*

Where in placing the evidence before the jury the Judge does not point out, the inherent improbabilities, inconsistencies and important contradictions in the evidence the charge is defective. EMPEROR *v.* MUJJAFFAR SHEIKH *Cal.* 302

——— s. 297—*Riot—Which party started riot, doubtful—Warning to jury against acting on uncorroborated evidence of interested witnesses and to treat such evidence with caution, is necessary—Failure to warn is misdirection.*

Where the parties were at bitter enmity and so far as the question of motive was concerned, either of the parties might have started the riot, it is obviously incumbent on the Judge to warn the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration, where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. The failure of the Judge to so warn the jury amounts to misdirection. BALAM PATEYYA, *In re* *Mad.* 375

——— s. 297—*Vandalism or theft and dacoity are different—Failure to point out difference to jury amounts to misdirection.*

Vandalism is one thing and dacoity and theft are quite different, and hence the failure of the Judge to point out the difference between vandalism and dacoity or theft to the jury when asking them to give their verdict on counts relating to dacoity and theft amounts to misdirection. BALAM PATEYYA, *In re* *Mad* 375

——— ss. 298, 299. See Criminal Procedure Code, 1898, s. 309 859 F B

——— s. 342 See Criminal Procedure Code, 1898, s. 287 339

——— s. 345 (6). See Bihar and Orissa Village Administration Act, 1922, s 76 491

——— s. 423 (1), (b)—*Committal by Appellate Court to Court of Session—Inquiry and committal order, if should be repeated.*

An Appellate Court under s. 423 (1) (*b*), Criminal

Criminal Procedure Code—contd.

P. C., has power to commit the accused for trial to the Court of Session, though it is not necessary for it to repeat the inquiry or write a long commital order, where the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very fully upon the record. MANSHARAM GIANCHAND *v.* EMPEROR *Sind* 454

——— s. 435—*High Court, if can revise proceedings of Panchayat.*

A Panchayat constituted under the Bihar and Orissa Village Administration Act is a Court and it is in the exercise of its criminal jurisdiction, an inferior Criminal Court, and, therefore, its orders are revisable under s. 435 of the Criminal P. C. GONI MABTON *v.* EMPEROR *Pat.* 491

——— ss. 435, 439—*Order of District Magistrate under s. 3, Sarais Act (XXII of 1867), calling upon certain persons to register their Sarais, if subject to revision by High Court.*

The District Magistrate as the chief officer charged with the executive administration of a district, in criminal matters can under no stretch of language be treated as a Court. His function as an executive officer are poles as under from his functions as a judicial officer and it is only in his judicial capacity that he is subject to the revisional jurisdiction of the High Court. His order calling upon certain persons to register their Sarais, under s. 3, Sarais Act, not being a judicial order is not subject to the revisional jurisdiction of the High Court. GHULAM SADID UD DIN *v.* EMPEROR *Lah.* 564

——— s. 438—*Reference recommending enhancement of sentence—Accused is entitled to show cause against conviction—High Court can examine actual evidence to decide propriety of conviction.*

Where in a reference under s. 438, Criminal P. C., the District Magistrate recommends that the sentence should be enhanced, the accused is entitled to show cause against his conviction, and the High Court can itself examine the actual evidence in the case in order to decide whether the conviction was a proper one or not. JOYRAM RAKSHIT *v.* ANNADA PROSAD KUNDU *Cal.* 288

——— s. 438—*Reference under—Conviction under s. 323, if can be altered to one under s. 325, Penal Code Act XLV of 1860).*

Hgh Court has no power in a reference under s. 438, Criminal P. C., to alter a conviction under s. 323 to one under s. 325, I. P. C. JOYRAM RAKSHIT *v.* ANNADA PROSAD KUNDU *Cal.* 288

——— s. 439. SEE Criminal Procedure Code, 1898, s. 435 564

——— s. 439—*Revision against appellate order of District Magistrate—No revision filed before Court of Session—Chief Court, if can entertain—Wrong advice of Counsel—Effect of.*

It is the uniform practice prevailing in the Chief Court to refuse to entertain an application in revision against an appellate order of the District Magistrate where the applicants have not gone in revision to the Court of Session, which has concurrent jurisdiction. The advice given by the Counsel that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicants to file the application in the Chief Court. DEBI SINGH *v.* EMPEROR *Oudh* 47

——— s. 476—*Company Judge, if Court.*

Company Judge conducting proceedings under s. 195, Companies Act is a "Court" within the meaning of s. 476, Criminal P. C. MOHAMMAD TAHIR *v.* EMPEROR *Lah.* 170

——— s. 476—*Perjury by contradictory statements—Prosecution for, under s. 193, Penal Code (Act XLV of 1860)—Essentials—Duty of Court—Prosecuting Court must state particular contradictions.*

The fact that a witness appears to have made contradictory statements at two different stages of a case is not by itself always sufficient to justify his prosecution for perjury. The fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh all the circumstances before embarking on prosecutions for perjury on the basis of contradictions, for, it is in the interests of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate.

It is usual, as it is so very desirable, in cases of perjury by contradictory statements for the prosecuting Court not to leave the matter at large but to specify the assignments of perjury, so that the Magistrate who deals with the case will know precisely what it is for which the accused is being proceeded against. SUBA SINGH *v.* EMPEROR *Pat.* 569

——— s 476—*Preliminary inquiry, if essential.*

Section 476, Criminal P. C., does not make a preliminary enquiry essential in law, and the proceeding under s. 476 without such enquiry would not be illegal. If the Court does not think it necessary, it may not order such an inquiry. MOHAMMAD TAHIR *v.* EMPEROR *Lah.* 170

——— s. 488—*Person of 20 years age and healthy must be presumed to be capable of maintaining himself—Burden is on him, to establish contrary.*

A person who is 20 years old and who is healthy and does not suffer from any illness must be presumed to be capable of maintaining himself. His station in life does not make any difference in this question and the burden of proving to the contrary is on him. MUHAMMAD YAR *v.* ALI MUHAMMAD *Lah.* 548

——— ss. 499, 514—*Surety bond — Forfeiture—Surety undertaking to produce accused on certain date and thereafter as directed by Court—Accused produced on date—With Court's permission accused leaving Court house to say prayers but absconding—Surety, if liable.*

The liability of the surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in the custody of the Court only when his bail bond is cancelled.

In his bond the accused bound himself to appear in the Court on a certain date and thereafter as directed by the Court and the surety bound himself that the accused shall so attend and in default of his so attending he bound himself to forfeit Rs. 1,000. The accused was produced on the fixed date. During the course of the proceedings the accused with the Court's permission left the Court house to say his prayers and absconded. The bail bond was not cancelled nor was the surety discharged;

Held, that the surety's liability continued even after the production of the accused in the Court. The forfeiture of the bond therefore was justified.

Held, however that inasmuch as the surety was taken off his guard, it was a mitigating circumstance in the case whereby the penalty for forfeiture could be

Criminal Procedure Code—contd.

reduced to something nominal. MURADALI MUHAMMAD IBRAHIM *v.* EMPEROR *Sind* 471

——— s 509 (1)—*S.* 509 (1), *applicability of, to evidence relating to facts tendered by person who also happened to be medical man.*

Section 509 (1), Criminal P. C, confines itself to expert evidence tendered by a medical witness as such. It has no application to evidence relating to facts tendered by a person who also happens to be a medical man. It is therefore necessary to prove a dying declaration by producing the doctor who had recorded it if in recording the statement of the deceased the doctor was not acting as a medical man. WARIS KHAN *v* EMPEROR *Oudh* 770

——— s. 514. SEE Criminal Procedure Code, 1898, s. 499 471

——— s. 514—*Forfeiture proceedings, if must be started before expiry of period of bond.*

The proceedings for the forfeiture of a bond for keeping the peace need not be commenced before the expiry of the period for which the bond was given. PADAM SINGH *v.* KING-EMPEROR *Oudh* 627

——— s. 514—*Security bond for keeping peace—Person under recognizance convicted—Forfeiture proceedings, whether must be started by same Court and at time of conviction.*

It is not necessary that proceedings for the forfeiture of the security bond for keeping peace should be taken only by the Court which convicts the person under recognizance and at the time of the conviction. PADAM SINGH *v.* KING-EMPEROR *Oudh* 627

——— ss. 514, 537—*Forfeiture of security bond—Failure to record grounds of proof—No prejudice to surety nor failure of justice—Defect is curable.*

Where in proceedings for the forfeiture of the security bonds the Magistrate holds for good and justifiable reasons that the bonds had been forfeited but fails to record the grounds of proof as required by s. 514, Criminal P. C, such an omission is merely an irregularity curable under s. 537 when the surety is not prejudiced thereby and no failure of justice has occasioned. PADAM SINGH *v.* KING-EMPEROR *Oudh* 627

——— ss. 517, 520—*Order of acquittal and order under s. 517 passed by First Class Magistrate—Appeal—Forum.*

An appeal from an order of acquittal and an order under s. 517, Criminal P. C., for disposal of property regarding which the offence had been committed, passed by a First Class Magistrate, lies to the Sessions Judge. RAM DIHAL *v.* BADRI *All.* 817

——— ss. 526, 476, 197—*Any person, irrespective of status can be prosecuted for making false complaint—Fact that member of Legislature is figuring in case is no grounds for transfer.*

The Magistrate when he tries a case under s. 406, I. P. C., should be alert to see that his Court is not used for the purpose of oppression by introducing the evidence of any *zemindar* or any Member of the Legislative Assembly who as such has no special position or privilege at all in any Court of Law, and the Magistrate must deal with the case as it comes before him strictly upon its merits. If for instance he believes the case is a false case inspired by some prominent person, he will, if he thinks that that prominent person has aided or abetted the making of a false complaint or has given false evidence in Court, not hesitate to take such action under s. 476, Criminal P. C., as the interest of justice requires. It must be made known that Magistrates will not be deterred from doing their duty merely because a person concerned is a *zemindar*, an M. L. A., or a prominent person. It is a truism that wherever British concepts prevail all men are equal before the law, and a *zemindar*, an M. L. A., or a prominent person has no special privilege under the Criminal P. C, and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way as against any other person. Hence the fact that such a person is figuring in a case is no ground for transferring it. IMAMDIN *v.* EMPEROR *Sind* 557

Criminal Procedure Code—concld.

——— s. 528—*Notice to opposite party, if obligatory before transfer of case.*

There is nothing in s 528, Criminal P. C., itself which makes it obligatory on the District Magistrate to issue notice to the opposite party, before transferring a case under s. 528 (2) and it is undesirable to fetter his discretion. KHEMANA *v.* DULAREY *Oudh* 681

——— s. 528 (2)—*District Magistrate, power of, to set aside order of transfer of case by Sub-Divisional Magistrate and transfer it to other Court.*

A District Magistrate has the power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court. There is nothing in the sub-s. (2) of s. 528, Criminal P. C., which suggests that the discretion of the District Magistrate is fettered in any way. KHEMANA *v.* DULAREY *Oudh* 681

——— s. 537.

SEE Criminal Procedure Code, 1898, s. 242 365

SEE Criminal Procedure Code, 1898, s. 514 627

——— s. 540—*Discretion under first portion of s. 540 should be exercised judicially.*

The first portion of s. 540, Criminal P. C., leaves a discretion in the Court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially. B. K. NARAYANA REDDI *In re* *Mad.* 342

——— s. 562—*First offence—Short sentence, passing of—Effect.*

The passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime. The young convict when he comes out of prison has the stigma of prison upon him and yet his imprisonment has not been sufficiently long for its disciplinary influence to have effect, while he has been brought into the company of hardened offenders who may further guide him to a life of crime: Therefore, it is wrong to pass upon the accused, whether he is 18 or 20 years of age, a short sentence for the first offence. EMPEROR *v* ACHAR HAMZO KUMBHAR *Sind* 341

Criminal trial—*Confession—Divergences between confessions before Police and Magistrate — If ground for rejecting them.*

Slight divergences between the two confessions the one made to the Police Officer and the other to the Magistrate or the omissions from the confessions of facts spoken to by the prosecution witnesses are not sufficient reasons for rejecting the confessions. *In re* KARUPPAN CHETTI *Mad.* 14

——— *Confession — Murder — Question by Magistrate held defective and answer by accused held no admission.*

Question put to the accused by the Magistrate recording the confession was to the following effect: "Did you throw the born child into the well as the result of which he died of drowning?" To this the answer given was "Yes":

Held, that question was put in an unfortunate

Criminal trial—contd.

form as it was a question composite in nature to which it was almost impossible to give a direct answer 'yes' or 'no' and it could not therefore be inferred from it that the accused did actually admit that the child was born alive. HASSAN PARI v. EMPEROR *Pesh.* 284

——— *Confession—Part of confession relied on by Court—Other part proved to be false — Such part can be discarded.*

If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case when part of it is proved false by other evidence. In such a case the Court is entitled to rely on one part disregarding at the same time the other. EMPEROR v. NANUA *All.* 873

——— *Evidence—Accomplice—Corroboration.*

Evidence of accomplices must be received with caution and not ordinarily to be accepted without corroboration in material particulars. B. K. NARAYANA REDDI *In re* *Mad.* 342

——— *Evidence—Dying declaration — Corroboration, necessity of.*

Dying declarations should be corroborated in material particulars and by independent testimony. RAVUPALLI RAMAMURTHY *In re* *Mad* 347

———*—Evidence—First information report—Value.*

The first information report, is really not a substantive piece of evidence but can be used only for corroborative purposes. WARIS KHAN v. EMPEROR *Oudh* 770

——— *Evidence—Statements by persons not called as witnesses—Court, if bound to accept their statement because case is criminal.*

The Court is not bound to accept statements made by persons who were not called as witnesses merely because the case is a criminal one. SANOO MANAJI v. EMPEROR *Sind* 616

——— *Evidence — Sufficiency — Evidence held not sufficient to warrant conviction.*

Held, on facts that the presence of the accused persons in the deceased's company shortly before his death, was no doubt suspicious but not enough to warrant their conviction, even though there was the only statement made by the co-accused that they took part in the murder, specially when the body of the deceased was in such a decomposed condition that it was not even possible to infer that more than one hand was responsible for the death of the deceased SINGAMPILLI YERRANNA *In re* *Mad.* 465

——— *Evidence—Trial Court's opinion as to credibility of witnesses—Value of.*

The trial Court has the opportunity of watching the demeanour of the witnesses when they are in the witness box and its opinion as to their credibility is of great value. WARIS KHAN v. EMPEROR *Oudh* 770

——— *Investigation—Sub-Inspector getting information from accused and acting on it — Whether can make him repeat that information before witnesses.*

In principle it is of course objectionable for a Sub-Inspector who has received information from the accused and is proceeding to act on that information to get him to repeat that information in the presence of witnesses. A Police Officer ought to expect to be believed when he gives evidence on oath.

It may of course also be possible that the Sub-Inspector was aware that there might be some doubt as to the admissibility of what the accused had stated at the Police Station as it was embodied in a confession made to a Police Officer, in which case, if he considered that the statement might be entirely inadmissible, he was justified in taking the statement again in circumstances where it certainly was admissible. BHAROSA v. EMPEROR *Nag.* 6

Criminal trial—concld.

——— *Joint trial—Large number of offences—Joint trial, when can be held—Proper procedure in such case, stated.*

Unless all the offences for which a joint trial is held are parts of the same transaction, there can be no joint trial held according to law in respect of all the offences. A joint trial in respect of very large number of counts is very much to be deprecated even though the law may not prohibit it. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. No doubt, joint trials would be legal in certain circumstances, but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a Judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him, to hold separate trials. The usual course to be adopted in cases of large number of counts is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. BALAM PATEYYA *In re* *Mad.* 375

———*—Jurisdiction—Objection to, taken at late stage —Court, if gets jurisdiction.*

A Court does not get a jurisdiction it does not possess, merely because objection to it is taken by the accused at a late stage MANSHARAM GIANCHAND v. EMPEROR *Sind* 454

——— *Revision—Finding of facts depending on correct interpretation of law—Case can be examined on merits.*

Ordinarily, it is not the practice of the High Court to disturb findings of fact in revision, but where the finding of fact depends on a correct interpretation of the law it can examine the case on the merits ROSHAN SINGH v. EMPEROR *All.* 189

Custom—*Proof of—Statements in* riwaj-i-am *—Admissibility of, under ss.* 48 *and* 35, *Evidence Act (I of* 1872).

The answers (*riwaj-i-am*) contained in a Manual compiled by Mr. (afterwards Sir) James Wilson, called a "General Code of the Tribal Customs in the Shahpur District of the Punjab", published in 1896, are clearly admissible in proof of custom under s. 48 of the Evi. Act, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under s. 35 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty. SUBHANI v. NAWAB PC 436

——— *Validity—Essentials—Antiquity— If must in every case be carried back to period beyond memory of man—English rule as to antiquity, whether applicable in India.*

The English rule, that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" is neither apposite or useful, when applied

to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. SUBHANI *v.* NAWAB P C 436

Custom (Assam)—*Pre-emption—Hindus of District Sylhet, are governed by Muslim law.*

By custom the Hindus of the District of Sylhet are entitled to the benefit of the Muslim law of pre-emption. In order to entitle the plaintiff to a decree for pre-emption he has to prove that he made two *talabs talab-i-mawasibat* the 'first demand' and *talab-i-isad* the 'second demand' in accordance with the Muslim law of pre emption. RAJANANDNI *v.* ASWINI KUMAR CHOWDHURY *Cal* 82

Custom (Punjab)—Adoption—*Sarsut Brahmins of Mauza Jandola, Tahsil Thanesar, District Karnal are governed by Hindu Law in matter of adoption*

The initial presumption in the case of Sarsut Brahmins of *Mauza* Jandola, Tahsil Thanesar District Karnal, is that they are governed by Hindu Law in matters of adoption and an adoption of wife's sister's son is therefore valid The mere fact that the family of these Brahmins owns one-half of the village raises no presumption that they have given up Hindu Law and adopted the custom of agricultural tribes in all matters. BIR BHAN *v.* JAGAN NATH *Lah.* 522

——— Alienation—*Sayyeds of Gurdaspur District are governed by Customary Law.*

The Sayyeds of Gurdaspur District are governed by what is called the usual Customary Law in the matter of alienations and ancestral immovable property cannot be alienated by the holders without necessity. GHULAM RASUL *v.* KAFAIL AHMAD SHAH *Lah.* 469

——— ——— *Widow — Reversioners' suit for declaration that widow's alienation cannot affect their reversionry rights—Other reversioners impleaded as defendants along with widow and alienee—Suit compromised and decreed—Plaintiff reversioners to get possession from alienee on certain payment—Defendant reversioners held entitled to benefit of declaration alone and not to share in compromise.*

The reversioners instituted a suit for a declaration that their reversionary rights were not affected by the alienation made by the widow. Along with the widow and the alienee they impleaded other reversioners as defendants. The suit was compromised and the declaration was granted. By the terms of the compromise the plaintiffs were to take

over possession from the alienee on payment of the certain amount by them alone:

Held, that so far as the reversionary rights were concerned, the defendant reversioners were entitled to share in the benefit of the compromise to the extent to which it must be taken as covering the rights of all the reversioners on the death of the widow *i e.*, the extent of the declaration in favour of the plaintiffs but were not entitled to share in any additional benefit which the active reversioners might secure for themselves by inducing a person in lawful possession to forgo his rights in return for a cash payment to be made by themselves alone. The fact that the plaintiff reversioners obtained possession without making actual payment could not affect the rights under the compromise JALAL DIN *v.* NAWAB *Lah.* 186

——— Ancestral Property—*Proof of—Revenue pedigree, value of.*

It is now settled law in the Punjab that the mere mention of the name of a person in the revenue pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. A genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is no doubt presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village. To establish the ancestral character of land it is not therefore sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance SUBHANI *v.* NAWAB P. C. 436

——— *Kharals of Montgomery District governed by Customary Law—Succession — Non-ancestral property—Daughters v. collaterals—Gift by daughter—Collaterals, if can contest it—Position of grand daughter.*

According to the custom prevailing among the Kharals governed by the Customary Law of the Montgomery District in the Punjab, daughters are preferred to collaterals in the matter of succession to non-ancestral property and hence the collaterals cannot contest a gift by the daughter.

Daughters and grand daughters, however, stand on the same footing. SANATA *v.* SAHIB BIBI *Lah.* 494

——— Succession—*Non ancestral property—Married daughters* versus *collaterals of tenth degree—Tulla clan resident at Mauza Mahmad Tulla, Tahsil and District Shahpur — Daughters take precedence—Onus to prove special custom to contrary lies on collaterals*

Under the customary law applicable to the members of the Tulla clan resident at *Mauza* Mahmad Tulla in the Tahsil and District of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner cannot take precedence over his married daughters in succession to his non-ancestral estate.

Where non-ancestral property is claimed by collaterals in preference to married daughters of the

Custom (Punjab)—contd.

deceased owner the initial onus lies on the plaintiffs to prove that the general custom in favour of the daughter's succession had been varied by a special custom enabling the plaintiff to exclude the daughters

In the Punjab as a whole, the daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as e g,) uncles or nephews), and, even as regards ancestral property, it is now well-settled that, more usually, the fifth degree is found to be the remotest customary limit. Some of the answers recorded in Wilson's Manual are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest as the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father and this with the recent judicial decisions are sufficient to abrogate the custom to the contrary laid down in Wilson's Manual of Customary Law.

[*Held*, that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, it was a weak presumption which had been sufficiently discharged by the evidence adduced in the case.] SUBHANI *v.* NAWAB P. C. 436

——— Village proprietary body—*Reclaimation of waste lands by proprietors—Agreement between proprietors and Government to surrender rights in waste land to Government after passing of Sind Sagar Doab Colonisation Act*, 1902—*Such agreements recorded in* wajib-ul-arz *prepared at subsequent settlements—Act repealed—Waste lands reclaimed during* interim *period—Effect of repeal of Act—Plaintiffs held bound by agreements.*

The plaintiffs were some of the proprietors in various villages According to the respective village *wajib-ul-arz* prepared at the time of the first settlement in 1878 a proprietor had the right under certain conditions to reclaim the *shamilat* (waste land) of the village and become Adna Maliks of the land. But this position was altered in consequence of a scheme of the Govt. of the Punjab to make a canal in the Sind-Sagar Doab for the purpose of irrigating tracts in that district. In furtherance of the scheme the Sind-Sagar Doab Colonisation Act was passed in 1903. Amongst other provisions it empowered the Govt. to make agreements between proprietors in the district for the surrender of their lands to Govt. on condition that they would receive back an area equal to one-fourth in the improved land. Such surrenders, however, were only to take effect on and from the date on which the excavation of the proposed canal should be begun. Agreements were entered into by the proprietors of all the lands in the villages in question for the surrender of the lands on the statutory terms. The agreement contained the term that from the date of the agreement up to the date of the surrender no one should notwithstanding any law or custom to the contrary acquire or be considered entitled to either proprietary or occupancy tenancy rights in the said lands. At the second regular settlement in 1902 the *wajib-ul-arz* in each case recorded the agreement between the villagers in this form, "We the proprietors of the village have signed the agreement under the Sind-Sagar Doab Act of 1902..... No one can acquire proprietary rights in the village *shamilat* till then." The same agreement was recorded in the *wajib-ul-arz* prepared at the third regular settlement in 1926. The project of the canal, however, was never carried into effect. The excavation was never begun: and in 1929, when the scheme had been finally abandoned the Sind-Sagar Act of 1902 was repealed (Act VI of 1929). The plaintiffs claimed that by reason of the repeal the rights as in 1878 revived and must be taken never to have been affected. They had during the *interim* period been engaged in reclaiming waste lands, and sought to enjoy the rights to become proprietors of the lands so reclaimed as though the various agreements had not been made:

Held, that the effect of the repeal of the Act was determined by the Punjab General Clauses Act, 1898, s. 4, and it could not be said that the Act once repealed was to be taken never to have been passed But apart altogether from the effect of repeal the agreements recorded in the second and third *wajib-ul-arz* operated independently of the Act. They expressly determined the rights of the parties during a known period of transition The plaintiffs must be held to their agreement: a result which was the more clearly just because the other proprietors acting on their agreement had lost rights of preventing the plaintiffs from acquiring the rights over the land they claimed. MOHAMMAD IKHTIAR *v.* HIMTU RAM P. C. 684

Custom (Punjab)—concld.

Dattakamimangoha, s. 2 cls. (8) (84). See Hindu Law—Caste 82

Decree—*Consent decree—Construction—Deed directing defendant to pay lump sum to plaintiff by annual instalments—Whole amount made payable on default of two instalments—Charge for decretal amount created upon shares in suit—Plaintiff to recover amount by sale of shares in case of default by defendant—Shares sold on default but sale proceeds insufficient to satisfy decree—Plaintiff, if can proceed against other property to recover balance—Personal decree, if necessary—Object of charge created, stated—Analogy of mortgage decree, whether applicable to consent decree.*

The plaintiff made an advance to the defendant, and certain shares were charged to secure the amount. The plaintiff sued to recover the amount due, and there was a consent decree which directed the defendant to pay to the plaintiff a lump sum by yearly instalments Then there was a default clause making the whole amount payable on default of payment of two instalments. Further on it was provided that a charge in favour of the plaintiff for the decretal amount was kept upon the suit shares, and then the decree went on. "If defendant fails to pay the monies in time, the same should be recovered by sale of the said shares." The defendant failed to pay the instalments on the due dates, and the shares were sold but as the sale proceeds were not sufficient to satisfy the decretal amounts the plaintiff took out the *darkhast* to recover the balance of the debt by attachment and sale of a house belonging to the defendant:

Held, that the charge created by the decree was for the protection of the plaintiff against the rights of intervening creditors, who might attach property of the judgment-debtor whilst the plaintiff's hands were tied by the time given for payment of instalments and its object was not to regulate the order in which the defendant's property was liable to be attached. Clause (1) of the decree, amounted to an order for payment, and could be enforced by any of the methods authorized by the Civil P. C, including attachment and sale of any of the defendant's property. There was nothing in the rest of the decree which expressly took away or limited that right,

Decree—concld.

and the plaintiff could not, therefore, be said to have deprived himself of that right or delayed its enforcement by implication merely because he had protected himself against other creditors by taking a charge on part of the defendant's property. Hence the plaintiff, having failed to realize the whole amount of his debt by sale of the charged shares, could proceed under the decree to attach any other property of the judgment-debtor which might be available No personal decree for the balance, was consequently necessary;

Held further, that the analogy of mortgage decree could not be applied to the consent decree which must be construed according to the terms of the language used. GURAPPA GURUSHIDDAPPA NEELI *v.* AMARANGJI VANICHAND *Bom.* 217 F B

——— *Consent decree and decree obtained on award, differences.*

A decree obtained upon an award given after hearing the parties by an arbitrator duly selected by them, cannot be treated on the same footing as a consent decree. The two are radically different. The Court's power in recording compromises cannot be used for disturbing an agreement between the parties. On proof of the compromise, the Court is bound to record the adjustment, unless it is unlawful, and to pass a decree in terms thereof. In the matter of awards, the procedure is laid down, so far as the *mofusil* Courts are concerned, in Sch. II, Civil P.C. If the award is not challenged on any of the grounds in para. 15 of that Schedule, the Court's business would be to record the award and pass judgment accordingly. The difference between a compromise decree and an award decree is this; that while the former is the result of the agreement of the parties with the Court's seal of approval, the award is the act of a Court or a tribunal set up by the parties of their own choice and is independent of the agreement of the parties. Moreover, if an award were irregular and offended against the provisions of the law, or if there were other grounds sufficient to invalidate it, the procedure to be followed to impeach the award would be the procedure laid down in the Code SHRIPADGOUDA VENKANGOUDA APARANJI *v.* GOVINDGOUDA NARAYANGOUDA APA RANJI *Bom.* 795

Dedication SEE Hindu Law 882

Deed—*Construction*—Dastur rewaz—*Remark column — Non-mention of river for description of boundaries of* taraf—*Whether proves absence of river in* taraf.

The non-mention of the river in the remark column of a *dastur rewaz* which is only meant to contain a description of the boundaries, does not necessarily lead to the conclusion that the river was not within *taraf*. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

——— *Construction — Deed of title — Area going against boundaries — Court should see what are operative provisions of document rather than descriptive schedule attached to it.*

The proposition that where the area goes against the boundaries, the boundaries should prevail, cannot be accepted as a universal proposition. The question as to what had been demised turns upon the true construction of a lease or grant. What the Court will have to see is what are the operative provisions of the document of title and what was actually granted by those operative provisions. The effect of the document depends, on the operative portion rather than on the descriptive schedule attached to the document.

Deed—concld.

Held, on construction that the operative portion of the lease was that which conveyed 3 *bighas* and that the boundaries given in the schedule did not control the operative portion in the body of the lease. They were merely description. EQUITABLE COAL CO. LTD. *v.* AMRITA NATH MITTER *Pat.* 737

——— *Construction—Gift—Principles of construction—Consistency with law.*

The cardinal rule of construction of deeds is to ascertain the intention of the donor as disclosed from the language used in the deed. It is also a well-understood rule of construction that such intention should be effectuated so far and as nearly as may be consistent with the law to which the donor was subject.

Where a childless Hindu made a gift of his property to the sons of one of his brothers and the grandsons of another brother:

Held, that in the absence of any special indication in the deed of gift itself, the donor must be taken to have intended that the donees should take *per capita* and not *per stirpes* because the property would have been so divided under the Hindu Law if the donees had all been persons of the same relationship to the donor. CHHEDI SINGH *v.* RAM SINGH *Oudh* 611

——— *Execution—Evidence—Registration endorsement, if can be treated as sufficient proof.*

The Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution but it is certainly open to the Court, to treat it as sufficient proof. GANPATRAO *v.* NAGORAO *Nag.* 41

Dissolution of Muslim Marriages Act (VIII of 1939), s. 4—*Suit by wife for dissolution of marriage on ground of her conversion—Act coming into force during pendency of appeal—S. 4 if applicable.*

A wife instituted a suit for a declaration that her marriage had come to an end on account of her conversion to Christian faith. After the decision of the suit but during the pendency of the appeal Act VIII of 1939 came into force:

Held, that the right claimed by the wife had not vested in her under any statute and consequently she could not insist that that right was indefeasible The law applicable to the question was as contained in s 4 of Act VIII of 1939, by which no marriage was dissolved merely on account of change of faith. FAZAL BEGUM *v.* HAKIM ALI *Lah.* 327

Divorce Act (IV of 1869), ss. 7, 18, 19—*Jurisdiction —Parties belonging to Mangalore, married there and husband having house of his own at that place —Husband in service at Rangoon—Husband and wife last residing at Mangalore when husband was on leave—Husband having no house or flat in Rangoon during this period—On husband's departure to Rangoon wife staying behind and presenting petition under ss. 7, 18, 19 in Mangalore —Mangalore Court held had jurisdiction to entertain it.*

Where there is a residence, it is possible to regard a person as residing there though he is not actually present in the flesh at that place. But where there is no place of residence, this fiction is not available, and the person must be deemed to be residing in the place where he actually lives.

The parties were married at Mangalore to which place they belonged and the husband had a house of his own at that place. The husband was, however, in service in Rangoon and the parties resided there for some years. The wife presented an ap-

Divorce Act—contd.

plication under ss. 7, 18, 19 of the Divorce Act at Mangalore on the ground that the parties last resided there when the husband was on leave. The husband had no house of his own or a rented house or flat in Rangoon during this period and the evidence showed that he had wound up the establishment at Rangoon before he left that place. On the expiry of the leave the husband went to Rangoon and the wife remained behind at Mangalore :

Held, that during the period of leave when the husband was living with his wife in Mangalore in his own house, he had no place in Rangoon which he could call his residence. Merely because he had a lien, on his post during his leave, he could not be regarded as a resident of Rangoon even during the time when he was spending his leave at Mangalore with his wife in his own house. The Court at Mangalore had, therefore, jurisdiction to entertain the application. JOHN BATIST D'SOUZA *v.* LIZZIE JANE LOBO [*Mad.* 382

Divorce Act (Burma) (IV of 1869), ss. 10, 14—*Petition must state distinctly facts upon which claim to have marriage dissolved, is founded*—*Exercise of discretion to excuse delay.*

Evidence in divorce proceedings to prove the case of the petitioner must be confined to the pleas set out in the petition. Consequently it is essential, as laid down in s. 10, Burma Divorce Act, to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. MA DUN MAY *v.* SAW JAMES *Rang.* 301 S P

Dying declaration.

SEE Criminal trial 347
SEE Criminal trial—Evidence 347

Electricity Act (IX of 1910), s 44 (d)—*Construction*—*Onus to show improper use of electrical energy*—*Latter part of s.* 44 (d) *relating to cl.* (d), *whether exonerates prosecution from discharging onus.*

Section 44 (*d*), Electricity Act, *inter alia* imposes a penalty for improperly using the energy of a licensee. The onus would, therefore, lie on the prosecution to show that there had actually been improper use of the energy. The latter part of s. 44 (*d*) in so far as it relates to cl. (*d*) does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself as defined in s. 2 (*o*) of the Act will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. A. C. MOJUMDAR *v.* EMPEROR *Cal.* 746

Equitable set off. SEE Transfer of Property Act, 1882, s. 76 (*b*) 533

Estoppel.

SEE Hindu Law 631
SEE Landlord and tenant 251

———*Bond payable in certain instalments*—*Suit by plaintiff on default of two instalments*—*Suit compromised and decree for two instalments passed*—*In a subsequent suit by plaintiff, defendant claiming that full consideration for bond had not been paid*—*Defendant's plea held not barred by compromise decree in previous suit.*

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise, must depend upon the answer to the question : 'Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree.'

The original bond was payable in ten annual instalments. The plaintiff instituted a suit for recovery of certain sum when two instalments remained unpaid. This suit was compromised and the plaintiff was granted a decree for the full amount and costs. The parties had come to an agreement that a decree for the two instalments should be passed, but that no further claim should be made by the plaintiff without going into the accounts relating to the balance. In a subsequent suit by plaintiff it was pleaded by the defendant *inter alia* that the full consideration for the bond had not been paid :

Held, that the compromise decree was merely confined to the two instalments which were in dispute in the previous suit. The decree could not, therefore, be considered to be tantamount to an admission that full consideration had been paid for the bond. Therefore, the consent decree in the previous suit was not a bar to the pleas raised by the defendant in the subsequent suit. ATA MOHAMMAD *v.* LACHHMAN DAS *Lah.* 781

——— Minor. SEE Contract 178

——— *Misrepresentation*

If a party is fully acquainted with the actual facts of the case, there can not be in fact any misrepresentation by the other party upon which the former could have been induced to act or alter his position. BHUTNATH JANAN *v.* GOPAL PRASAD SAHA *Cal.* 26

Evidence—*Duty of Court*—*Judge cannot in rejecting evidence of important witness rely on information gained from other cases.*

A Judge cannot travel beyond the record of the case before him and rely for the rejection of the important witness in the case on information gained from other cases heard by him. FAZAL BEGAM *v.* HAKIM ALI *Lah.* 327

———*Duty of party*—*Party not producing best evidence*—*Court can draw inference unfavourable to party.*

It is for a party to prove his case by the best evidence available to support the contentions put forward. Where, therefore, a money-lender is examined by a party wishing to prove a money transaction but fails to get his account books produced, the Court is entitled to draw an adverse inference against him. GANSU RAM *v.* PARVATI KUER *Pat.* 411

——— Hearsay evidence—Admissibility. SEE Evidence Act, 1872, s. 2 220

Evidence Act (I of 1872), s. 2—*Repeal by Common Law of evidence*—*Effect* — *Hearsay evidence*—*Admissibility*—*Discretion of Judge in respect of admissibility of evidence.*

It is entirely erroneous to state that "the principle of exclusion adopted by the Evi. Act, should not be applied so as to exclude matters which may be essential for the ascertainment of truth." This mode of regarding the law of evidence is very unsound and hearsay evidence which does not fall under s. 32, Evi. Act, cannot be admitted upon such principle. What matters should be given in evidence as essential

for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rule of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it It is therefore discarded for all purposes and in all circumstances To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. SRIS CHANDRA NANDY *v.* RAKHALANANDA THAKUR
P. C. 220

——— ss. 4, 112, 114, Illus. (d)—*Proof of marriage—Presumption—Discretion of Court under s. 4.*

Under s. 4, Evi. Act it is open to the Court upon proof of the marriage on a certain date either to regard as proved the subsistence of the marriage on a certain subsequent date unless and until it is disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of s. 4 in a judicial manner according to the circumstances of the case. ISMAIL AHMAD PEERADI *v.* MOMIN BI BI
P. C. 209

——— s. 8. SEE Evidence Act, 1872, s. 25 873

——— s. 13—*Rights of party not in issue in previous suit—Judgment, admissibility of, in subsequent suit.*

Where rights of a party in a subsequent suit were not in issue in a previous suit, the judgment in the previous suit is not admissible in subsequent suit. GANPATRAO *v.* NAGORAO *Nag.* 41

——— s. 18—*Witness—Party, if bound by statement of his witness.*

There is no rule of law with regard to the statement of witnesses, that a party must be bound by the statement of his witness though the belief in such a rule is not uncommon and does great harm in judicial trials in some of the Subordinate Courts. JALAL DIN *v.* EMPEROR *Lah.* 186

——— ss. 21 (1), 32—*Woman describing herself as wife of G in deeds when her marriage with G was not in dispute—Such statements, if admissible and if can be proved by her subsequently in dispute as to her marriage with G.*

Where a woman has described herself in deeds executed by her as the wife of one *G* when there was no dispute about her marriage with *G*, the statements made by her in such deeds are admissible and can be proved by her in a subsequent dispute wherein her marriage with *G* is questioned as she had special means of knowledge about her marriage with *G*. BASHIRAN *v.* MOHAMMAD HUSAIN *Oudh* 161

——— s. 25—*Admissions not amounting to confessions, whether excluded by s. 25.*

Under s. 25, Evi. Act only confessions are excluded and not admissions not amounting to confessions.

The accused, a Police Sub-Inspector, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount;

Held, that the statement as to acceptance of bribe being confession was inadmissible under s. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up being admission was admissible. SARDAR ALI SHAH *v.* EMPEROR *Lah.* 878

——— ss. 25, 27, 8—*Statement and act, difference—Accused taking in his hands certain articles and handing them over—Whether amounts to statement or confession—Applicability of s. 8 to such case.*

The difference between a statement and an act is clear. A statement must consist of words, be they spoken, be they written, or be they spelled out, as would be done by a mute person who spells out words on his fingers, and even words would not always be statements, as for instance, if a person recited the numbers from 1 to 10, if one considers a statement in the sense used in s. 162, Criminal P. C. Acts however exclude words and cannot be translated into words. It cannot be held therefore that the fact that in the case the accused by taking in his hands certain articles and handing them over, made a statement much less can it be said that he made a statement which amounts to a confession within the meaning of s. 25, Evi. Act. To such a case of s. 8, Evi. Act, applies. EMPEROR *v.* NANUA *All.* 873

——— s. 26—*Accused sent to doctor for medical examination, with head constable—Examination made not in immediate presence of head constable—Confession to doctor during examination—Admissibility.*

Where the accused made a confession to the doctor while being medically examined but not in the immediate presence of the head constable in whose charge she was sent to the doctor:

Held, that the accused was in the custody of Police when she made the confession to the doctor and hence it was inadmissible under s. 26, Evi. Act. HASSAN PARI *v.* EMPEROR *Pesh.* 284

——— s. 27. SEE Evidence Act, 1872, s. 25 873

——— s. 27—*Accused after committing murder lodging report to Police—First Information Report containing confessional matter—Conclusion of—Such matter if can be admitted under s. 27.*

Where the accused after committing murder goes to the Police Station and lodges the first information of the crime, and the report contains statements in the nature of confessions and statements having no connection with the actual narrative of the crime, the statements in the nature of confession cannot be admitted but they are not excluded for the purposes of s. 27, Evi. Act. BHAGORA *v.* EMPEROR *Nag.* 6

——— s. 27—*Accused describing murder and part played by other accused and almost simultaneously producing deceased's earrings—Admissibility of statement under s 27.*

Under s. 27, Evi Act, cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement must be distinguished.

Where an accused makes a statement to a Police Officer describing the murder and the part played by the other accused and almost simultaneously produces ear-rings identified as those worn by the deceased, the discovery of the earings cannot be said to have been made in consequence of the information given by the accused and therefore the statement is inadmissible in

Evidence Act—contd.

evidence under s. 27. SINGAMPHLLI YERRANNA, *In re* *Mad.* 465

——— s. 27—*Accused's statement to Police that he threw away knife on certain spot after killing deceased—Accused leading Police to the spot but knife not found—Police broadcasting that whoever has taken knife should return it or houses would be searched* — *A coming forward and stating that he found a knife on spot mentioned by accused but he has thrown it away* — *A producing knife from spot where he alleged it was thrown away by him —Statement by accused held admissible under s. 27.*

The accused stated that he would show the knife with which he had stabbed the deceased and which he had thrown away. The Sub-Inspector, the accused, and another witness who was requested to go with the Sub-Inspector, proceeded to the spot but no knife was found. The Sub-Inspector broadcast that whoever had taken the knife away should return it or search would be made of the houses. Then *A* came forward and stated in the presence of the accused that he had picked up the knife from that very spot. He took the party to some 40 or 50 yards to the west of his house and showed the knife, the blade sticking in the earth :

Held, that the statement of the accused to the Police was admissible under s. 27, Evi Act, since it led to the discovery of (1) the fact that a knife had been seen to be thrown away and was later found by *A* at the spot indicated, and (2) the knife itself; the fact that the knife was not actually found at the spot mentioned by the accused was immaterial. RAVUPALLI RAMAMURTHY, *In re* *Mad.* 347

——— s. 27—*Accused voluntarily making statement to Police confessing crime—Such accused, if in custody of Police within the meaning of s.* 46 (1), *Criminal Procedure Code* (*Act V of* 1898).

A person who makes a statement to a responsible Police Officer, voluntarily confessing that he has committed an act which the I. P. C., regards as an offence, is submitting himself to custody within the meaning of s. 46 (1) of the Criminal P. C., and is then in the custody of a Police Officer within the meaning of s. 27 of the Evi. Act. BHAROSA *v.* EMPEROR *Nag.* 6

——— s. 27—*Amendment of s.* 162, *Criminal Procedure Code* (*Act V of* 1898), *whether affects s.* 27.

The provisions of s. 27 of the Evi. Act, are still valid and are not affected by their Lordships' judgment in *Pakala Narayana Swami* v. *Emperor*, 160 Ind. Cas. 1. Consequently the amendment of s. 162, Criminal P. C. in 1923 does not affect s. 27, Evi. Act. BHAROSA *v.* EMPEROR *Nag.* 6

——— s. 27—*Statement under s.* 27—*Made of recording—Admissibility in part—Duty of Judge.*

Statements under s. 27, Evi. Act, should be recorded in the first person, that is to say, as far as possible in the actual words of the accused ; they should not be paraphrased. The Judge should admit those parts which he considers admissible but leave some record for the consideration of the Appellate Court of any other words which the prosecution claimed should be received in evidence. RAVUPALLI RAMAMURTHY, *In re* *Mad.* 347

——— ss. 27 and 30—*Only those portions of information given by accused which relate to facts discovered thereby are admissible* — *Statement of accused involving other accused but not relating to aforesaid facts—Admissibility of statement against other accused.*

It is necessary to observe strictly the provisions of s. 27, Evi. Act, by which the only portions of the information given by accused which are admissible are those which relate distinctly to the facts discovered thereby. Hence, statements by an accused which do not relate to aforesaid facts but involve other accused are inadmissible under s 27 against the latter ABDUL BASHA SAHIB, *In re* *Mad.* 814

——— s. 30—*Confession by accused implicating co accused—Evidentiary value of—It can be used as positive evidence.*

The confessions of an accused implicating the co-accused are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under s. 30, Evi. Act, along with such other evidence as there may be. Such confessions may help the Court to decide whether the other evidence is or is not credible. It cannot, however, supply the place of positive evidence regarding the commission of the crime. KARUPPAN CHETTI, *In re* *Mad.* 14

——— s. 30—*Confession by accused that he killed deceased because other accused promised to give him certain amount* — *Admissibility under s.* 30—*Whether evidence against other accused.*

A confession by an accused to a prosecution witness that he killed the deceased because the other accused had promised to give him a certain amount, is admissible under s. 30 but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. But it cannot be treated as against the other accused. SINGAMPILLI YERRANNA, *In re* *Mad.* 465

——— s. 32. See Evidence Act, 1872, s. 21 (1) 161

——— s. 33—*Scope of, s.* 33.

Section 33, Evi. Act covers not only cases of privity of estate and succession of title, but also cases where both the following conditions exist, *viz.* (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question issue in the first proceeding is identical. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, *i. e.* that he was (in the latter case), in effect, fighting that person's battle as well as this own. GANPATRAO *v.* NAGORAO *Nag.* 41

——— s. 35. See Custom 436

——— s. 35—*Age—School Register* — *Evidentiary value.*

Where there is no evidence to show on what materials the entry in the school register about the age of a person was made the statement in the register about his age has no evidentiary value. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA CHOWDHURY *Cal.* 419

——— s. 35—*Endorsement by Sub-Registrar that executant presented document for registration and admitted execution, if relevant fact under s.* 35.

An endorsement by the Sub-Registrar showing that the executant presented the will for registration and acknowledged execution is a relevant fact under s. 35, Evi. Act. GANPATRAO *v.* NAGORAO *Nag.* 41

——— s. 43—*Privy Council decision* — *Finding*

showing that village was fixed place—Decision not inter partes—Finding, if evidence.

A finding in a Privy Council decision cannot be relied on by a party to a suit for showing that the village in question was a fixed place, where the judgment was not *inter partes*. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

——— s. 44—*"Obtained by fraud" and "collusion" in s. 44, explained—X executing pro-note in favour of Y, to shield property from creditors—Y agreeing not to execute decree on pro-note—Suit on pro-note—X and Y making bogus reference to arbitration—Decree passed on award—Y executing decree inspite of agreement to contrary—Suit by X to set aside decree as fraudulent and collusive—X and Y held, both being* in pari delicto *X could not vacate decree—Proper remedy of X stated.*

A Judgment or order obtained by fraud upon a Court binds no such Court, and its nullity may be alleged in any collateral proceeding without the necessity of setting it aside. The expression "obtained by fraud" in s. 44, Evi. Act expressly refers to the fraud practised against the Court by any one party, or it may also imply a fraud against any party to the proceeding. he term 'collusion' is used apparently in a different sense, and the language of the section is so comprehensive that it might enable a party to the collusion to lead evidence of his own fraud. But as the section lays down a rule of proof it would not abrogate the rule of larger equity which must guide the Court in granting relief. The collusive decree can be impeached by innocent persons claiming under the parties to the judgment or represented by them therein, or by strangers who were neither privies to nor representatives of the parties to the former suit. If, however, fraud is practised by both the parties on the Court, neither of them can impeach the judgment on the ground that it was collusively procured.

X executed a promissory note in favour of *Y* in order to shield his property from his creditors. *Y* agreed not to execute the decree on the pro-note. *Y* brought a suit on the pro note and both *X* and *Y* made a bogus reference to arbitration and obtained a decree on the award by falsely representing the award to be genuine and thus practised fraud on the Court. Subsequently *Y* in violation of his agreement put the decree into execution. *A* then brought a suit to set aside the decree as being collusive and fraudulent;

Held, that both parties having colluded and practised fraud on the Court, were *in pari delicto* and it was not, therefore, open to one of the parties to vacate the decree and thus take advantage of his business. Nor could the collusive decree be dealt with on the analogy of a transfer fraudulently effected under s. 84, Trusts Act.

Held, further that proper remedy for *X* for preventing *Y* from executing the decree in breach of his agreement was by way of suit for injunction and not by a suit for setting aside the decree. SHRIPADGOUDA VENKANGOUDA APARANJI *v.* GOVINDGOUDA NARAYANGOUDA APARANJI *Bom.* 795

——— s. 58—*No admission by defendant in written statement or at hearing—Plaintiff is not relieved of producing best material in support of his case.*

The plaintiff is not relieved of producing the best materials in support of his case, where no admission has been made by the defendants either in their written statement or at the hearing. MIDNAPORE

ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

——— s. 68—*Attesting witness unable to prove document—If can be proved by other evidence*

Under s. 68, Evi. Act what is necessary is that an attesting witness if available should be called in evidence. If he is not able to prove the document there is no bar to its being proved by other evidence. BASHIRAN *v.* MOHAMMAD HUSAIN *Oudh* 161

——— s. 90—*Copy not thirty years old—Presumption under s 90, if can apply.*

The presumption contained in s. 90 of the Evi. Act cannot apply to a copy that is not itself 30 years old. GANPATHRAO *v.* NAGORAO *Nag.* 41

——— s. 91—*Rent suit based on unregistered lease—Rate of rent cannot be proved* aliunde.

The terms of s. 91, Evi. Act, are quite explicit in their prohibition of the proof of the terms of the lease *aliunde*, and no other evidence can be given to prove the rate of rent in a suit which is based on an unregistered lease except the lease itself which is inadmissible in evidence under s. 49, Regis. Act. ATUL KRISHNA BOSE *v.* ZAHED MONDOL *Cal.* 635

——— s. 92. SEE Insurance 155

——— s. 92—*Gift deed—Construction — Conduct of parties—Relevancy.*

Where the language of the deed is clear and free from ambiguity, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point. CHHEDDI SINGH *v.* RAM SINGH *Oudh* 611

——— s. 112. SEE Evidence Act, 1872, s 4 209

——— s. 114—*Adverse inference—Omission to examine witness—Effect.*

The omission of a party on whom the onus lay, to examine a particular witness gives rise to a presumption adverse to him. ONKARSA *v.* MUNICIPAL COMMITTEE, NANDURA *Nag.* 473

——— s. 114—*Birth of first child to young woman and not in presence of any one—Presumption that child was born alive, if can be drawn.*

No presumption under s. 114, Evi. Act, that the child born was born alive can be reasonably made especially in the case of a young woman giving birth to her first child and entirely unattended during the process. HASSAN PARI *v.* EMPEROR *Pesh.* 284

——— ss. 114 (b), 133—*Accomplice—Corroboration in material particulars—Nature of corroboration—Circumstantial corroboration, if sufficient.*

It is firmly established both in England and in India that in practice an accomplice must be corroborated in material particulars before the accused can be convicted. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime:

Held, on facts that the statement of accomplice about the acceptance of the bribe by the Sub-Inspector of Police to hush up the murder, being circumstantially corroborated, the offence was proved. SAFDARALI SHAH *v.* EMPEROR *Lah.* 878

——— s. 114, illus. (d). SEE Evidence Act, 1872, s. 4 209

——— s. 133. SEE Evidence Act, 1872, s. 114 (*b*) 878

Execution. SEE Limitation 318

——— *Application necessitated by Court's striking off previous application, whether fresh application for execution or merely one for revival.*

An application in execution which is necessitated by the action of the Court in striking off a previous

application for execution, is not in law a fresh application, but must be taken to be an application to revive or continue the former application. K. S. R. M. SIVASUBRAMANIAM CHETTIAR *v.* MURUGESA MUDALIAR *Mad* 325

——— *Decree compromised—Judgment-debtor to pay certain portion of decretal amount by instalments on fixed date and execute assignment deed in respect of balance—Deed not executed on fixed date but later—Other terms not complied—Decree-holder acting on deed—Whether can take out execution in respect of decretal amount including that portion for which deed of assignment was executed.*

Where by a compromise decree the judgment-debtors were to pay the decretal amount in certain fixed instalments, on certain fixed day and execute deed of assignment of the arrears of rent, in respect of the balance of the decretal amount, but the terms are not fulfilled by the judgment-debtors except to execute the assignment deed on same date later than the one fixed by the compromise, and it is found that the decree-holder had acted on the deed by collecting the rent, he cannot take out the execution of his decree in respect of that portion of the decree for which this assignment deed was executed, on the ground that the judgment-debtor had failed to execute it on the date fixed by the compromise. ADIT NARAYAN SINGH *v.* BINAPANI *Pat.* 110

——— *Payment by judgment-debtor to one of joint decree-holders, if binding on others.*

The payment made by the judgment-debtor to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or the other. INDERDAWAN SINGH *v.* JAIRAJ SINGH *Oudh* 568

——— Step-in-aid of. SEE Limitation Act, 1908, Art. 182 (5) 566

Execution sale—*Decretal amount substantially reduced in appeal after sale—Judgment-debtor found not in position to pay up even reduced amount before date of sale or within* 30 *days from sale—Sale proceeds less than final decretal amount* —*S.* 144, *Civil Procedure Code* (*Act V of* 1908), *held did not apply and sale could not be set aside.*

In execution of a decree, the property of the judgment-debtors was sold and purchased by the decree-holder. Subsequently, the amount of the decree was reduced substantially by the High Court in second appeal. The sale proceeds were less than the final decretal amount. It was found that the judgment-debtors were not in a position to pay up the whole decretal amount and thereby avoid the sale of their property, even if the decretal amount had been reduced before the sale was held or within 30 days from the date of sale;

Held, that as the judgment-debtors could not have paid up even the reduced decretal amount and the sum realised by the sale was less than the reduced decretal amount, the situation would not have been altered in any way, had the decree been modified before instead of after the sale and hence this was not a case to which s. 144, Civil P. C., was applicable and the sale could not be set aside. GANSU RAM *v.* PARVATI KUER *Pat.* 411

——— *Houses Nos.* 146 *and* 147 *put up for sale—House No.* 147 *first put up for sale but sale* amin *pointing out house No.* 146 *to bidders through* bona fide *mistake*—X *purchasing it under* bona fide *belief that he purchased house No.* 146—*House No.* 146 *subsequently put up for sale and again* amin *wrongly pointing out towards house No.* 147—Y *purchasing it knowing that he was purchasing house No.* 147 *and not No.* 146—*Sale certificate describing houses correctly* i. e., *one purchased by* X *as house No.* 147 *and other purchased by* Y, *as house No.* 146—X *and* Y *obtaining possession of houses Nos.* 146 *and* 147 *respectively*—X *reconstructing house at great cost*—Y *suing* X *for possession of house No.* 146 *on strength of sale certificate, after lapse of about twelve years*—Y *held could not succeed.*

In execution of a mortgage decree two adjacent houses bearing Nos. 146 and 147 were put up for sale. At the time of the sale of house No. 147 the sale *amin* through a *bona fide* mistake pointed out to the bidders house No. 146 and described it as house No 147. *X* purchased this house No. 146 believing it to be house No 147. House No. 146 was then put up for sale and was described by the *amin* under a *bona fide* mistake as house No 147 and was purchased by *Y* under the belief that he purchased house No. 147 while the house actually sold was house No. 146. Both *X* and *Y* entered into possession of the houses Nos. 146 and 147 respectively. The sale certificates mentioned correct numbers of the houses purchased by *X* and *Y* as Nos. 147 and 146 respectively. *X* reconstructed house No. 147 at a great cost under a *bona fide* belief that he had purchased that house. After about twelve years *Y* sued *X* for possession on the basis of the sale certificate:

Held, that *Y* must have bid for, and intended to bid for, the house No. 147 and nothing else. And as he had been content to accept that position for almost twelve years he could not succeed in obtaining something which *ex hypothesi* he never bought. Even if, it was accepted that by virtue of the sale certificate he had become technically the owner of house No. 146 no Court in justice, equity or good conscience would assist him to obtain possession of something which he never bargained to have At the most he could be held to be a trustee for the real owner *X*. KALYAN DAS *v.* BRIJ KESHORE *All.* 495

——— *No bidders on date of auction—Decree-holder if can, in same proceeding ask Court to put property for sale at later date.*

The fact that there are no bidders on occasion of the auction does not prevent the decree-holder from asking the Court in the same proceedings to put up the property for sale at a later date. SIVASUBRAMANIAM CHETTIAR *v.* MURUGESA MUDALIAR *Mad.* 325

——— Setting aside of. SEE Civil Procedure Code, 1908, O. XXI, r. 90 124

Extortion.

SEE Penal Code, 1860, s. 383 241

SEE Penal Code, 1860, ss. 383, 385, 347, 342 454

Fraud. SEE Insurance 156

Gift.

SEE Deed 611

SEE Muhammadan Law 161

Government of Burma Act, 1935, s. 5 (3)—*Scope of s.* 5 (3)—*It applies only as between Governor and Ministers regarding administrative matters.*

The correct reading of s. 5 (3), Govt. of Burma Act, is this. If any question arises whether any matter (*a*) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (*b*) is not a matter as respects which the Governor

is by or under the Act required to act in his discretion or to exercise his individual judgment —then the decision of the Governor in his discretion is final.

Section 5 (3) only applies as between the Governor and the Ministers in regard to administrative matters. It has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of part IV ("Legislative") of the Govt. of Burma Act. U LUN *v.* U CHIT HLAING *Rang.* 91

——— s. 25—*Member appointed Second Lieutenant in Army, whether holds office of profit, when he has received no remuneration or his appointment is subject to His Majesty's approval.*

A person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers holds an office of profit under the Crown in Burma, even if he has in fact received no remuneration or has not joined any particular unit of the Army in Burma or his appointment is subject to the approval of His Majesty. U LUN *v.* U CHIT HLAING *Rang.* 91

——— ss. 25, 42—*Ordinance providing that member whose seat has become vacant under Government of Burma Act shall nevertheless be restored to his former seat is void.*

Having regard to the terms of s. 24 (2) the only meaning which can be assigned to s. 25 (1) (*a*) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. An Act of the Legislature, or an Ordinance the effect of which is to provide that a member whose seat has become vacant under the Govt. of Burma Act shall nevertheless be restored to his former seat which is then vacant—such an Act amends the provision of the Govt. of Burma Act, and is beyond the powers of the Burma Legislature to enact or in the case of an Ordinance, beyond the powers of the Governor. U LUN *v.* U CHIT HLAING *Rang.* 91

——— ss. 25, 42—*Power of Speaker of House to declare seat of member vacant.*

The question whether a seat of a member of the House of Representatives has become vacant or not is not a point of order at all for the Speaker, nor is it the matter for the House to determine. It is a point of law affecting the status of an individual and is for a Court to determine. U LUN *v.* U CHIT HLAING *Rang.* 114

——— ss. 25 (1), (a), 27 (3)— *Member resigning his post in army—He ceases to hold any office for profit even if resignation is yet subject to His Majesty's approval.*

Where a member has resigned his appointment in the army he cannot be said to be holding any office for profit under the Crown and is not disqualified for being a member of the House of Representatives even if His Majesty has not yet approved of his being given permission to resign his appointment. U BA MAUNG *v.* U CHIT HLAING *Rang.* 234

——— ss. 27, 32— *Power of Speaker to declare whether seat has become vacant or not—Speaker so declaring, whether protected either by s.* 27 (1), *or by s.* 32 (2).

One must look at the particular statute which bring into being the Legislature whose powers and privileges are under consideration. In order therefore, to appreciate the position of the Speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Govt. of Burma Act. He has no powers to declare whether a seat has become vacant or not.

Sub-s (1) of s 27, Govt. of Burma Act is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. The Speaker's declaration that a member's seat was vacant although made by words spoken in the Chamber, does not come within the purview of the sub-section. In making such a declaration the Speaker does a great deal more than merely rule upon a point of order arising under the rules of procedure of the House. Consequently he is not protected either by s. 27 (1) or by s. 32 (2), U LUN *v.* U CHIT HLAING *Rang.* 91

——— s 27 (3)—*Speaker of house of representatives, if subject to High Court's jurisdiction—His right to declare that member's seat has become vacant.*

The Speaker of the House of Representatives is subject to the jurisdiction of the High Court. He has no power to declare a member's seat to have become vacant. U BA MAUNG *v.* U CHIT HLAING *Rang.* 234

——— s. 41—*Ordinance under s.* 41 *providing that it would cease to operate at expiration of six weeks from re-assembly of Legislature—Legislature re-assembling at* 11 *a. m., on February* 15—*Ordinance, when expires.*

Where an Ordinance under s. 41 provided that the Ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature, if there be no resolution by the House disapproving it, and the Legislature re-assembled at 11 A. M., on February 15:

Held, that the Ordinance ceased to operate at midnight on March 28 and 29, as the law takes no notice of the fractions of a day. U LUN *v.* U CHIT HLAING *Rang.* 91

——— ss. 41, 42—*Ordinance has same force as Act.*

An Ordinance promulgated under either s. 41 or s. 42 of the Govt. of Burma Act has the same force and effect as an Act of the Legislature. U LUN *v.* U CHIT HLAING *Rang.* 114

——— ss. 41, 42—*Ordinance issued by Governor —Whether implies that Governor has formed his opinion and exercised his individual judgment —Ordinance expressing purpose of enabling Governor satisfactorily to discharge functions—Governor is sole Judge—Court, if can sit on judgment*

The Governor's functions are capable of being exercised in any one of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; indeed it is not their duty to aid or advise him in respect of these matters; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters in the Govt. of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second or third group according to the opinion formed by the Governor as to the course which he should take. Hence where an Ordinance issued is expressed to be under powers conferred by s. 42, it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him.

The Court will not inquire whether circumstance

Government of Burma Act—contd.

in fact existed which rendered immediate action necessary before the promulgation of an Ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an Ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only Judge of that. U LUN v. U CHIT HLAING *Rang.* 114

——— ss. 41, 42—*Promulgation of Ordinance — Publication in* Gazette *is necessary.*

Promulgation and publication in the *Official Gazette* are not synonymous. Publication in the *Official Gazette* is not *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals Reading of an Ordinance by the Speaker of the House of Representatives is sufficient promulgation. U LUN *v.* U CHIT HLAING *Rang.* 114

——— ss. 41, 42—*Expiry of Ordinance.*

An Ordinance was promulgated under s. 41 of the Govt. of Burma Act: the Legislature re-assembled on February 15, 1940:

Held, that the Ordinance expired at the midnight which concluded on March 28, as six weeks from February 15, 1940, expired on March 20, 1940. U LUN *v.* U CHIT HLAING *Rang.* 114

——— s. 42—*High Court, if can enquire, whether Ordinance promulgated under s. 42 is within Governor's powers—Ordinance providing that members of House of Representatives should not be disqualified, if they held commission in His Majesty's forces, if* ultra vires *of Governor's powers.*

High Court is not precluded from enquiring whether an Ordinance promulgated by the Governor under s. 42 is or is not within his powers. Sub-s. (4) of s. 42 makes it clear that the Court can go into the question whether any provision of an Ordinance promulgated under s. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature, would not have been valid. An Ordinance providing that members of the House of Representative should not be disqualified for being members of the House if they held commissions in His Majesty's forces is not matter of defence, but is concerned with something which is a matter entirely for the Ministers. The Governor has therefore no power to promulgate such an Ordinance when the Legislature is then in session. U LUN *v.* U CHIT HLAING *Rang.* 91

——— s. 42—*Ordinance, if should contain preamble.*

Obiter Per *Dunkley, J.*—There ought to be a common form of preamble for all Ordinances, and the preamble should set out that the Governor is satisfied as required by the terms of s. 42 (1) and also the purpose within s. 48 (1) for which the Ordinance is promulgated. But it is not legally necessary that this should be done, and legally all that is necessary is that the Governor should declare that he promulgates the Ordinance under the provisions of s. 42, Govt. of Burma Act; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an Ordinance. U LUN *v.* U CHIT HLAING *Rang.* 114

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——— s. 42—*Ordinance when said to be promulgated.*

"Promulgation" of an Ordinance without doubt connotes the fact of making the public aware of the existence of the new law. In Burma, as in India and elsewhere, promulgation of a new law takes place through the medium of the *Official Gazette*. It is wrong for the notifications which appear in the *Burma Gazette* when an Ordinance is first published therein to say, as they do: "The Governor has promulgated the following Ordinance"; they should say "The Governor hereby promulgates the following Ordinance." Consequently an Ordinance is promulgated on the date on which it is published in the *Gazette*. U LUN *v.* U CHIT HLAING *Rang.* 91

——— s. 124 (1)—*Whether refers to artificial persons—Official Trustee under s. 6 or s. 7 (1) (a) Official Trustees Act (II of* 1913) *whether servant of Crown.*

A corporation cannot be a servant of the Crown, although the members of the corporation may well be. Section 124 Govt. of Burma Act refers to natural persons only and not to artificial persons. Under s. 6, Official Trustees Act, the Official Trustee is a corporation sole with a perpetual succession and therefore is not a servant of the Crown. Nor is an Official Trustee acting under s. 7 (1) (*a*), Official Trustees Act, as an ordinary trustee, a servant of the Crown. OFFICIAL TRUSTEE *v.* RAKBURN *Rang.* 61

Government of India Act, 1935, (25 and 26 Geo V, Ch. 42), s. 205 (1)—*Dismissal of revision application by Single Judge of High Court is final order—Such order certifying that matter involves substantial question of law involving interpretation of Government of India Act—Appeal to Federal Court, if competent—S. 111-A, Civil Procedure Code (Act V of* 1908), *whether bar.*

An order passed by a Single Judge of the High Court dismissing an application for revision, is a final order of the High Court. Hence when such order certifies that the appeal involved a substantial question of law as to the interpretation of the Govt. of India Act, an appeal to the Federal Court is competent and s. 111-A, Civil P. C., is no bar to such appeal. A. L. S. P. P. L. SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN *Mad.* 856

——— s. 205 (1)—*Effect of s. 205 (1) in respect of appeal to Federal Court.*

The effect of s 205 (1), Govt. of India Act is that where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs. 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Civil P C, then the Federal Court is empowered to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case. A. L. S. P. P. L. SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN *Mad.* 865

——— s. 270 (1)—*Applicability — Act done by public officer apparently official Act — Character, if changed by allegations in plaint of conspiracy or malice.*

If an act done by a public officer is apparently an official act, its character as such will not be

Government of India Act—1935—concld.

changed by allegations that it was done in bad faith or that it had not that character which it purported to have. Applicability of the statute depends on what the act purports to be and is not affected by allegations that the apparent state of things is not the real one. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character: and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less where the same malice is attributed to him jointly with others. The word conspiracy only means that a malicious purpose is entertained by two or more persons jointly. NAND KUMAR SINHA *v.* PASHUPATI GHOSH *Pat.* 276

——— s. 270 (1) — *Giving of evidence by Police Officers—When official act.*

The giving of evidence by the Police Officers is not an act necessarily referable to their duty as Police Officers. The giving of evidence by a public officer may be an act regarding which it is to be determined on the facts of the particular case whether it was or was not done in an official capacity. There may be cases in which a public officer giving evidence does so in the execution of his duty as such officer.

Where, however, the trial Court has found that the giving of evidence by the public officers in the case was done in the execution of their duty the High Court will not, in revision, go behind such finding. NAND KUMAR SINHA *v.* PASHUPATI GHOSH *Pat.* 276

——— s. 270 (1)—*Receipt of affidavit and making of complaint for offence under s. 193, Penal Code (Act XLV of 1860) by Sub-Divisional Officer, are official Acts—Suit for damages based on such acts—Consent of Governor, if necessary.*

The receipt of an affidavit of a person by a Sub-Divisional Officer and making of the complaint against such person to the District Magistrate of an offence under s. 193 read with s. 116, I. P. C. are official acts done by the Sub-Divisional Officer in his capacity as such, whether rightly or wrongly done and no suit for damages for wrongful prosecution will lie in respect of these acts without the consent of the Governor of the Province under s. 270 (1), Govt of India Act, 1935, when such acts are done before the relevant date *i. e.*, April 1, 1937. NAND KUMAR SINHA *v.* PASHUPATI GHOSH *Pat.* 276

Government Securities Act (X of 1920), s. 5—*Object—Question of assignor's beneficial ownership in war bonds and Government promissory notes deposited with Government by assignee, if affected by s. 5.*

Section 5, Govt. Securities Act, was enacted only for the protection of the Govt. who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of the assignor in the war bonds and Govt. promissory notes deposited by the assignee with the Govt., is not affected by s. 5. MIDDE SAMPATIRAYUDU *v.* SONTI VENKATARATNAM *Mad* 597

Grant—*Presumption*—Britti *granted by founder of estate, in his lifetime — His successors continuing grant for generations—Presumption as to permanent grant or charge on estate, if arises.*

Where the original founder of an estate granted a *britti* in his lifetime; and his successors from pious motives continued the grant for several generations to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods:

Held, that these facts alone were not sufficient to raise a presumption of any lost grant either for the permanent gift of *britti* or for its being constituted a charge on the estate. SRIS CHANDRA NANDY *v.* RAK A-LANANDA THAKUR PC 220

Haq-i-Chaharum. See Landlord and tenant 824

Hiba-bil-ewaz See Muhammadan Law 161

Hindu Law— Adoption — *Adoption by widow on death of her adopted son—Estate vested in her as heir of deceased adopted son, if divested.*

Where on the death of an *aurasa* or adopted son the estate which has descended to him from his father vests in his mother as heir, and she makes an adoption to her deceased husband, the estate so vested in her will be divested. PATTU ACHI *v.* V. RAJAGOPALA PILLAI *Mad* 630

——— ——— *Illatom adoption — Incidents to be determined by evidence in each case—Held, that plaintiff was illatom son-in-law and agreement must be inferred from facts, on basis of which affiliation was carried out—Second appeal—Finding of fact—Illatom adoption.*

An illatom affiliation is a creature of agreement. But this does not mean that in every case of an illatom affiliation there must be a detailed contract embodying all the incidents of the arrangement in the particular case. The incidents of illatom affiliation have not been completely established by judicial decisions and these incidents should ordinarily be settled by evidence in the particular case.

One *K* when he had no children took the plaintiff into his family with the idea of a regular adoption. Subsequently when sons and a daughter were born to him he formed the idea that, in due course, he would marry his daughter to the plaintiff and take the plaintiff as an illatom son-in-law. On this understanding the plaintiff continued to live in the family. On his death-bed *K* instructed his wife to complete the illatom affiliation by marrying the daughter to the plaintiff. The plaintiff was duly married to *K's* daughter and lived in the family and was treated as the illaton son-in-law;

Held, that the plaintiff was an illatom son-in-law. The plaintiff performed his part by marrying the daughter and was thereafter treated as an illatom son-in-law. From these facts it must be inferred that there was an agreement on the basis of which the illatom affiliation was carried out.

It is not open in second appeal to attack the findings of fact on the essential questions of the authorization by the prospective father-in-law to his wife to complete the affiliation after his death and of the subsequent marriage and the status recognized in favour of the adoptee as an illatom son-in-law. NAGI REDDI *v.* NANJUNDAPPA *Mad.* 298

——— ——— *Widow — Authority to adopt—Time limit for adoption—Will providing for adoption of son of any nephew except V and K — Widow permitted to adopt any one except son of V or K on refusal of nephews to give son in adoption—Eligible nephews and their wives dead—Adoption of nephew's grandson, held valid.*

Apart from any express restriction in that respect, imposed by the husband there is no limit to the time during which a widow may exercise her power of adoption.

A direction to operate as a prohibition against a widow adopting a boy as a son to her husband except the boy named by him must be explicitly made and clearly intended by the husband to limit the dis-

Hindu Law—contd.

cretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption to him :

Held, on facts that the direction in the will that the son of a nephew should be adopted was merely recommendatory so long as a nephew was available to give him in adoption and it was not intended that the direction was to be followed for all time and on every occasion when the widow might choose to adopt. It was reasonable to infer from the provisions of the will that the testator was desirous that an adoption should be made by his widow. He prohibited the adoption of a son of *V* or *K* and he expressed the desire that the son of one of his other nephews should be adopted if available. But he had not made it clear that in the event of such a son not being available no adoption was to be made. The adoption of the plaintiff who was a grandson of one of the eligible nephews was therefore valid as at that time, the three eligible nephews and their wives were all dead, so that, although some of their sons were living, they had no parents to give them in adoption, and it was impossible to comply with the provisions of the will. DAMODAR VISHNU *v.* SHRIRAM LAKSHMAN *Bom.* 413

——— **Alienation**—*Legal necessity — Limited owner.*

The costs of necessary litigation for the purpose of obtaining property to which a limited owner was entitled would constitute legal necessity but the costs must be reasonable costs. MITTULAL SINGHANIA *v.* PURSOTOMB DEBI BAGLA *Cal.* 193

——— ——— *Widow—Trust, if alienation.*

Quaere.—It is doubtful whether a trust deed can be regarded as an alienation. DAMODAR VISHNU *v.* SHRIRAM LAKSHMAN *Bom.* 413

——— **Caste**—*Baidya—Whether Ambhastha.*

Persons belonging to the caste of Baidyas are not Ambhasthas. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— ——— *Dattakamimangoha s. 2 cl. (8)—"So forth" in cl. 8, includes marriage.*

The words "so forth" in s. 2, cl. 8 include marriage. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— ——— *Dattakamimangoha, s. 2, cl. (84) —Ambhastha, whether comes under "Murdavhishikta and others."*

An Ambhastha does not come under "Murdhavishikta and others" mentioned in s. 2, cl. 84, of Dattakamimangoha. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— **Debts**—*Suit on promissory note executed by father—Sons joined as defendants but subsequently dismissed from suit—Decree against father alone—Interest of sons in family property, if liable in execution.*

Where in a suit on a promissory note executed by father alone, the sons are impleaded on the ground that the debt was incurred for family necessity but the sons are subsequently dismissed from the suit and a decree is passed against the father alone, the decree-holder can proceed to execute the decree against the son's interests in the family property. REDDI KRISHNAN NAIDU *v.* CHINTALA SOMI NAIDU *Mad.* 825

——— **Impartible estate**.—*Bhamgarh estate in Nimar District—Holder's right to alienate.*

The holder of an impartible estate (Bhamgarh estate in Nimar District) governed by custom of primogeniture has a power to alienate the estate. RAO BHIMSINGH *v.* GANGARAM *Nag.* 598

——— **Impartible estate**—*Succession to ancestral impartible estate in joint Hindu family is governed by Mitakshara.*

The successor to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara is designated by survivorship although he holds the state according to the custom of impartibility. The estate devolves on the successor. RAO BHIMSINGH *v.* GANGARAM *Nag* 598

——— **Inheritance** — *Madras — Brother's son's daughter.*

Under the Hindu Law as administered in the Presidency of Madras female *bandhus* are entitled to come in after the male *bandhus* are exhausted provided of course they satisfy the other conditions required by law. Consequently a brother's son's daughter is entitled to inherit. YENAMANDRA JAGANNADHAM *v* TEEBETHALA ADILAKSHMI *Mad.* 135

——— **Joint family**—*Co-parcenery—Family consisting of male and his deceased brother's wife—Widow adopting son—Whether becomes co-parcener with uncle.*

There is no co-parcenary body where the family consists of an individual male and for instance his deceased brother's wife ; but if the latter, having authority from her late husband, should adopt a son the latter would become a co-parcener with his uncle in the family estate BHAGWATI *v.* COMMISSIONER OF INCOME TAX, U. P. & C. P. *All.* 236

——— ——— De facto *manager—Mortgagee dealing with him in good faith, if protected.*

A person dealing in good faith with the *de facto* manager of a joint Hindu family is not affected with notice of any defect in his *de jure* title. A mortgagee dealing with a member of a joint Hindu family acting as a *de facto* manager of the family properties until they are actually divided, cannot be defeated on the ground that such member was not *de jure* manager of the family, where there is no proof that mortgagee was aware that proposal for a partition were on foot or that he dealt with the mortgagor otherwise than in good faith and in the belief that he was also the *de jure* manager. LACHHMI PRASAD *v.* BAHRAICH RAM *All* 571

——— ——— *Manager—Finding that loan was borrowed for family benefit is one of fact.*

A finding that a loan was borrowed by the manager of the joint Hindu family for the benefit of the family is a finding of fact and when supported by evidence, is binding in second appeal even though the second Appellate Court were disposed to disagree with it. LACHHMI PRASAD *v.* BAHRAICH RAM *All.* 571

——— ——— Manager — Mortgage by. SEE Mortgage 657

——— ——— *Self-acquired property—Person by will giving absolute estate to wife—Son adopted by widow on death of husband and property devised to him by will—Property in hands of adopted son is self-acquired.*

A person made a will by which he conferred the absolute estate in the property on his widow. On the death of the testator his widow adopted a son under the authority given to her by her husband and made a will devising the property to her adopted son :

Held, that the absolute estate given to the widow would not be avoided by the adoption. The property was self acquired in the hands of the widow. It was also the self-acquired property in the hands of the adopted son as he got it under the will of

his adoptive mother. NARINJAN DAS *v.* KRISHAN LAL *Lah.* 160

——— Joint family business—*Transaction by manager—When supported — Principles governing transactions relating to joint family business, stated—Creditor, if must show actual benefit—Business mainstay of family, whether* prima facie *evidence that loan borrowed for business was for benefit of family.*

There are two separate and distinct grounds upon which the power of a manager of a joint Hindu family can be "rightly exercised" either "in a case of need" or "for the benefit of the estate." That these grounds are separate and alternative. Where the question involves the consideration of a transaction relating to a business, the following principles apply: (1) If the business is merely the individual enterprise of any particular member or members of the family as distinct from a 'family' business, no question either of 'need' or 'benefit' can arise and the transaction can never bind the interests of the other members of the family. (2) Where the business is strictly 'ancestral', then either 'need' or 'benefit' to the estate or family will be presumed, (3) Where the business is a 'family' business but is either new or "newish" no such presumption in favour of the mortgagee arises but the question becomes one of fact whether there has been "benefit to the estate or family". In that case, when no actual benefit is positively proved, the mortgagee has to show that he made reasonable enquiries as to the purpose for which the loan was required and was reasonably satisfied that the purpose was beneficial. (4 Finally, where it is shown that the business in question is the 'mainstay' of the family, in the sense that it is all, or practically all, the family has to depend upon, then, the proposed mortgagee is entitled to accept that fact as *prima facie* evidence that a loan taken for the purposes of that business is a transaction for the benefit of the estate or family. He is not required to go further and to enquire into the technical business necessity for raising the money. LACHHMI PRASAD *v.* BAHRAICH RAM *All.* 571

——— Maintenance—*Widow—Estoppel — Mortgage by son, of house left by deceased father—Widow signing deed after hearing contents—Whether estopped from claiming right of residence and maintenance as against mortgagee.*

A Hindu son mortgaged a house left by his father and after having read the contents of the deed, his widowed mother signed the deed. As a token of her consent the widow had acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance:

Held, that the widow was estopped from claiming those rights against the mortgagee. JASODAN DEVI *v.* JAI GOPAL *Pesh.* 631

——— Marriage—*Marriage between Baidya and girl Kayestha, validity.*

A marriaged by a Baidya girl with a Kayestha is valid according to local custom. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY *Cal.* 82

——— Partition—*Consent decree not to partition, if acts as estoppel.*

A subsisting consent decree providing *inter alia* that the land in suit should not be partitioned, so long it stands operates as an estoppel between the parties and their representatives. PULNI KRISHNA MUKHERJEE *v.* ADYA NATH MUKHERJEE *Cal.* 692

——— ——— *Separation in status and actual separation of assets, if different.*

A separation 'in status' may well be different thing from an actual separation of assets. It is possible, that a family may have divided 'in status' notwithstanding that the physical partition of the assets was not yet complete. LACHHMI PRASAD *v.* BAHRAICH RAM *All.* 571

——— Partition—*Subsequent agreement between members to effect partition referring to previous agreement to same effect and cancelling it—Subsequent agreement held re affirmation of intention.*

Where a subsequent agreement between the members of a joint Hindu family to effect a partition of family property referred to a prior agreement between them to the same effect and cancelled it:

Held, that the subsequent agreement was a 'reaffirmation' rather than a 'cancellation' of any intention to separate which might be found to be contained in the earlier agreement. LACHHMI PRASAD *v.* BAHRAICH RAM *All* 571

——— Religious endowment — *Dedication — Bathing ghat on banks of Ganges at Benares—Dedication, nature of—Partial or complete —Whether must be complete.*

A bathing *ghat* on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu Law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a *dharamsala* or a *math*, notwithstanding that it be not dedicated to any particular diety. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu Law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this, from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu Law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also "where the owner retained the property in himself but granted the community or part of the community and easement over it for certain specified purposes." HEMANTA KUMARI DEBI *v.* GAURI SHANKER TEWARI P C 882

——— ——— *Dedication—Essentials for valid dedication.*

There is the very broadest distinction between saying that the ownership of a person in a bathing *ghat* is not absolute because it is qualified by the public's right of user for purposes of bathing, and say that the person is not the owner at all, but a mere *mutawalli* in whom nothing vests because his predecessor had dedicated the *ghat* in the full sense of divesting himself completely of all interest therein Dedication in the full sense known to the Hindu Law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu Law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the

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standpoint of the Hindu Law it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. When the dedication is only partial the property in some parts of India might nonetheless in common parlance be described as *devottar*; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; the only difference being that it passes with the charge upon it. HEMANTA KUMARI DEBI *v.* GAURI SHANKER TEWARI PC 882

——— Religious endowment—*Dedication—Prayag or Puthiya ghat at Benares—Nature of dedication—Plaintiff held owner of said ghat and could restrain defendants from using it for acting as ghatias without plaintiff's consent in exercise of profession of ghatias.*

The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular diety that nothing short of complete dedication would be appropriate for a public bathing *ghat*. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication: rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing *ghats*; though it might be common enough in the case of banks dedicated to the public for bathing purposes: even then the ownership of the banks would be another matter:

Held, that the plaintiff was the owner of the Prayag or Puthiya *ghat* at Benares and permanent injunction could be granted to the plaintiff, restraining the defendants from frequenting the Prayag *ghat*, without the consent of the plaintiff or her successor-in-title, for the purpose of acting as *ghatias* thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of *ghatias*. HEMANTA KUMARI DEBI *v.* GAURI SHANKER TEWARI PC 882

——— ——— Shebait—*Co-*shebaits *are co-sharers of* shebaiti *right and not of* debutter *property.*

The fundamental fact to be remembered in the case of an absolute *debutter* is that the property of the *debutter* estate belongs absolutely to the idol. The *shebait* is not the owner of the property and if there are several *co-shebaits* they are in no sense co-sharers in the property. The *shebait* has not the legal ownership but only the title of a manager of a religious endowment. *Co-shebaits*, are not co-sharers of the *debutter* property. They are co-sharers of the *shebaiti* right. This "possessory title" of a *shebait* is merely a right to possess on behalf of the idol; it is not a title which the *shebait* has by virtue of a right of ownership in the property. GOBINDA DAS NATH *v.* SHYAMA CHARAN NATH *Cal.* 200

——— ——— Shebait—*Co-*shebaits—*Right to contribution among co-*shebaits, *if exists—One* shebait *paying revenue to save property from sale—Other* co-shebaits, *when liable for contribution.*

Hindu Law—contd.

A finding that the parties are co-sharers in the *shebaiti* interest cannot by itself afford sufficient basis for a decree for contribution in proportion to the shares of the parties. Unless some special contract or custom is proved, the right to contribution cannot arise. The property which is saved from sale by the payment of revenue by one of the co-*shebaits* is not the *shebaiti* interest in which the *hebaits* are co-sharers but the property of the idol in which they are not co-sharers. The other co-*hebaits* are not, therefore, liable for contribution in the absence of a special contract or custom. But even if special contract or custom is proved the co-*shebaits* are not liable for contribution, where the revenue is paid by one of them out of the surplus funds in his hands. GOBINDA DAS NATH *v.* SHYAMA CHARAN NATH *Cal.* 200

——— Religious endowment—Shebait—*Position of—If trustee—One* shebait *if can sue others for contribution when obligation on part of others is proved.*

Shebaits are managers of the *debutter* property and although their rights and duties to some extent resemble those of trustees they are not trustees in the true legal sense of the term inasmuch as the property of the estate is not vested in them as manager of the estate of the idol. One of the *shebaits* can sue the others for expenses incurred in the course of management if it can be established that there was an obligation in the other managers to share in the payment of these expenses. GOBINDA DAS NATH *v.* SHYAMA CHARAN NATH *Cal.* 200

——— ——— Shebaitship—*Devolution of—Principles as to, stated.*

The principles applicable to a case where the *shebait* is dead are as follows: (*a*) If there is a provision in the deed of endowment about the mode in which the office is to be filled up, the next *shebait* is to be appointed in pursuance of the provision, that is, the devolution of the trust depends upon the terms on which it was created; (*b*) If there are no such provisions, then it depends on the usage of a particular institution; (*c*) In the absence of all these, the office of *shebait* reverts to the heirs of the founder.

The founder of the endowment did not nominate anybody as the next *shebait*, although she had reserved that right in herself, nor did the managing committee to whom she had given such right nominate anybody as the *shebait*. Indeed the managing committee never took the slightest interest in this endowment and they did not care to fill the vacancies as they occurred by the death of the members and so their number was reduced to two:

Held, that the title to the property and its management and control followed the line of inheritance from the founder, and the next heir-at-law of the founder became the *shebait*. Such a vesting could not be prevented by the likelihood of any power if there was any such power left outstanding in the committee of two being exercised. The office became hereditary in the hands of the heir-at-law and after his death it was not necessary again to go back to the original founder and see as to who would be her heirs as it would be in contravention of the Hindu Law of inheritance to say that the endowment should be held in a series of successive life estates by the heritors.

Held, further that after the death of one of the two members of the managing committee the sole surviving member of the committee could not constitute the committee and, the son of the heir-at-

law who succeeded him after his death obtained an indefeasible title from the very start and in any event after the death of the sole surviving member of the committee his title became absolutely indefeasible. DHARAM NARAIN *v.* SURAJ NARAIN *All.* 697

——— Religious endowment—Shebaitship—*Suit about—Parties—Deity, if necessary party.*

Where in a suit merely questions of *deb-sheba* arise, the idol is not a necessary party to be brought on the record, for the transferability of *shebaitship* does not depend upon the will of the idol. PULIN KRISHNA MUKHERJEE *v.* ADYA NATH MUKHERJEE *Cal.* 692

——— Shebaitship—*Turn of worship (joint* pala)—*Partition of—Extent of.*

The joint *pala* cannot be put up for sale as it would be wrong to compel the holder of a religious office to part with it against his wishes for a pecuniary consideration but the joint *palas* can be partitioned by giving each *shebait* a turn of worship in rotation when, the *shebaits* have a material and proprietary interest in the offerings and it has become impossible owing to disputes and differences to carry on the *sheba* jointly:

Held, that the custom existed whereby the *palas* of the deity were trasferable. PULIN KRISHNA MUKHERJEE *v.* ADYA NATH MUKHERJEE *Cal.* 692

——— Reversioner—*When next reversioner is female getting limited interest, remote reversioner who would get absolute estate can sue for declaration that alienation made by limited owner is bad.*

Ordinarily, a remote reversioner is not entitled to institute a suit unless he can show that the next reversioner has precluded himself from instituting a suit or has refused to institute a suit or is in collusion with the limited owner. Where, however, the next reversioner is a female, who would also get a limited interest, the remote reversioner who would get an absolute interest is entitled to sue for the prevention of waste, or for a declaration that an alienation by the limited owner is bad on the ground that it was made without legal necessity. MITTULAL SINGHANIA *v.* PURSOTOMH DEBI BAGLA *Cal.* 193

——— Widow—Maintenance. SEE Civil Procedure Code, 1908, s. 34 27

——— ——— *Maintenance — Husband, if can dispose of property so as to jeopardise wife's right to maintenance—Provision as to maintenance of widow in husband's will, value of—If deprives Court's power to fix reasonable maintenance.*

A widow is entitled to be maintained by persons who may have inherited the estate of her husband, so long as she does not lose such right by reason of inchastity on immorality. It is not open to a husband to dispose of his property in such a manner as to jeopardise the rights of his wife. If a provision is made by a Hindu husband in his will as regards the maintenance to be granted to his widow after his death, this can only be taken as a suggestion made by the husband as to what would be a reasonable provision for her maintenance and cannot deprive the Court of its power to fix a reasonable maintenance. Even if the husband bequeathed his property ignoring the wife's claim to maintenance absolutely, the bequest will not defeat the widow's claim to maintenance and will defeat her claim. JAMUNA KUNWAR *v.* ARJUN SINGH *All.* 27

——— ——— *Maintenance—In order to claim maintenance, widow, if bound to reside in husband's house—Direction in husband's will that widow must reside at family house, if can be ignored for just cause.*

Ordinarily a widow is not bound to remain at the residence of her deceased husband in order to claim maintenance provided she does not leave it for unchaste purposes and when there is a direction in the will that she must reside at the family house the direction can be ignored for just cause:

Held, on facts that there were sufficient grounds for the widow to leave the residential house, JAMUNA KUNWAR *v.* ARJUN SINGH *All.* 27

——— Widow — *Surrender—Suit by presumptive reversioner for declaration that surrender by limited owner is invalid—Onus to prove that surrender is valid, where lies—Suit by remote reversioner—Limitation.*

In a suit by presumptive reversioners for a declaration that alienations by the intermediate limited owners is not binding on the actual reversioners the onus of proving legal necessity, is upon the alienee. The suit for a declaration by a presumptive reversioner that surrender by the limited owners is invalid and does not destroy rights of actual reversioners should be governed by the same rule of onus inasmuch as under the Hindu Law the intermediate limited owners have only life interest and the estate vests absolutely only in male reversioners.

Where the immediate reversioners were parties to the alienation by the widow, and consequently precluded themselves from bringing a suit for having it declared to be improper, the remote reversioner is competent to maintain a suit for a declaratory relief under s. 42, Specific Relief Act. As the Act makes no express provision for such cases, the suit must necessarily be referred to Art. 120, under which it should be instituted within six years from the date when the right to sue accrued. The right to sue would accrue ordinarily as soon as the alienation is made, but in a case where the plaintiff was not born when the widow executed the deed, his right to sue could not come into existence before the date of his birth. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA CHOWDHURY *Cal.* 419

——— ——— *Surrender—Surrender with consent of daughter of next reversioner—Daughter reserving to herself as consideration substantial part of property or stipulating for any benefit to her save and except what was necessary for maintenance—Surrender to preserve husband's estate—Surrender, if binding on next reversioner.*

Under Hindu Law a widow can, with the consent of her daughter who is the next heir of her husband, relinquish the estate in favour of the daughter's son. But the consent given by her must show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting, in substance, to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. If the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same, a substantial part of the property which she is also presumed to surrender, or stipulates for any benefit to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life interest for consideration, but that could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice

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of the actual reversioner at the time of her death. Mere consent might operate as a personal estoppel against the consenting daughter or any other person claiming through her, but it cannot bind the actual reversioner. Such a surrender is not binding on the actual reversioner even if it is made to preserve the husband's estate. Protection of the husband's estate is, no relevant matter for consideration in determining the validity of a surrender by the widow. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA CHOUDHURY *Cal.* 419

——— Widow—*Surrender—Surrendering female, can take portion of immovable property for maintenance—Such maintenance reserved—If it can be enjoyed by widow's successor after her death.*

The maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering female heir from taking a portion of the immovable property or a lump sum at once for purposes of maintenance provided it is not unreasonable.

A surrendering female heir can always reserve for herself a right to be maintained out of the estate which she surrenders, but the maintenance can be enjoyed by her only during her lifetime. It would be against the spirit of the doctrine of surrender if the widow would stipulate for a maintenance allowance not only to be paid to her during her lifetime, but which would be payable for ever to her heirs and successors.

The widow has full powers over the income of her husband's estate, and a gift of the accumulated income, unless she had already chosen to treat it as a part of the corpus, cannot affect the validity of surrender. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA CHOWDHURY *Cal.* 419

Husband and wife—*Cruelty—Onus—Nature of proof.*

There can be such a thing as mental cruelty but it should be possible to point to some definite words or actions as constituting it. A charge of matrimonial cruelty is a serious matter nonetheless serious when it is made against a medical man and it is for the party who makes such a charge to prove it if it is denied. If he or she fails to prove it, a Court of Law is bound to presume that it is unfounded, mere failure to control a daughter of 17—often no easy task—cannot either alone or in conjunction with anything else amount to cruelty to her step-mother. THA MYA *v.* MA KIN PU *Rang.* 836

——— Marriage—Proof of. SEE Evidence Act, 1872 s. 4 P C 209

Impartible estate. SEE Hindu Law 598

Income Tax Act (XI of 1922), s 2 (1) — *Agricultural income — Determination of— Income held not agricultural.*

In order to determine whether the income is agricultural income or not regard must be had to the source of such income.

An ancestor of the assessee had in the past rendered some service to the Bettiah Raj. In consideration of these services the Raj had for many years given a *thikadari* lease of certain villages at a comparatively favourable rent to this ancestor and afterwards to his descendants. On the expiry of the term of the lease the Raj declined to grant a new lease and the sum of Rs. 4,500 per annum was granted to the then lessee in lieu of the profits which he would have made if he had continued as lessee. The question was whether this allowance was agricultural income within the meaning of s. 2 (1), Income Tax Act :

Income Tax Act—contd.

Held, that this annual payment made to the assessee could not be regarded as agricultural income as it was not derived from any lands. It was in fact an annual *ex gratia* payment made by the Raj to the assessee in consideration of some services rendered by an ancestor of his in the remote past. COMMISSIONER OF INCOME TAX *v.* DHANESHWARDHAR MISRA *Pat.* 767

——— ss. 3, 9—*Trustees of private trust, if association of individuals within s.* 3.

The Trustees under the trust constitute an association of individuals within the meaning of s 3 of the Act, but that does not make them owners within the meaning of s. 9. COMMISSIONER OF INCOME-TAX BOMBAY PRESIDENCY, SIND and BALUCHISTAN *v.* IBRAHIMJI HAKIMJI FIRM *Sind* 256

——— s. 4 (3) (i)—*Private* waqf *for maintenance of settlor's family—Income, if taxable.*

A difference must be drawn between property dedicated in name and in fact to God, in short a difference must be drawn between a private *waqf* created, if not primarily, at least in part, for the maintenance of the settlor's family, and a *waqf* created for charitable or religious purposes falling within the exception in s. 4 (3)(i) of the Income Tax Act. So far as the *waqf* operates as a *waqf* for charitable and religious purposes, immunity from taxation can be claimed, but so far as the *waqf* operates for the maintenance of the settlor's family or other *quasi* secular purposes, so far the income is liable to taxation. COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN *v.* IBRAHIMJI HAKIMJI FIRM *Sind* 256

——— s. 6—*Interest awarded under s.* 28, *Land Acquisition Act* (*I of* 1894), *if chargeable with income-tax—Nature of such interest, stated.*

Under s. 28, Land Acquisition Act the awarding of interest is not mandatory but is discretionary with the Court; and so the claimant is not entitled to it as of right under any rule of law. Interest awarded under s. 28, is in the nature of compensation for the loss of the late owner's right to retain possession of the property acquired. In other words, it is damages assessed in terms of interest for loss of possession of property up to the date of receipt of its consideration. Such interest is not therefore, income within the meaning of s. 6, Income Tax Act, nor can this money be treated as profits when the assessee neither owns nor possesses what was, the only possible source of such profits. Nor can it very well be said that the money in question represents the interest which the assessee might have received by investing the principal sum. Consequently the interest awarded under s 28, Land Acquisition Act, is not assessable to income-tax BAHARI LAL BHARGAVA *v.* COMMISSIONER OF INCOME-TAX, U. P. & U P. *All.* 731

——— ss. 6, 9—*Private* wakf *for maintenance of settlors' family—Trustees of such* waqf *are not owners of income—Income to be taxed in hands of beneficiaries.*

For the purpose of ss. 6 and 9, Income Tax Act, the trustees of a private *waqf* created for maintaining the settlor's family are not the owners of the income. The income should, therefore, be taxed in the hands of the beneficiaries and not in the hands of the trustees COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY SIND AND BALUCHISTAN *v.* IBRAHIMJI HAKIMJI FIRM *Sind* 256

——— s. 8, Prov. 2—*In obedience to directions of Income-tax Authorities, assessee company inserting certain figure as interest on tax-free securities in their return—Whether can challenge in appeal.*

Income Tax Act—contd.

Even if the assessee-company in obedience to the direction of the Income-tax Department and under protest accepted a certain figure as interest on tax-free securities and inserted it in their return, they are free to challenge it in appeal within the time allowed. COMMISSIONER OF INCOME-TAX *v.* INDIAN LIFE ASSURANCE CO. LTD., KARACHI *Sind* 714

——— s. 8, Proviso 2—*Life Assurance Company holding tax free securities, if entitled to ask that whole interest of tax free securities should be deducted from the total income before tax is assessed even if that total income is calculated according to statutory rules.*

The mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in r. 25, Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities, given by the proviso to s. 8, Income Tax Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee-company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the interest of their tax-free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules. COMMISSIONER OF INCOME-TAX *v.* INDIAN LIFE ASSURANCE CO., LTD., KARACHI *Sind* 714

——— s. 13, Proviso—*Assessee doing business of selling gold and silver served with notices under ss. 22 (4) and 23 (2)—Books of account accepted in respect of transactions in silver and s. 13, Proviso applied in respect of transactions in gold—Income-tax Officer held justified in doing so.*

An assessee who was doing a business of selling gold and silver was served with notices under ss. 22 (4) and 23 (2), Income Tax Act. The *munib* of the assessee was specifically asked about the profits from the transactions in gold and silver. In respect of the transactions in gold the Income-tax Officer applied Proviso to s 13;

Held, that the income-tax authorities were justified without giving notice to the assessee, in applying the proviso to the s. 13 in respect to transactions in gold while accepting the books of account in respect to transactions in silver. GANESHILAL CHHAPPAN LAL *v.* COMMISSIONER OF INCOME TAX *All.* 606

——— s. 13, Proviso—*Income tax Officer exercising his judgment and not acting arbitrarily — Interference with discretion*

The language of the proviso to s. 13 makes it clear that discretion is vested in the Income-tax Officer; but obviously it was not the intention of the Legislature that such discretion should be arbitrary. What the Court has to consider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of accounts; if he did exercise his judgment and did not act arbitrarily, then having regard to the language of the proviso, his discretion cannot be interfered with. GANESHILAL CHHAPPAN LAL *v.* COMMISSIONER OF INCOME TAX *All.* 606

——— s. 14—*Widow of Hindu co parcenary, whether member of undivided family within meaning of s. 14—Widow receiving allowance as member of undivided family—Partition between co-parceners, whether affects her status as member of undivided family—Her allowance, if exempt.*

The widow of a Hindu co-parcenary, though not herself a member of the co-parcenary body, may nevertheless be a member of the undivided family within the meaning of s. 14, Income Tax Act. The widow of a deceased co-parcener receiving maintenance allowance as member of Hindu undivided family continues to be a member of the undivided family with each of the entities into which the family subsequently disrupts irrespective of whether any such entity consisted of one male member or of several male members because there can be no partition between a co-parcener and a member of the undivided family who is not a co-parcener, as for instance, the widow of a deceased co-parcener. Hence the maintenance allowance received by the widow continues to be exempt under s. 14 even after the disruption of the family. BHAGWATI *v.* COMMISSIONER OF INCOME TAX, U. P. & C. P. *All.* 236

——— ss. 33, 34, 35 — *Powers of Income-tax Officer in matter of revision*

It is not open to an Income-tax Officer, when he has proceeded to a final assessment to reopen that assessment whenever and, however, he pleases. The powers of Income-tax Officers in the matter of revision are limited by ss. 33, 34 and 35 of the Income Tax Act. COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY SIND AND BALUCHISTAN *v.* IBRAHIMJI HAKIMJI FIRM *Sind* 256

——— s. 64 (3), Proviso— *Proviso to s. 64 (3), construction.*

The words occurring in the proviso to s. 64 (3) Income Tax Act, are that the assessee should have had an opportunity of representing his views and not that the assessee should have been formally heard on his objection KANHAIYA LAL GOENKA *v.* COMMISSIONER OF INCOME-TAX, U. P. *All.* 725

——— ss. 64 (3), 66—*Place of assessment decided under s. 64 (3)—Incometax Officer accepting final order of Commissioner and proceeding to make assessment—Plea of jurisdiction, if can be raised in appeal before Assistant Commissioner—High Court whether can under s. 66 deal with that question.*

It is not permissible to an assessee to create a question arising out of the appeal by putting it in the grounds of appeal when as a matter of fact the assessee is not competent to raise the plea and the Assistant Commissioner is not competent to decide the plea. Where the place of assessment has been decided under the provisions of s 64 (3), Income Tax Act, and an Income-tax Officer accepting the final order of the Commissioner or Commissioners or the Central Board of Revenue proceeds to make an assessment, the plea of jurisdiction cannot be raised before the Assistant Commissioner on appeal and the High Court cannot deal with that question under s. 66 of the Act KANHAIYA LAL GOENKA *v.* COMMISSIONER OF INCOME-TAX, U. P. *All.* 725

——— s. 66. SEE Income Tax Act, 1922, s. 64 (3) 725

Inheritance. SEE Hindu Law 135

Injunction—*Grant of, is discretionary—Defendant assuring that he would take no action to the prejudice of plaintiff—Injunction should not be granted.*

The granting of an injunction is a discretionary matter and the Court would be loath to consider that circumstances could make it desirable to

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grant one in a case where the defendant has given an assurance that he would refrain from any action to the prejudice of the defendant. U I UN v U CHIT HLAING *Rang.* 114

Insanity SEE Penal Code, 1860, s 84 . 282

Insolvency—*Official Receiver—His position as regards ordinary Civil Courts.*

The Official Receiver so far as the ordinary Civil Courts are concerned is a suitor and a suitor only. He is not entitled to send reports as he does to the Insolvency Court and if he wants to either file a plaint or a written statement or a counter-affidavit he ought to do it in the proper form. P. S. AR. AR ARUNACHALAM CHETTIAR *v.* OFFICIAL RECEIVER, COIMBATORE *Mad* 138

Insurance—*Life—Fraud — Person effecting insurance must be actually dependent on or expect advantage from continued existence of person insured—Persons effecting insurance on his younger brother's life held had no insurable interest and hence the insurance contract was void under ss.* 23 *and* 30, *Contract Act* (*IX of* 1872) — *Insurance Company can under s* 92, *Evidence Act* (*I of* 1872), *prove that person effecting insurance was doing it for his own use and benefit and not for use and benefit of person insured.*

To give the person effecting the insurance an insurable interest in the life of the person insured, there must be actual dependence of the person effecting the insurance on the person whose life is insured or he must have an expectancy of some advantage from the continued existence of the person insured.

A doctor insured the life of his younger brother who was carrying on a money-lending business on his own behalf and was not rendering any valuable services to the doctor. He was receiving Rs. 11 per month from his brother on account of the price of a house that he had transferred to him. He was also receiving maintenance and in lieu of that maintenance he used to assist his brother as a compounder. No such services were being rendered by him as could be enforced by the doctor in a Court of Law. The voluntary services rendered by him were also of an insignificant and perfunctory nature and in lieu thereof he used to receive maintenance from his brother. In the policy he was shown as a money-lender carrying on an independent business and was not insured as a compounder rendering services to his brother. Shortly afterwards, the policy was assigned in favour of his brother doctor and the assignment was registered in the office of the company. The company continued to receive premiums from doctor by means of cheques. On the death of his brother the doctor demanded a sum of Rs. 20,000, but the company refused to pay on the ground that the contract of insurance was void on account of fraud and misrepresentation, that the real person securing the insurance was the doctor and that his younger brother was merely a figurehead:

Held, that it could not be held that doctor was in any way dependent on his brother or that he expected to receive any substantial advantage from the continued existence of the life of his brother. In insuring his younger brother's life for a sum of Rs. 20,000 he was not insuring the life of a compounder but he was entering into a wagering transaction hoping to make money if his younger brother disappeared. The insurance contract was therefore against public policy and was also a wagering contract under the provisions of ss. 23 and 30, Contract Act.

Held, also that under proviso (1) to s 92, Evi. Act, the insurance company was entitled to prove facts showing that the insurance was really effected by the

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doctor for his own use and benefit and not for the use and benefit of his younger brother MANI SHANKAR SOMESHWAR PANDYA *v.* ALLIANZ UND STUTTGARTER LIFE INSURANCE BANK, LTD. *Lah* 155

Interim order. SEE Civil Procedure Code, 1908, s. 151 175

Interogatories. SEE Civil Procedure Code, 1908, O III, *r.* 1 707

Interpretation of Statutes—*Declaratory statute.*

A declaratory statute has a retrospective effect. FAZAL BEGAM *v.* HAKIM ALI *Lah.* 327

——— *Fiscal enactment—Doubt arising—Construction in subject's favour.*

Where the interpretation of a fiscal enactment is open to doubt, it should be construed favourably to the subject. BAHARI LAL BHARGAVA *v.* COMMISSIONER OF INCOME TAX *All.* 731

——— *Punctuations.*

A statute must be interpreted without regard to punctuation. BHOLA SINGH *v.* RAMAN MAL *Lah.* 312

——— *Section primarily intended to apply to suits—Principle of construction in applying it to appeals.*

Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the section good sense VENKATARAMASASTRI *v.* VENKATASUBRAMANIA DIKSHITAR *Mad.* 758

——— *Side-headings to sections.*

The Courts are not entitled to look at the side-headings to sections of a statute in interpreting the statute. The Legislature is not responsible for the side-headings. BRIJMOHAN SINGH *v.* TULSIRAM *Nag.* 75

——— *Similar words in similar enactment—Interpretation.*

When the same or exactly similar words are used in statutory provisions which appear to have a similar object, they should be interpreted in the same way. VISHNU TATYABA NAIK *v.* EMPEROR *Bom* 229

——— *Statutes imposing pecuniary burdens—Strict construction.*

Statutes which impose pecuniary burdens, are always construed strictly and a construction which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject will be adopted. DAULAT RAM *v.* MUNICIPAL COMMITTEE, LAHORE *Lah* 72

Investigation. SEE Criminal trial 6

Issues. SEE Practice 571

Joint trial SEE Criminal trial 375

Jurisdiction. SEE Divorce Act, 1869, ss 2, 18, 19 382

Jury—Charge to. SEE Criminal Procedure Code, 1898, s. 297 302

Land Acquisition Act (I of 1894), s. 23—*Market value of acquired land, how to be determined*

It is wrong to say that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The market value of the acquired land is to be ascertained from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity. MADARA *v.* SECRETARY OF STATE *Pesh.* 215

——— **s. 28.** SEE Income Tax Act, 1922, s. 6 731

Landlord and tenant—*Estoppel—Termination of tenancy—Estoppel, when continues—S.* 43, *Presidency Small Cause Courts Act* (*IX of* 1887), *if modifies rule—S.* 46 *of the Act, if applies.*

The ordinary rule is that a tenant must deliver possession before he can dispute his landlord's title and that, that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. Section 43, Presidency Small Cause Courts Act does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant Section 46 of that Act has no application. M. VENKATA RAO *v.* B. SUBBA RAO *Mad* 251

——— Haq-i-chaharum—*Liability of lessee or vendee of building site to pay, on transfer of building—Question is not of custom having force of law.*

The question whether the vendee or lessee of building sites would be liable to pay *haq-i-chaharum* to the *zemindar* on transfer of the buildings, is not a question of a custom having the force of law. The question really is one of contract between the *zemindar* and the person in occupation of the site. RAMAI CHAUBEY *v.* RAM DATTA SONAR *All.* 824

——— *Rent—Suit for, on ground that rent was settled—No declaration that land was liable to assessment sought—Failure to prove settlement—Suit cannot be tried as for declaration.*

Where in a suit for rent the plaintiff has not sought for a declaration that the land was liable to fair and equitable assessment, but on the other hand it is asserted that the land has been settled at certain amount per annum, with the defendants, on the story of that settlement having failed the suit cannot be allowed to be tried as a suit for declaration that the land was liable to be assessed for rent. RAMGOBIND SAHU *v.* MOSO DHOBI *Pat.* 780

——— *Rent—Suspension, doctrine of—Essentials for applicability of—Landlord realising rent of part of demised land from sub-tenant by mistake and not with intention of evicting tenant—Tenant not entitled to suspension of rent.*

Mere dispossession of the tenant from part of the demised premises is not sufficient to justify a total suspension of rent, but in order to apply the doctrine of suspension it must be proved that the landlord deliberately and intentionally evicted the tenant from a part of the demised premises.

Where a landlord has realised the rent of a part of the demised land from the sub-tenant by mistake and his purpose was not to evict the tenant from that portion of the land, his action does not entitle the tenant to a suspension of the rent of the tenure. BASANTI LAL *v.* JAMUNA PRASAD SINGH *Pat* 250

——— Ryot, *if can build house on* parti *land in front of his house.*

A ryot is not entitled to build a residential house upon the *parti* land in front of the existing house. BADRI LONIA *v* DWARKA PRASAD RAM SHUKLA *All.* 785

Lease—*Construction—Lease originally granted for building and manufacturing purposes at fixed annual rent—Lessee and his successors in possession for long time during which transfers taking place without objection by* zamindar—*Lease must be deemed to be perpetual with transferable and heritable rights—Mere fact of land being subsequently cultivated does not affect nature of original lease.*

Where a *zemindar* has originally leased a land on a fixed annual rental for building and manufacturing purpose and the lessees and their successors have remained in possession of the land for a long time during which period the land has been the subject of numerous transfers without any exception even having been taken by the *zemindar*, the lease must be deemed to be a perpetual lease with heritable and transferable rights. The mere fact of the land being brought under cultivation subsequently cannot nullify the original lease and alter the position of the lessee and his successors to that of agricultural tenants. RAM DAUR RAI *v.* LACHMI PRASAD *All.* 407

Legal practitioner—*Professional misconduct—Gross negligence—Judgment-debtor filing satisfaction petition with forged signature alleged to be of decree-holder's son, acknowledging satisfaction—*Mukhtar *endorsing identification of decree-holder on being told by judgment-debtor that person brought by him was decree-holder—Decree-holder alleged to be illiterate—Judgment-debtor known to* mukhtar *for* 15 *years*—Mukhtar *not making investigation nor taking precaution of obtaining thumb impression of alleged decree-holder but acting merely on judgment-debtor's assurance that he would obtain such thumb-impression*—Mukhtar *not acting for his or judgment-debtor's benefit—Mukhtar's act held, grossly careless and negligent—Serious notice of his conduct without imposing punishment of suspension held sufficient in the circumstances.*

In execution case a satisfaction petition was filed purporting to be by the decree-holder. On the petition was a signature alleged to be that of the decree-holder's son, acknowledging satisfaction and also an endorsement of identification of the decree-holder, by the *mukhtar*. Subsequently this petition was found to be a forged one and the judgment-debtor was found guilty of presenting a forged petition of satisfaction. Proceedings were started against the *mukhtar* under the Legal Practitioners Act. In answer to the charge the *mukhtar* stated that the judgment-debtor a *sadhu*, had been known to him for fifteen years; that the latter came to him and showed him a man who he said was the decree-holder and asked him (the *mukhtar*) to identify him as such; that he was shown the petition of satisfaction which had already been completed, and he identified the person shown to him as the decree-holder. It was said that the decree-holder was illiterate and could not sign and another person signed who purported to be decree-holder's son. The *mukhtar* did not take the precaution of taking the thumb-impression of the person who was said to be the decree-holder on the mere assurance of the judgment-debtor that he would take his thumb-impression :

Held, that the frankness of the *mukhtar* in admitting that he made no further investigation while identifying the decree-holder and that he had acted merely upon the assurance of the judgment-debtor, must be considered as a point in his favour. Although cases of *mukhtars* identifying improperly must be regarded severely ; yet in the present case the Court could take a more lenient view because of the *mukhtar's* past record and because there was no suggestion that the *mukhtar* acted as he did for gain or in order to benefit the judgment-debtor in the case. He did not appear to have had any dishonest motive, though, in the circumstances, he was grossly careless and negligent Although the Court must take serious notice of his conduct yet in the circumstances the Court did not think that it was necessary to impose any punishment by way of suspension. RAMSWARUP LAL, A MUKHTAR, *In re* *Pat.* 861 S B

Lessor and lessee—*Mortgage by lessee of lease-hold property—Privity of estate or privity of contract between mortgagee and lessor, if exists—Mortgagee entering into possession—Effect—Liability of mortgagee for rent and royalty due from lessor.*

In case of a mortgage of a lease-hold property by the lessee the interest taken by the mortgagee is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate. No privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term. There is no privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee.

Hence the mortgagee of the lease-hold property is not liable to the lessor for the rents and royalties due by the lessor from the lessee. JAGADAMBA LOAN CO., LTD. *v.* SHIBA PRASAD SINGH P C 890

Limitation—*Execution — Decree transferred to another Court—Question whether execution is time-barred can be determined by either transferee Court or decree Court—It depends on convenience.*

Where the decree has been sent to another Court for execution, both, the Courts to which the decree is sent and the Court which passed it have jurisdiction to determine the question whether the execution of the decree is time-barred or not. The question which of the two Courts is more suitable depends upon the question of convenience and priority. P. L. S. P. SUBRAMANIAN CHETTIAR *v.* L. N. CHETTIYAR FIRM *Rang.* 318

——— *Minor — Suit against— Plaint within time —Subsequently defendant found to be minor— Guardian* ad litem *appointed, but beyond limitation —Suit, if barred — Civil Procedure Code (Act V of* 1908), *O. XXXII, r.* 3 *(C. P. Amendment)— Scope and interpretation.*

Order XXXII, r. 3 of Civil P. C., as amended in the Central Provinces contemplates distinctly a suit brought against a certain defendant in which a dispute about minority is raised and in which the Court has to be satisfied about the fact of minority and then on being satisfied it has to appoint a proper person to be guardian. It does not mean that the suit is a nullity until that is done or that no suit can be taken to have been instituted until a guardian has been appointed. The Lim. Act contemplates a suit brought against particular person; it does not matter whether that person is a major or a minor. The suit is not instituted against the guardian but against the minor himself and the minor does not become another person simply because he is subsequently described as a major. Consequently the suit, so far as the Lim. Act is concerned, is against the proper person, whether he is described as a major or a minor and therefore is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the person who in point of fact is a minor. If no proper guardian is appointed, the suit of course in the result becomes a nullity. But it is a nullity not because it is not instituted in time but because the procedure for continuing the suit against the minor and for obtaining a decree or order against him has not been carried into effect. ABDUL AZIZ *v.* AMIR *Nag.* 805

Limitation Act (IX of 1908)—*Limitation Act, construction of — Principles—Hardship no ground for enlarging period.*

Limitation Act ought to receive such a construction as the language in its plain meaning imports. A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State it must, if unambiguous, be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it. Although great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights, yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD. *v.* JANMOHAMMED ABDUL RAHIM P C 225

——— s. 2 (3)—*Administration bond is bond as defined in s.* 2 (3).

An administration bond falls within the terms of the definition of bond given in s. 2 (3), Lim. Act. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD *v.* JANMAHOMED ABDUL RAHIM P C 225

——— s. 3—*Civil Procedure Code (Act V of* 1908), *O. VIII, r.* 2— *Apparent contradictions between —Provisions of, explained.*

Seemingly contradictory provisions of s 3, Lim. Act and O. VIII, r. 2, Civil P. C, are easily reconcilable. Section 3 makes the question of limitation a material question although not raised by the parties; but a Court is not bound to raise and decide a question of fact of its own motion. Hence where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound under the provisions of s. 3 to raise the question *suo motu* and decide it.

But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. VIII, r. 2, to raise such question in his written statement; if he fails to do so thereafter it is within the discretion of the Court to allow the question to be raised or not. OFFICIAL TRUSTEE *v.* RABBURN *Rang.* 61

——— s 5—*Applicability to execution applications.*

Section 5, Lim. Act, does not apply to applications in execution at all. P. L. S. P. SUBRAMANIAN CHETTIAR *v.* L. N. CHETTIYAR FIRM *Rang.* 318

——— s. 10, Art. 120—*Claim for account on footing of trustee's wilful default—Claim, whether governed by s.* 10, *Limitation Act—Art* 120 *of the Act, if applies—Claim for account of corpus of trust funds vested in trustee, if falls within ambit of s.* 10.

Section 10, Lim Act has no application to a claim for an account of moneys which ought, but for the default of the trustee, to have come into his hands, but in actual fact never became vested in him. It does apply to a claim for an account on the footing of wilful default. Such a claim is liable to be barred by limitation, and Art. 120, Sch. I is the Article applicable. Hence the claim

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for an account of the corpus of the trust funds which became vested in the trustee falls within the ambit of s. 10, and is not barred by limitation; but a claim for an account of the interest which the trustee ought to have earned for the trust funds, but failed to earn is governed by Art. 120. OFFICIAL TRUSTEE *v.* RAEBURN *Rang* 61

——— s. 10, Art. 120—*Suit against trustee de son tort, for accounts—S. 10, if applies — Article applicable.*

In a suit for accounts against the trustee *de son tort* s. 10, Lim. Act, will not apply, for, it applies to cases of express trust alone. Such a point is governed by Art. 120. DHARAM NARAIN *v.* SURAJ NARAIN *All* 697

——— s. 12. SEE Civil Procedure Code, 1908, s. 109 295

——— ss. 19, 20—*Difference between s. 19 and s. 20.*

There is a fundamental difference between the ss. 19 and 20, Lim. Act. Under s. 20 all that is necessary is that an acknowledgment of the payment, (or, under the old section as it stood before the amendment: "the fact of payment"), should appear in the handwriting of, or be signed by the person making the payment. If the person making the payment is a Judge of the Court, and an acknowledgment of the payment, (or the fact of payment if the unamended section applies) appears in his handwriting or is signed by him, then that is enough. But that is not enough under s. 19. GAJADHAR PRASAD *v.* UDAICHAND *Mad.* 401

——— ss 19, 20 — *Explanation 2 to s. 19—Deposition of party admitting liability for claim reduced to writing and signed by Judge—Judge, if agent for purposes of s 19.*

Explanation 2 to s 19, Lim Act means not only that the agent must be duly authorised to sign the document in question but that he must be authorised to sign for the purpose which the section contemplates, that is to say he must be authorised to sign on behalf of the person sought to be made liable for the purpose of acknowledging liability. The authorisation need not necessarily be direct. It can be implied, as for instance from the nature of the employment, but the authorisation, whether it be express or implied, must be to acknowledge the liability in question and not merely to sign the document. Though a Judge of a Court is authorised, and indeed required by law, to sign the statements which he records, he is authorised to do so for the purpose of authenticating the depositions and not for the purpose of acknowledging liability. He is in no sense the agent of the witness. He is merely fulfilling a statutory duty which is imposed upon him by O. XVIII, r. 5 of the Civil P. C., in order to bring into play the presumption raised by s. 80 of the Evi. Act. The fact that the witness is a party and consequently goes into the box voluntarily does not make any difference. GAJADHAR PRASAD *v.* UDAICHAND *Nag.* 401

——— s. 20—*Appropriation of payments— Payment without instruction—Appropriation of, to save limitation—Account books maintained on katauti system—Entry of payment by debtor on credit side—If can be treated as part payment of principal.*

Under s. 20, Lim. Act, in the absence of definite instructions by the debtor the creditor can appropriate payments made by the debtor. In the case of interest, if it is attempted to save limitation, the

instructions must be by the debtor and the payment must be of interest as such, but in the case of principal, if the debtor has given no instructions, the creditor can appropriate it, if he so chooses, towards principal and can save limitation provided time has not run out at the time of appropriation, and provided acknowledgment of payment appears in the handwriting of or on a writing signed by the person making the payment. The execution of a *sarkhat* by the debtor in the creditor's books of account maintained on *katauti* system, on the credit side, amounts to a part payment of principal within the meaning of s. 20. SITARAM HABURAM *v.* SITARAM LALMAN *All.* 854

——— s. 28. SEE Limitation Act, 1903, Art. 44 168

——— Art. 44—*Manager loosely described as de facto guardian is no guardian at all—Applicability of Art. 44.*

Article 44 refers to the relationship of guardian and ward. A manager, loosely, described as a *de facto* guardian, is not a guardian at all. The article applies only if the transfer is binding unless it is set aside by a suit. LALIT KUMAR DAS CHAUDHURY *v.* NOGENDRA LAL DAS *Cal.* 168

——— Art. 44, s. 28—*Art. 44, scope of—Ward's failure to sue within time prescribed by Art. 44—Effect—Whether extinguishes right to property under s. 28.*

Article 44, Lim. Act has nothing whatever to do with suits for possession. The only thing which becomes barred at the expiry of time prescribed by Art. 44, is the ward's right to set aside a transfer. The failure to sue within the time prescribed does not extinguish the right to the property under the provisions of s. 28 of the Act. LALIT KUMAR DAS CHOUDHURY *v.* NOGENDRA LAL DAS *Cal.* 168

——— Art. 47—*Final order—Appeal and revision, distinction between, made in Criminal Procedure Code.*

Where the Sessions Judge in exercise of his power under s. 435 makes a reference to the High Court under s 438 with the recommendation that the order of the Magistrate be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order of the High Court passed under s. 439 will be the final order in the case.

The Magistrate decided the case under s. 145, Criminal P. C. on August 4, 1932. An application was filed for revision before the Sessions Judge who made a reference to the High Court on September 29, 1932. But the High Court by its order dated November 11, 1932, discharged the reference and the suit was brought on November 13, 1935, 9th to 12th being holidays:

Held, that the order of the High Court and not the order of the Magistrate was 'final order' within the meaning of Art. 47, Lim. Act, and the period of limitation under Art. 47 must be computed from the date of the High Court's order. The suit was therefore within limitation. RAMPAL SINGH *v.* MANSUKH RAI KHEMKA *Pat.* 501

——— Art 47—"*Final order*" *in col. 3, Art. 47 refers to order contemplated by col. 1.*

The "final order" in col. 3 of Art. 47 of the Lim. Act must be understood to refer to the order contemplated by col. 1 of the same Article. RAMPAL SINGH *v.* MANSUKH RAI KHEMKA *Pat* 501

——— Art. 47—"*Final order in the case*", *meaning of—High Court's order in revision in pro-*

ceedings under s. 145, Criminal Procedure Code (Act V of 1898) — Whether Magistrate's order or High Court's order is final.

The Criminal P. C, makes a clear distinction between an appeal and a revision, because in the case of an appeal the party has a right to be heard but there is no such right in the case of a revision. Revision is entirely in the discretion of the Court. But where the Court does exercise its power of revision under s. 435 of the Code, the order which is ultimately passed by the High Court under s. 439 of the Code is no less effective than an order passed on appeal. Section 439 itself provides that in revision the High Court may in its discretion exercise any of the powers of an Appellate Court. If, therefore, an order passed by an Appellate Court could be regarded as the final order, there is no reason why an order passed by the High Court in exercise of its power of revision under s. 439 of the Code could not be equally regarded as the final order. Whether the High Court ultimately interferes in revision or not, its order is none the less the final order. RAMPAL SINGH *v.* MANSUKH RAI KHEMKA *Pat.* 501

——— Art. 47—*High Court's order dismissing appeal for want of jurisdiction, if final.*

The order of the High Court dismissing an appeal for want of jurisdiction cannot be the final order. RAMPAL SINGH *v.* MANSUKH RAI KHEMKA *Pat.* 501

——— Art. 47—*Whether High Court's order summarily dismissing revision is final.*

Quære.—Where the High Court summarily dismisses an application for revision, whether its order would be the final order within the meaning of Art. 47 of the Lim. Act. RAMPAL SINGH *v.* MANSUKH RAI KHEMKA *Pat.* 501

——— Art. 61. See Limitation Act, 1908, Art. 120 823

——— Arts. 66, 80—*Bond—Bond providing for payment of loan within seven years—Further stipulation that interest due would be paid at end of each year and that in default of such payment creditor would be entitled to recover entire amount of bond with interest—No interest paid in any year—Bond held single bond—Limitation for suit on bond held ran from date specified for payment as prescribed by Art 66 and not from date of first default in payment of interest—Whole amount held did not become due on default so as to induce application of Art. 80.*

The plaintiff instituted a suit on September 1, 1936, for recovery of money on foot of a bond dated September 2, 1926. The bond provided that the loan would be repaid within seven years from the date of execution of the bond. There was also a stipulation that interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for the recovery of the entire debt with interest. No interest was paid by the defendant in any year:

Held, that the bond such as one in question was a single bond notwithstanding the fact that there was what is called a default clause. Nor was it an instalment bond. The option given to the creditor was purely for the benefit of the creditor and did not make the money become payable. It merely gave the creditor a right, if he chose to exercise it, to have the money made payable Neither of the Arts. 66, 74 and 75, Lim. Act, were applicable to such a case. In such a case the period of limitation for instituting a suit for the amount due under the bond, ran from the date specified for payment as prescribed by

Art. 66 of the Lim. Act and that it did not run from the date of the first default in payment of interest, nor did the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80. RAGHUNANDAN TEWARI *v.* SHEORAJI *Oudh* 481 F B

——— Art. 68—*Nature of administration bond—Art 68 applies to such bond—Time, when begins to run.*

An administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants; and such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond becomes statute barred by the operation of Art. 68 of the Lim. Act, that does not affect the rights of the benefices against the administrator.

It is no doubt true that a suit by the assignee of an administration bond is a suit by a person who derives title from the assignment which is authorised by the terms of s. 292 of the Succession Act, but this does not show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not, in any case greater than the rights possessed by the assignor. A suit upon such a bond, if brought by an assignee, is not in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken. The action brought by the assignee being on a bond subject to a condition, Art. 68, Lim. Act applies and time begins to run from the last date on which the condition was broken and no action can therefore, be brought after the expiration of three years.

An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property. Therefore the administrator cannot be guilty of any default or misconduct in relation to the administration after the date of his death, though, of course, his representatives would continue liable in respect of any such default or misconduct committed by him during his lifetime. The condition of the bond could be said to have been broken by the administrator by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administrator. The condition of the bond according to its terms could therefore be broken at the latest on the death of the administrator and a suit brought by the person to whom the bond is assigned under s 292, Succession Act beyond three years of such death is barred by time. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD. *v.* JANMAHOMED ABDUL RAHIM P C 225

——— Art. 80. See Limitation Act, 1908, Art. 66 481

——— Arts. 111, 116, 83—*Sale and mortgage of lands by A in favour of B—Sale consideration left with B to be paid to A as creditor for debts due*

under mortgage and handnotes—Default by B—Handnotes paid by A—Same lands subsequently sold in execution of decree against A—Suit for possession and recovery of consideration—Suit held governed by Art. 111, read with Art. 116 and time-barred—Time held began to run when handnotes were paid by A.

The plaintiffs owed some amount to *R* on two mortgages and two handnotes. They executed in favour of the defendants a sale deed and a *sudbharna* bond and the defendants were put in possession of the land thus sold and mortgaged to them. The consideration was left with the defendants for payment to *R*. Defendants failed to pay to *R*. Plaintiffs themselves paid off the handnotes on March 25, 1929, and *R* sued them on the mortgages and obtained a decree. Subsequently the plaintiffs executed a sale deed in favour of *X* in respect both of the lands which had been sold to the defendants and mortgaged to them. Subsequently the same lands were put up for sale in execution of a money decree against the plaintiffs and purchased by *Y*. The suit was instituted on September 24, 1935, to recover possession of the land covered by the sale deed and mortgage of the defendants and the consideration which the defendants had failed to pay:

Held, that the consideration for the sale deed in favour of the defendants could not be split up into two parts, namely, the amount payable on the handnotes and the amount payable on the mortgages of *R*. That as the mortgage debts had fallen due prior to the execution of the sale deed there was a breach on the part of the defendants to pay the consideration money for the sale deed when they declined to pay the debts on the hand note. As there was an express agreement to pay the consideration money and as this agreement was contained in a registered document the period of limitation was that provided by Art. 111 read with Art. 116, namely 6 years and the suit having been filed beyond such period the plaintiffs' claim to recover the unpaid consideration money for the sale deed was barred. Even if the suit was viewed as a suit on a contract of indemnity to which case Art. 83 would apply, the suit was barred as the plaintiffs were damnified on March 25, 1929. BRAHAMDEO NARAIN RAI *v.* JAIKISHUN CHAUDHURY *Pat.* 172

——— Art. 115—*"Successive breaches," meaning of.*

The term "successive breaches" in Art. 115, Lim. Act refers only to cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance, etc. BRAHAMDEO NARAIN RAI *v.* JAIKISHUN CHAUDHURY *Pat.* 172

——— Art. 120.

SEE Limitation Act, 1908, s. 10 697

SEE Limitation Act, 1908, s. 10, Art. 120 61

——— Art. 120—*Suit by District Board for realizing tax on circumstances and property, is governed by Art. 120.*

A suit brought by the District Board for realizing a certain amount as tax on circumstances and property, is not really a suit for recovery of money but for the recovery of a liability under a particular statute and does not fall within the purview of Arts. 37 to 115, Lim. Act, but is governed by Art. 120. DISTRICT BOARD, DEHRA DUN *v.* BABU RAM *All.* 870

——— Arts. 120, 61—*Joint purchase of property by plaintiff and defendant—Stamps for sale certificate purchased by plaintiff—Suit for contribution—Article applicable—Cause of action, when arises.*

A claim for contribution in respect of a share of the amount spent by the plaintiff for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by him and the defendant is governed by Art. 120, Lim. Act and not by Art. 61. The cause of action in such a case does not arise when the stamps are purchased but when they are actually utilized for the purpose in question. S. P. RM. M. MEYAPPA CHETTIAR *v.* S. P. RM. M. RAMASWAMI CHETTIAR *Mad.* 823

——— Art. 124—*Art. 124, applicability to appointment to office by nomination.*

Article 124, Lim Act is not applicable where the appointment to the office is made by nomination and applies only when the appointment is by succession through inheritance. DHARAM NARAIN *v.* SURAJ NARAIN *All* 697

——— Art. 124—*Distinction between claim to religious office and to property of endowment as also between movable and immovable property of endowment, if can be made.*

There is no distinction as regards limitation between a claim to an office and a claim to the property of endowment. Nor is there any distinction between movables and immovables in a matter of endowment. DHARAM NARAIN v. SURAJ NARAIN *All.* 697

——— Art. 142—*Plaintiff applying for mutation—Defendant co-sharer in possession denying title of plaintiff—Plaintiff's suit for possession—Limitation, when begins to run.*

The plaintiff applied for mutation of his name on April 29, 1934. The defendant objected and denied the plaintiff's title on May 19, 1921. The plaintiff learnt of this denial 15 days later. The Revenue Court dismissed the plaintiff's application on March 30, 1925 holding that the defendant was in possession. The plaintiff brought a suit for possession on March 30, 1937:

Held, that the suit was barred by limitation. Even assuming that the parties were co-sharers the possession of the defendant became adverse to the plaintiff from the date the plaintiff came to know of the denial of his title, and not from the date on which the plaintiff's mutation application was dismissed. The suit having been brought after 12 years from such date was time-barred. JWALA PRASAD *v.* LAKSHMI NARAIN *Oudh* 686

——— Art. 142—*Suit for possession based on title—Plaintiff alleging dispossession—Art. 142 applies—Burden to prove possession within 12 years is on plaintiff.*

Article 142, Lim. Act, applies to a suit for possession based on title, where the plaintiff alleges his dispossession and the plaintiff has to prove his possession within 12 years of the suit. JWALA PRASAD *v.* LAKSHMI NARAIN *Oudh* 686

——— Art. 179—*Order permitting decree-holder to withdraw money awarded to him upon rateable distribution is ministerial order—Application for withdrawal is not step-in-aid—Subsequent execution petition held barred by limitation.*

In execution of his decree, a decree-holder realised the decretal amount in part after the sale of certain properties. On February 28, 1933, the Court approved the schedule of rateable distribution and dismissed the execution case on part satisfaction. On March 18, 1936, the decree-holder applied for the withdrawal of the amount lying in Court. Sub-

Limitation Act—concld.

sequent execution petition was filed on March 18, 1939, and it was urged on behalf of the judgment-debtor that the application was barred by limitation:

Held, that the Court had on February 28, 1936, decided the matter once and for all, and all that was necessary for the decree-holder to do was to comply with the ministerial rule for allowing him to withdraw the money lying in Court. His application on March 18, 1936, and the order passed thereon was a purely ministerial order and was not a judicial order in any sense of the word. The subsequent application being, therefore, presented over three years from the termination of the earlier execution case was barred by limitation. M. NOORUL HODA v. RAI NOHAR PRASAD VARMA *Pat.* 566

——— Arts. 180, 182—*Application for possession by decree-holder auction-purchaser—Article applicable.*

An application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, Sch. I, Lim. Act and not by Art. 182. There is nothing to indicate that the Legislature intended this article to apply to those auction-purchasers who were strangers. GURMUKH DASS L. DUNI CHAND v. MOHAMMAD KHAN NAMDAR KHAN *Pesh* 337

——— Art. 181—*Applicability to proceedings under s.* 144, *Civil Procedur Code* (*Act V of* 1908) *—Decree for pre-emption by trial Court—Deposit made—Decree reversed in appeal by original vendee—Amount withdrawn before such decree—Application for restitution—Time, when runs—Second appeal by pre-emptor—Limitation, if suspended—Time, when runs in case of deposit withdrawn after first Appellate Court's decree.*

The article of Lim. Act applicable to applications under s. 144, Civil P. C., is Art. 181. Where the pre-emption decree of the trial Court is reversed in appeal by the original vendee, the right to apply for restitution in respect of the amount withdrawn by the vendee before the appellate decree from out of the deposit made in Court by the pre-emptor decree-holder for payment to the vendee, accrues at the moment when the first Court's decree is drawn up and the limitation runs from that time. The right to apply for restitution is not suspended because a second appeal is preferred by the pre-emptor. In respect of the amount withdrawn by the vendee after the decree of the first Appellate Court limitation for restitution in respect of that amount runs from the date on which the amount was withdrawn. UJAGAR SINGH v. LEKHA SINGH *All.* 387

——— Art. 182. SEE Limitation Act, 1908, Art. 180 337

——— Art. 182—*Deed void* ab initio—*Limitation is not stopped.*

The *darkhasts* filed by the assignee are ineffective to prevent limitation running, only if the assignment was void *ab initio*. If the effect of the decree is merely to cancel the assignment as from the date of the suit it prevents running of limitation. RAMCHANDRA KRISHNAJI CHANDOLE v. VITHU GOVIND PANHALE *Bom.* 79

Lower Burma Land and Revenue Act (II of 1876), ss. 55, 56—*Government purchasing land at revenue sale and setting holder as licensee—Suit to set aside sale—Government, if necessary party.*

Per *Dunkley, J.*—Government is a necessary and proper party to a suit to set aside a revenue sale, where the purchaser is the Govt. who settles the holder of the land as a licensee. To such a case s. 56 would apply. AH TWE v. MA MAI SEIN *Rang.* 372 F B

——— ss. 55, 56—*Question as to arrears of land revenue or defaulter or both—Jurisdiction of Civil Court to decide—Suit to set aside sale by Township Officer for arrear of land revenue—Civil Court, if can entertain.*

With regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act, 1876, specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the Revenue Officer, and accordingly this question is one for him to determine. The Civil Court has no jurisdiction in view of ss. 55 and 56, Lower Burma Land and Revenue Act, to decide the question as to arrears of land revenue or defaulter or both and, therefore, it cannot entertain suit to set aside a sale held by Township Officer for land revenue arrears. AH TWE v. MA MAI SEIN *Rang.* 372 F B

Madras Abkari Act (I of 1886)—A, *bidder at auction of toddy shop entering into partnership agreement with* R *after date of auction but before issue of license—Agreement held illegal.*

A, a bidder at an auction of a toddy shop entered into an agreement with *R* after the date of the bid at auction but before the date of the issue of license, the terms of which were that, *A*, should bear one-half of the expenses of running the business and that the sale proceeds should be divided between *A* and *R*. The duties of *R* ware confined to the supervision of the procuring of toddy from the trees:

Held, that by the constitution of this partnership there was transfer to *R* of the privilege of selling toddy and such an agreement being illegal could not be enforced. NARASIMHULU NAIDU v. PEMMATI NAGA REDDY *Mad* 827

Madras Agriculturists' Relief Act (IV of 1938), s. 3 (ii)—*Holder of vendor's lien in land, if agriculturist.*

The holder of a vendor's lien in agricultural land is qualified to be an agriculturist. V. S. SINGHARACHARIAR v. PAPPETTI AMMAL *Mad.* 896

——— s. 3 (ii) Proviso A—*Criterion for applicability of proviso is date of assessment and not period for which it is made.*

The criterion for the applicability of Proviso A to s. 3 (*ii*), Mad. Agri Relief Act, is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending March 31, 1938, and it does not lay down any restriction regarding the period in respect of which that assessment might have been made. RAJOO v. PALANIYAPPA CHETTIAR *Mad* 547

——— s. 8, Explanation—*Whether covers case in which debt due by* A *is discharged on debt due by* B *to same creditor being substituted for it.*

Explanation to s. 8, Mad. Agri Relief Act was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of *X* or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. It does not cover a case in which a debt due by *A* is discharged on a debt due by *B* to the same creditor being substituted for it. NEELAPPA REDDIAR v. SOLIMUTHU UDAYAN *Mad.* 171

——— s. 9—*For applicability of s.* 9 *both prior*

Madras Agriculturists' Relief Act—concld.

debt and debt sued on must be debts due from agriculturist.

Both the debt sued on and the prior debt which it is found to have been superseded must, if s. 9, Mad. Agri. Relief Act is to have any application fall within the definition of the term "debt" in s. 3; that is to say, both the prior debt and the debt sued on, must be debts due from an agriculturist.

Where therefore *A* and his brother *B* executed a promissory note in supersession of an earlier promissory note executed by *A* alone who was not an agriculturist within the purview of the Act, it is not open to *B* to call in aid s. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt. N. KRISHNASWAMY IYEY *v.* T. N. NAGALINGA MUDALIAR . *Mad.* 470

——— s. 10 (2)—*Mortgage executed for price payable to mortgagee for land purchased from him —Scaling down of such debt.*

Where a mortgage is executed for the price payable by the mortgagors for lands purchased by them from the mortgagees, the debt falls under the category of s. 10 (2), cl. (2) and cannot therefore be scaled down. ATHIYAPPA GOUNDAN *v.* RAMANATHAN CHETTIAR . *Mad.* 281

——— s. 15—*S.* 15, *if can be invoked in favour of tenant whose rent is payable to assignee of rent from Malabar Jenmi.*

Section 15 of the Mad. Act IV of 1938 cannot be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar Jenmi

The terms "Jenmi" and "Intermediary" used in s. 3 and in the succeeding ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee. AMAD KOYA *v* APPU *Mad.* 406

Madras City Municipal Act (IV of 1919), as amended by Act (X of 1936), s. 287—*Power of Commissioner to refuse renewal of license.*

There is nothing in s. 287, Mad. City Municipal Act, which indicates an intention on the part of the Legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. The Commissioner has in a proper case the power to refuse a renewal. The refusal should not however be arbitrary or prompted by some ulterior motive. ABDUL KAREEM *v.* COMMISSIONER, CORPORATION OF MADRAS *Mad.* 551

Madras Co-operative Societies Act (VI of 1932), s 51—*Registrar or arbitrator in passing award under Act, if acts as Court—Proceedings under Act, whether suit and award if decree within meaning of s.* 51 (1), *Provincial Insolvency Act (V of 1920).*

The Registrar or the arbitrator in passing the award under the Mad. Co operative Societies Act certainly acts as a Court. The procedure laid down under the Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are satisfied in a proceeding under the Act. An award under the Act is a decree as used in s. 51 (1), Prov. Insol. Act. There is however no reason to suppose that a decree holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder. GOVADA BALAB ARATHI CO-OPERATIVE CREDIT SOCIETY, GOVADA *v.* ALAPATI VENKATAKRISHNAYYA *Mad.* 555

——— s. 51, rules under r. 15—*Award made*

Madras Co-operative Societies Act—concld.

under, filed in Civil Court under r. 15 (7) (c)—*If can be executed by assignee of person in whose favour it was made.*

An award under r. 15 of the rules under s. 51 of the Co-operative Societies Act made, after it has been filed in Civil Court for enforcement under r. 15 (7) (c) can be executed on the application of an assignee from the person in whose favour the award was made. K. MUNUSAMI CHETTI *v.* CHENCHU NAIDU *Mad.* 634

Madras Debt Conciliation Act (XI of 1936), s. 4 (1)—*Application under, by insolvent debtor without permission of Insolvency Court—Jurisdiction of Debt Conciliation Board to entertain it.*

An application to a Debt Conciliation Board when the debtor is an insolvent and the Insolvency Court has not given its consent, is in direct contravention of s. 28 (2) of the Prov. Insol. Act and the Board has no jurisdiction to entertain it. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. An insolvency takes away the jurisdiction of the Debt Conciliation Board. K. DASARADHARAMA REDDY *v.* RAHIMTULLA HUSSANI *Mad* 567

——— s. 17. SEE Madras Debt Conciliation Act, 1936, s. 18 416

——— ss. 18, 17—*Board is entitled to give certificate under s.* 18, *even when it is bound eventually to dismiss petition of debtor under s.* 17.

Action under s. 18, Mad. Debt Conciliation Act does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The opening words of s. 18 (1) make it quite clear that the certificate can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the debtor. The fact that the Board may have to dismiss a debtor's petition under s 17, does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused. MUTAU GOUNDAN *v.* PERIYA GOUNDAN *Mad.* 416

Madras District Municipalities Act (V of 1920), s. 83 (1)—*Power house built on part of hill set apart for religious purposes—Power used for lighting temple and way leading to it and also supplied to shop-keepers at profitable rates—Power house, held not exempt from tax.*

The words "places set apart for public worship ..... other purpose" in s. 83 (1), Mad. District Municipalities Act read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. Where a power house is built on a part of a hill which is set apart for religious purposes, is used for the purpose of lighting the way upto the temple on the hill and the temple itself and the electricity is supplied to the shop and hotel-keepers within the hill at a profitable rate, the power house being used for commercial as well as religious purposes is not exempt from taxation. MUNICIPAL COUNCIL, PALNI *v.* SRI DHANDAYUTHAPANI DEVASTHANAM, PALNI *Mad.* 34

Madras High Court (Original Side) Rules—*Questions raised, within province of Judge—When can be referred to Official Referee—Consent*

Madras High Court (Original Side) Rules—concld.

of parties—Consent withdrawn—Report of Official Referee, value of.

The Official Referee is not a Judge of the Court but only a Commissioner and the adjudication by him of the questions, which under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself cannot confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, *i. e.*, the working out of those rights either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee.

Where the questions raised in the issues are entirely within the province of the Judge, the Court has no jurisdiction to refer them to any one for decision unless the parties have agreed to submit their disputes to arbitration. When the consent of the party to the matter proceeding before the Official Referee is withdrawn the report of the Official Referee should not be considered. If, however, the parties have expressly agreed that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration. V. G. MANICKA MUDALIAR *v.* ANDALAMMAL *Mad.* 801

Madras Hindu Religious Endowments Act (II of 1927), s. 84 (1)—*Villagers actively managing temple since 1904—Presumption that they had right to manage even prior to 1904—Archakas allowed to manage small portion—Effect.*

Where the villagers were managing a temple since 1904 though prior to that date they had allowed the *archakas* to manage the small property of the temple for some years:

Held, that the presumption was that even before that year the villagers had the right of management and the villagers by allowing the *archakas* for some years before 1904 to manage the small property of the temple, did not lose their right of management of the institution, or even of its property. *In re* MUNIRATNA GURUKKAL *Mad.* 696

Madras Local Boards Act (XIV of 1920), s. 55 (2) (b)—*Person whose adjudication is annulled under s. 43, Provincial Insolvency Act (V of 1920), if "undischarged insolvent" within s. 55 (2) (b)—Whether disqualified to be member of Local Board—S. 55, if controlled by s. 73, Provincial Insolvency Act (V of 1920).*

Annulment of adjudication, under ss 35, 39 or 43, Pro. Insol. Act, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which, adjudication under the Act confers upon a debtor, and he can no longer be regarded in the eye of the law as an insolvent. Hence a person whose adjudication is annulled under s. 43, Prov Insol. Act is not disqualified for election as a member of a Local Board as an "undischarged insolvent" under s. 55 (2) (b), Mad. Local Boards Act. That expression in s. 55 is not controlled by s. 73, Prov. Insol. Act. CHINNIYA PILLAI *v.* SUBBARATNAM PILLAI *Mad.* 147

Madras Survey and Boundaries Act (VIII of 1923), s. 14—*Suits under—Government, if necessary or proper party.*

The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Govt., in no sense represent them in their actions under the Survey and Boundaries Act. They are Statutory Officers given statutory powers and they act in a *quasi*-judicial manner; and their decisions are binding on parties in the absence of a suit. The Govt. is not in the least interested in the result of the suits; for the Survey Officer, in making his decisions acts not as an agent of the Govt., but as a statutory officer specially empowered under the Act. Consequently the Govt. is neither a necessary nor a proper party in suits under s. 14, Mad. Survey and Boundaries Act. SECRETARY OF STATE *v* MALRAJU VENKATA NARASIMHARAO BAHADUR *Mad.* 37

Maintenance.

SEE Burmese Buddhist Law 836
SEE Hindu Law 631
SEE Hiddu Law—Widow 27

Marumakkattayam Act (XXII of 1933), s. 38.

SEE Marumakkattayam Act, 1933, s. 43 869

——— **ss. 43, 38**—*Application for registration of* tarwad *under s. 43, pending*—Tavazhi, *if can file partition suit—Rule of Hindu Law as to partition, whether applies to* tarwad—*Partition suit—Other members, if precluded from applying for registration—Doctrine of* lis pendens, *applicability of.*

Chapters VI and VII of the Act stand apart and there is nothing in any of the sections of these two chapters which suggests that a *tavazhi* is precluded from filing a suit under s. 38 for partition because there happens to be pending an application for registration under s. 43. The ordinary rule of Hindu Law that the filing of a partition suit involves the automatic severance of the joint status applies to a *tarwad* and hence the filing of a suit under s. 38 puts an end to the right of other members of the *tarwad* to apply for registration under s. 43. The doctrine of *lis pendens* obviously can have no application here. There is a right to partition given in Chap. VI and there is nothing in Chap. VII which prevents that right being exercised while the *tarwad* remains unregistered. MADHAVI AMMA *v.* NAGAPPAN NAYAR *Mad.* 869

Master and servant—*Employment of servant on basis of special contract—Pension rules subsequently framed by employer—Rules, when can be imported into contract.*

Where a person has been employed on the basis of a special contract the provisions of the pension rules, framed by the employer subsequently cannot be imported into it unless there is any indication in the contract itself that the rules were to be considered as incorporated in the contract. AMIR SINGH *v.* NATIONAL BANK OF INDIA, DELHI *Lah* 384

——— *Misconduct on part of servant justifying his dismissal condoned by master—Master cannot subsequently claim right to dismiss him or impose any other punishment in respect of that misconduct.*

Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. DISTICT COUNCIL, AMRAOTI *v.* VITHAL VINAYAK BAPAT *Nag.* 658

——— *Pension, when cannot be claimed as of right.*

In the absence of a contract between the employer and the employee, the employee cannot as of

Master and Servant—concld.

right claim the pension for past services Nor can the pension which is granted as a matter of grace be claimed as of right. AMIR SINGH *v.* NATIONAL BANK OF INDIA, DELHI *Lah.* 384

——— *Refusal to pay wages during period of suspension of servant, when justified.*

A local body has no more authority and power over its servants and employees than any other person or body unless such powers are expressly conferred by statute. The matter, therefore, must be governed along the ordinary lines of master and servant An ordinary master not given special powers by statute or by some rule or law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. The master can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that instead of exercising the right he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forego his salary during a certain period and agreed to continue to serve on fresh terms under a fresh contract. But it would be necessary for the master to prove in such a case first, that there is this fresh agreement, and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement DISTRICT COUNCIL, AMRAOTI *v.* VITHAL VINAYAK BAPAT *Nag.* 658

Mesne profits—*Suit for possession and mesne profits —Claim for mesne profits neither tentatively valued nor court-fee paid—Prayer for amendment of plaint by valuation of claim and payment of court-fee can be granted at any stage of suit.*

In a suit for possession and mesne profits the plaint ought to give a tentative valuation for the claim for mesne profits and on that valuation court-fees ought to be paid. But the Court cannot dismiss the prayer for mesne profits without giving an opportunity to the plaintiff to value the relief and to pay court-fee thereon. A prayer for valuing the claim for mesne profits separately and for payment of deficit court-fee thereon ought to be allowed at any stage of the suit. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

Minor. SEE Adverse possession 168

——— SEE Contract 178

——— SEE Limitation 805

——— SEE Muhammadan Law 253

——— *Voidable transaction—Repudiation by minor —Whether should institute suit—Failure to sue within three years of his majority—Whether ipso facto perfects title of person claiming under voidable transaction.*

A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it. It is not necessary that he should bring a suit Hence the minor's failure to institute a suit within three years of his majority does not *ipso facto* perfect the title of the person claiming under the voidable transaction. LALIT KUMAR DAS CHAUDHURY *v.* NOGENDRA LAL DAS *Cal.* 168

Mortgage. SEE Suits Valuation Act, 1887, s. 8 871

——— *Amendment—Question involving identity of mortgaged property, if can be dealt with on application to amend relevant documents.*

A question involving the identity of the property mortgaged cannot be dealt with on an application to amend the relevant documents after the mortgage decree is passed, sale held and a sale certificate is issued. SHYAMA KANT LAL *v.* RAM LAL *Pat.* 748

——— *Construction — Usufructuary — Mortgagor binding himself to deliver possession and authorising mortgagee to retain possession till payment of money advanced—Indication in document that property is to be taken as security—Mortgage held usufructuary within meaning of s.* 58 (d), *Transfer of Property Act* (*XX of* 1929)—*Mortgagee not put in possession—He is entitled to decree under s.* 68, *Transfer of Property Act* (*IV of* 1882).

Where the mortgagor binds himself to deliver possession of the property in *Jeth* 1341 *F.* and authorizes the mortgagee to retain possession until *Jeth* 1350 *F.* when the executant binds himself to pay the money and the mortgagee is entitled to retain possession until payment of the money advanced, the transaction is an usufructuary mortgage. The mere absence of hypothecation clause is immaterial when in the deed the word *'rehan'* is expressly mentioned in the heading and in the body of the document in more places than one there are indications that the parties intended that the properties described in the document should be taken as security for the loan advanced.

In such a case where the mortgagee is not put in possession against the stipulation contained in the document under s. 68, T. P. Act, he is entitled to either a decree for the amount which he lent or for possession. HARNATH SINGH *v.* MAIYA AMBIKA DEVI *Pat.* 272

——— Equitable. SEE Registration Act, 1908, s. 17 152

——— *Hindu Law — Joint family—Manager— Mortgage by, on behalf of himself and as* karta *and guardian of his younger undivided brother— What mortgagee must show in order to bind minor's interest in mortgaged property—Mortgage by* karta *held was not binding on minor's interest in property mortgaged.*

Where mortgage of property of Hindu joint family consisting of two brothers one of whom is minor is executed by the elder brother who is *karta* for himself and as manager and guardian of his undivided younger brother, stating as consideration the payment of debts of joint family business, the mortgagee, in order to bind the minor's share in the mortgaged property has to show in his suit that there was necessity for the loan, or that he made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan.

The mortgage in suit was executed in 1916, in favour of *B* by *A* " for himself and as family manager and guardian of his undivided younger brother *R*", on the security of certain properties belonging to the joint undivided family. The consideration was stated to have been received " by your obtaining the same and paying the same towards the debts due by our common firm at Colombo." The mortgagee sued *A* and *R* on the mortgage. *R* denied both the continuance of the Colombo business and of the existence of debts of such business in 1916. There was no evidence sufficient to establish—even *prima facie*—the continued existence of the family business in Colombo in 1916, and the indebtedness

Mortgage—contd.

of such business and no evidence of any enquiry made by the mortgagee, as to the truth of the representations made to him by *A*. In answer to the order for discovery, *R* filed an affidavit to the effect that the account-books called for were not, and never had been, in his possession, or under his control. The mortgagee took no further steps in the matter:

Held, that the mortgage was not binding on the interest of *R* in the property mortgaged in the absence of evidence as to the position in 1916. The statements of *A* in his written statement, which were not supported in evidence were of no value against *R*.

Held, further that the evidence, acquiesced in by the mortgagee negatived any deliberate withholding of account-books and no adverse inference could be drawn. RAMANATHAN CHETTIAR *v.* M AR RM. VISWANATHAN CHETTIAR P C 657

——— *Mortgage of movable property—How to be enforced.*

A mortgagee of movable property is not entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a Receiver to secure possession of it in order that his security may be realised. CHINNI VENKATACHALAM CHETTI *v.* ATHIVARAPU VENKATRAMI REDDI *Mad.* 679

——— *Mortgage of produce of land—Subsequent lease of land—Standing crop on land claimed by mortgagee—Mortgagee's title, if prevails over that of lessee with notice of mortgage.*

Where the produce of the land realised therefrom every year is also mortgaged with the land, so long as the mortgagee allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights will not also prevail against a *bona fide* assignee from the mortgagor without notice of the mortgage in his favour. Where however the lessee of the land takes the assignment with notice of the mortgage of the produce of that land realised every year and standing crop on the land is claimed by the mortgagee, the title of the mortgagee to the crops must prevail over that of the lessee. CHINNI VENKATACHALAM CHETTI *v.* ATHIVARAPU VENKATRAMI REDDI *Mad.* 679

——— *Mortgagee put into possession under registered* sudbharna *bond but no consideration paid—Suit by mortgagor after expiry of term of mortgage for possession—Suit should be treated as for redemption after taking accounts—Mortgagee is liable to account for income of property.*

Where under a registered *sudbharna* bond the mortgagees were actually given possession but the consideration was never paid by the mortgagees, a suit brought by the mortgagor for possession, after the expiry of the term of the mortgage should be regarded, as a suit for redemption after taking of accounts. In such a suit the mortgagor would be entitled to possession on payment of the consideration and such other sums as might be due to him after taking of the accounts. In such a case as nothing is payable by the mortgagor on account of the principal, for the consideration was never paid by the mortgagee, the mortgagee is liable to account for the income of the property during the time he was in possession as mortgagee. BRAHAMDEO NARAIN RAI *v.* JAIKISHUN CHAUDHURY *Pat.* 172

———*Movable property, mortgage of—Validity—Produce of land realised every year mortgaged with land—Mortgage of produce operates as mortgage of movable property.*

Mortgage—contd.

Under the Indian law there can be a valid mortgage of movable property. Under s. 3, T. P. Act, immovable property does not include growing crops. Where the deeds of mortgage not only give security to the mortgagee over the immovable property comprised therein but also over the produce realised therefrom every year, the deeds of mortgage will operate in respect of the produce on the land as a mortgage of movable property. The moment the crop comes into existence the mortgagee gets title to the crop. CHINNI VENKATACHALAM CHETTI *v.* ATHIVARAPU VENKATRAMI DEDDY *Mad.* 679

——— *Simple mortgage—Characteristics of stated.*

The characteristics of a "simple morgage," are (1) that there must be a loan; (2) that the mortgagor must have bound himself personally to repay the loan; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold, in the event of his having failed to repay and (4) that possession of the property has not been, and is not to be, transferred to the mortgagee during the pendency of the mortgage. These stipulations may be express, or they may appear by necessary implications from the terms of the particular transaction. Thus, a promise to pay necessarily arises out of the acceptance of a loan and it need not be stated in so many words in the deed. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner. OM PARKASH *v* MUKHTAR AHMAD *Lah.* 789

——— *Substituted security — Amendment—Partition after mortgage of share in village—Mortgagor losing share in village mortgaged and obtaining share in another village—Mortgagee not proceeding against such substituted security in mortgage suit—Property originally mortgaged sold and purchased by decree-holder—Sale certificate issued—Subsequent application by decree-holder for amendment of description in mortgage decrees, execution petition, sale proclamation and sale certificate—Amendment held could be allowed upto stage of final decree and no more.*

The mortgagors mortgaged their shares in village *S* while partition proceedings were proceeding in respect of the *mahal* which included the village *S* but before the partition was finally concluded and approved of by the Commissioner. By the partition the mortgagors lost all the property of any value in *S* but were given a separate *takhta* in village *B*. In a mortgage suit the mortgagee however did not take any steps to proceed against the substituted security but only prayed for sale of the original security. The preliminary and final decrees were for the sale of that share in *S* and such was the share mentioned in the execution petition, the sale proclamation and the sale certificate. After the whole proceedings were over and difficulties arose as to obtaining possession of the substituted security, the mortgagee decree-holder who had purchased the property himself applied to the Court for amendment of the description of the mortgaged properties in the preliminary and final decrees in the suit and in all the consequential papers of the execution proceedings, that is, in the execution petition, sale proclamation and sale certificate.

Mortgage—contd.

Held, that the partition must be deemed to have taken place after the mortgage On the principle of substituted security the mortgagees could have proceeded against such part of the property allotted to the mortgagors in village *B* as represented their original share in *S* which had been mortgaged by the mortgage and could have brought to sale the substituted security and hence an amendment of the plaint, the preliminary decree and the final decree, could be allowed but no further amendment, could be justifiably made. Because if an amendment was made in the execution petition, sale proclamation and sale certificate, the result would be that property would have been bought and sold which had never been even put up up sale. No amendment could therefore be made in any of the relevant documents and proceedings following the final decree. SHYAMA KANT LAL *v* RAM LAL *Pat.* 748

——— *Substituted security, ascertainment of—Method—Duty of Court.*

In ascertaining what precisely is the substituted security out of a share allotted to the mortgagor in partition subsequent the mortgage the partition papers and the valuation of the properties made in the partition proceedings are no doubt of the utmost importance but it would be advisable that, before a finding is recorded as to what the substituted security is, the parties should be given an opportunity of placing their contentions before the Court and any evidence which they may seek to adduce and which the Court may consider to be properly admissible. After such inquiry the Court should come to the conclusion as to what is the substituted security and such should be inserted in all the relevant documents. SHYAMA KANT LAL *v.* RAM LAL *Pat.* 748

——— *Suit on mortgage—Lessee and trespasser, if necessary parties.*

Though the lessee, or the trespasser, (or even the transferee), may be proper parties if their interests accrue subsequent to the mortgage, they are not necessary parties to a suit on mortgage. UMAR HAJI KARIM *v.* BADRIDAS RENURAI *Nag.* 306

——— *Usufructuary—Mortgage bond containing term mentioning period after which mortgagor undertakes to redeem property on payment of principal—Whether inconsistent with usufructuary mortgage.*

Where the mortgagee is given possession of the mortgaged property and the stipulation is that he should remain in possession till the sum advanced is paid and enjoy the usufruct in lieu of interest, the mortgage is usufructuary even if the mortgage bond mentions a period or term, after which the mortgagor undertakes to redeem the property on payment of the principal money. Such a term is quite consistent with the mortgage being a usufructuary mortgage and does not by itself import any personal liability. It simply amounts to a proviso for redemption, and fixes the minimum period within which the right of redemption can be exercised. A provision in the deed that in case of dispossession the mortgagee would be able to realise the principal and interest at certain rate, is in the nature of an indemnity clause and does not alter the nature of the mortgage. BHUTNATH JANAN *v.* GOPAL PROSAD SAHU. *Cal.* 26

Motor Vehicles Act (VIII of 1914), s. 16, rules under, Punjab Motor Vehicles Rules, rr. 24 (1), 48 and 49—*Offence under—Summons not specifying nature of—Accused not given opportunity to produce defence—Conviction held could not be sustained.*

Where in a case in which the accused was charged with offences under rr. 34 (1), 48 and 49, Punjab Motor Vehicles Rules the nature of the offence was not specified in the summons which was issued to the accused, and the case was somehow taken up before the date fixed and no adjournment was granted to him to enable him to produce his evidence in support of his defence,

Held, that the accused was prejudiced in his defence and consequently his conviction could not be sustained. GHULAM QADIR *v.* EMPEROR *Lah.* 673

——— s. 112—*U. P. Motor Vehicles Rules*, 1940, *rr.* 2 (*g*), 79 (viii)—*Offence under s.* 112 *read with r.* 79 (viii), *if can be tried by Honorary Special Magistrate or by stipendiary Magistrate.*

In r. 2 (*g*) of the U. P. Motor Vehicles Rules, 1940, "Magistrate" means a stipendiary Magistrate. This presumably means that wherever the word "Magistrate" occurs in the rules it must be understood to mean a stipendiary Magistrate. The rules do not deal with the trial of offences under the Act. The mere fact that the offence of which the accused was convicted is made an offence by r. 79 (*viii*) of the Motor Vehicles Rules is no reason for holding that the Magistrate trying the case must be a Magistrate such as is defined in those rules. The accused can therefore be convicted by Honorary Special Magistrate for offences under s. 112 of the Motor Vehicles Act read with r. 79 (*viii*) of the Motor Vehicles Rules. SOBHA RAM *v.* EMPEROR *Oudh* 50

——— s. 112—*Words "this Act", if include convictions under old Act—Three previous convictions for offences under old Act—Proper sentence—Motor Vehicles Rules* (1940), r. 79 (viii).

The words "this Act" in s. 112, Motor Vehicles Act of 1939, do not include convictions under the old Act of 1914, which is repealed by the new Act.

Where, therefore, an accused who had three previous convictions for offences under the old Act of 1914, was convicted under s. 112 of Act of 1939, for breach of r. 79 (*viii*) of Motor Vehicles Rules of 1940, for carrying passengers in excess and was sentenced to a fine of Rs. 100:

Held, that the fine of Rs. 100 was illegal and must be reduced to Rs. 20.

Held, further that the proper course for the Magistrate in such a case was to cancel the accused's licence for a period of at least six months, and if this accused was brought up again for an offence under the Motor Vehicles Act, the Magistrate would do well to cancel his licence either for a period of one year or six months. EMPEROR *v.* BISHUN NARAIN *Oudh* 340

Motor Vehicles Rules (1940) r. 79 (viii). See Motor Vehicles Act, 1939, s. 112 340

Muhammadan Law—Gift—*Gift in future, validity.*

Under the Muhammadan Law immediate possession is essential for gift. A gift in future is void. Where the donor retains possession during his lifetime and the donee is to take after his death, the gift is void. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHOUDHURY *Cal.* 540

——— Hiba-bil-ewaz—*Deed duly executed and registered showing* bona fide *intention of donor to divest himself* in præsenti *of property and confer it upon donee—Deed delivered to wife*

Muhammadan Law—contd.

—*Gift is valid though possession is not delivered.*

The words in the deed of gift duly executed and registered that the donor had put the donee in possession and occupation of the land gifted from the date of its execution, show the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee. Where it is also stated in the deed that the donor stipulated and reduced it to writing that he had no concern of any sort left in the land gifted and that all the rights which he had would hereafter be enjoyed by the donee the gift is not invalid merely for the reason that possession was not delivered. Where a Muhammadan executes a deed of gift of immovable property in favour of his wife which declares that he had delivered possession over it to her as absolute owner and the deed is handed to and retained by her the gift is valid though the donee has not obtained actual possession until after her husband's death. PASHIRAN *v.* MOHAMMAD HUSAIN *Oudh* 161

——— Marriage—*Acknowledgment— Acknowledgment by man that certain woman is his wife, if invests that woman with status of married wife—Such acknowledgment, when raises presumption of marriage.*

An acknowledgment by a man that a certain woman is his wife, is sufficient in the eyes of the Muhammadan Law to invest the woman with the status of a married wife and the subsequent born children with the status of legitimacy, unless the marriage is shown to have been legally impossible. By reason of the acknowledgment a presumption in favour of the marriage is raised. If direct evidence of marriage is adduced and the Court disbelieved it, the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption. BASHIRAN *v.* MOHAMMAD HUSAIN *Oudh* 161

——— ——— ——— *Proposal and acceptance—Form of —Lapse of long time—Presumption.*

Where there is evidence that the woman gave her consent to the marriage and that the man agreed to the dower, this was sufficient proposal and acceptance. The Muhammadan Law does not prescribe that the proposal and acceptance should be made in any particular form. Moreover, after the lapse of a long time, all the formalities required should be presumed to have been complied with. BASHIRAN *v.* MOHAMMAD HUSAIN *Oudh* 161

——— Minor—*Sale of minor's immovable property by mere* de facto *guardian—Validity.*

Under Muhammadan Law, the mother of a minor child who is merely his *de facto* guardian, has no power to sell any immovable property belonging to the minor and consequently, the sale of his interest by the mother is absolutely void. SAMBHU GOSAIN *v.* PIYARI MIAN *Pat.* 253

——— Wakf—*Absence of* mutwalli—*Power of nomination and appointment of* imam, *by whom to be exercised.*

In the absence of a *mutwalli* the power of nomination and appointment of an *imam* to a mosque is given to the *waqif's* descendants and the members of his family preferentially to others. If the person appointed by the *waqif* is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the Kazi for the removal of the incompetent servant and the appointment of the person selected by the congregation. M. M SHAHUL HAMEED MARAKAYAR *v.* MOHAMMAD HUSAIN SAHIB *Mad.* 131

——— ——— Wakf — Mutwalli — De facto mutawalli *whether can get declaration that he is proper* mutawalli.

Quære—Whether a *de facto mutawalli* can get a declaration from the Civil Court that he is the properly constituted *mutawalli*. KAMMON *v.* ALLAH BAKHSH *Lah.* 323

——— ——— ——— Mutwalli—Mutwalli *himself* peish imam—*Surrender by him of* mutwallishipto *mosque committee—Committee's power to dismiss him acting as* peish imam.

It is no doubt customary in many mosques for the *mutwalli* to exercise full disciplinary powers over the servants of the mosque. But this power cannot be said to have vested in the *mutwalli* of the mosque, where the *mutwalli* was himself the *peish imam* for, it is absurd to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. Therefore, the surrender by such person of his functions as *mutwalli* to the mosque committee cannot be said to have invested that committee with a power of dismissal over that person which he as *mutwalli* could not have exercised. M. M SHAHUL HAMEED MARAKAYAR *v.* MOHAMMAD HUSSAIN SAHIB *Mad.* 131

——— ——— ——— —Mutawalli—*Nomination by, of successor during* marz ul maut—*Effect— Diarrhoea or general debility due to old age, if* marzu-ul-maut.

Under Muhammadan Law the nomination of his successor by the *mutwalli* for the time being is valid only if it is made while he was in death illness (*marz-ul-maut*). Neither diarrhoea nor "general debility due to old age" can be called mortal maladies and, therefore, nomination of successor during such illness is not valid. KAMMON *v.* ALLAH BAKHSH *Lah.* 323

——— ——— Waqf *found to be invalid—Beneficiary, if trespasser until it is set aside.*

The fact that the deed is not a *waqf* will not make it a void deed It is a deed by which an interest has been conveyed by the *waqif* to the beneficiary and until it is set aside, the beneficiary cannot possibly be called a trespasser. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHOUDHURY *Cal.* 540

——— ——— Waqif *must be owner at time of dedication.*

There are many kinds of *waqfs* but the term *waqf* has a definite legal meaning; it cannot be said that an undertaking to create a *waqf* is void for uncertainty. If nothing more is said the undertaking means that the person has contracted to create such a *waqf* as to him seems suitable or best. He is, however, not free to dispose of the property in any way he likes; the disposition must be by way of a valid *waqf*. When he makes the *waqf* he will have to specify the objects of the *waqf* with reasonable certainty or the *waqf* will be void for uncertainty; but the contract to make a *waqf* would not be invalid because the terms of the proposed *waqf* are not mentioned in the contract.

Under Muhammadan Law the property dedicated by way of *waqf* must belong to the *waqif* at the time of dedication. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHOUDHURY *Cal.* 540

Muhammadan Law—concld.

Municipality—*Insufficiency of, municipal service, whether ground for tax-payers withholding payment of tax.*

Municipality—concld.

The insufficiency of municipal service is no ground for the tax-payers withholding the payment of tax. If they are dissatisfied with the service provided by the Municipal Board they may complain to the District Magistrate and have their grievances remedied. The High Court, however, has no jurisdiction to reduce or disallow taxes on the ground that the Municipality has been inefficient in the discharge of its municipal duties. BADRUNNISSA *v.* MUNICIPAL BOARD, AGRA *All.* 822

Murder. SEE Criminal trial 284

Murshidabad Estate Administration Act (XXIII of 1933), s. 19 (1)—"*Arrears*", *if covers arrears due before Act came into force.*

The word "arrears" in s. 19 (1), Murshidabad Estate Administration Act, covers "arrears" which became due before the Act came into operation SECRETARY OF STATE *v.* SADEK REZA *Cal.* 807

Muslim Dissolution of Marriages Act (VIII of 1939), s. 2 (viii) (f), (a) (ii)—*Grounds for dissolution of marriage—Wife separating from husband due to ill-treatment—No effort on husband's part to treat wife as wife or according to injunctions of Quran — Case falls under* s 2 (viii) (f) — *Wife forced to live with parents for 12 years due to husband's ill-treatment—No society of husband—Husband's conduct, whether cruelty — Payment of maintenance on Magistrate's order for some months during two years prior to suit—Wife, if debarred from relying on* s 2 (ii) *in respect of earlier period of ten years.*

It is of course only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution. But where there has never after the separation been any real intention on the part of the husband or positive effort made by him to treat his wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which having regard to human imperfections and to the circumstances of the husband could be condoned as an honest effort in that direction, the case falls within the purview of s. 2 (*viii*) (*f*), Muslim Dissolutiont of Marriage Act.

The wife was forced to live away from her husband for about 12 years on account of his ill-treatment. The return to husband meant submission to conditiens impossible to a self-respecting woman. Her life thus was made miserable. She was compelled to do without the society of her husband and she could not marry any other person. She was forced to live with her parents, a degrading position, and be a burden upon her parents. In pursuance of the Magistrate's order, however, the husband had been paying maintenance allowance to her for some months during two years preceding the suit by the wife for the dissolution of the marriage :

Held, that the payment of maintenance during two years preceding the suit did not debar the wife from relying on s 2 (*ii*) of the Act in respect of the earlier period of ten years as a good ground for the dissolution of her marriage.

Held, further that it was reasonable in the circumstances of the case to say that the husband was making her life miserable by cruelty of conduct within the meaning of s. 2 (*viii*) (*a*). The fact that she could by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month—a sum wholly insufficient for maintaining her in any comfort was not enough to relieve her of her misery. ASMABAI *v.* UMER MAHOMED SIDIK MIRZA *Sind* 847

Mussalman Waqf Validating Act (IV of 1913), s. 3—Waqf *for maintenance of family and children—Ultimate gift to religious, pious or charitable purpose, is essential.*

In the case of a *waqf* for the maintenance of the *waqif's* family and children, an ultimate gift for a religious, pious or charitable purpose is essential for its validity as a *waqf* and the intention to make such a gift cannot be inferred from the mere use of the word *waqf*.

The *waqif* by the *waqfnama* provided for the payment of certain trivial sums payable annually to the Imam of a Masjid, to a High School, a Girl's School and a Madrasa. He also awarded two gold medals. The rest of the income was divided among the members of his family and on their deaths among their eldest male issue. He then further stated that if any of the beneficiaries died without male issue the income would "revert to the *waqf* estate and will be appropriated by the *mutwalli*";

Held, that there was no ultimate gift to a religious, pious or charitable purpose and consequently the *waqf* was invalid. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHOUDHURY *Cal.* 540

Mutwalli.

SEE Muhammadan Law 131, 323

N.-W. F. P. Agriculturists Debtors' Relief Act (IV of 1939), s. 2, Proviso (1)—*House or shop property mortgaged—Proviso, if contemplates that equity of redemption should not be worth more than Rs.* 500.

The Proviso (1) to s. 2, N.-W. F. P. Agri. Debtors' Relief Act, does not contemplate that in a case of morgaged property the equity of redemption should not be worth more than Rs. 500. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500. HABIB GUL JAN GUL *v.* GOPI CHAND SINGH JAWAHAR MAL *Pesh.* 560

N.-W. F. P. Muslim Personal Law (Shariat) Application Act (VI of 1935), s 2—*Reversioners' suit for declaration that alienation by woman holding life estate is not binding on them, is not maintainable after the passing of the Act.*

In all suits instituted after the passing of the N.-W. F. P. Muslim Personal Law (Shariat) Application Act the Courts must determine the rights of the parties under Muhammadan Law and not according to custom. A reversioner is unknown to Muhammadan Law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate. His right under custom is based on a *spes successionis*, which is also unknown to Muhammadan Law.

Consequently, after the passing of the aforesaid Act, the reversioners have no *locus standi* to sue for declaration that alienation by woman holding life estate is not binding on them. AMIR FAHIM *v.* AJUN IASA *Pesh.* 480

Negotiable Instruments Act (XXVI of 1881), s 118—*Presumption under— Promissory note—Distinction, if can be drawn between admission and proof of execution—Execution held proved and presumption under s.* 118 *applied.*

Section 118 of the Negotiable Instruments Act provides that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration. No distinction is drawn in that section between admission of execution and proof of execution, and it is immaterial whether execution is admitted or is proved. In either case the presumption can be made.

Negotiable Instruments Act—concld.

Where the suit was between the sons of the parties to the promissory note and the defence was based on ignorance of the execution and not on any definite knowledge that the promissory note had not been executed by the father of the defendants who were minors represented by their real uncle and one of the plaintiff's witnesses deposed that he knew the handwriting and signature of the executant and that the note was executed by the defendant's father and although the defendants could have produced evidence to disprove execution of the promissory note they did not do so:

Held, that the Court was justified in the circumstances to hold that the evidence of the plaintiff's witness was sufficient to prove the execution of the document, and the presumption provided by s. 118 of the Negotiable Instruments Act, therefore, applied. RISHI KESH *v.* BRIJ MOHAN LAL *Oudh* 863

New plea. SEE Practice 451

Oaths Act (X of 1873), s. 11—*Scope— Section relates to proceedings in which evidence was given and not to all possible proceedings — Evidence on special oath in proceeding under O. XXI, r. 100, Civil Procedure Code whether conclusive proof in suit under r. 103.*

Primary meaning of s. 11, Oaths Act must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil P. C., itself shows that there is an essential difference between the two. The claim proceeding is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider. Therefore any evidence given under the special provisions of the Oaths Act in a proceeding under r. 100, O. XXI, cannot be conclusive proof in any suit under r. 103. M. R. RANGANATHA AIYAR *v.* JAYAVELU MUDALIAR *Mad* 591

Official Trustees Act (II of 1913), s. 6 or 7 (1) (a). SEE Government of Burma Act, 1935, s. 124 (1) 61

Oudh Civil Rules, Vol. I, Paras. 53, 54, 55—*—Document filed and admitted—Should not be returned before conclusion of case.*

A document filed and duly admitted should not be returned to the party before the conclusion of the case. SHEORAJ *v.* GANGA PRASAD *Oudh* 675

Oudh Rent Act XXII of 1886), s. 19-A. SEE Oudh Rent Act, 1886, s. 19 150

——— **ss. 19, 19 A**—*Remission of revenue, when entitles tenants to get remission of rent.*

Mere remission of revenue does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered. DAYA SHANKAR *v* BADRI PRASAD *Oudh* 150

Pakka adatya. SEE Contract 779

Partition. SEE Hindu Law 571

———*Decree directing member to pay certain sum as his share of marriage expenses of his sisters— Absence of notice of marriage, whether ground to refuse such payment.*

According to a decree in a partition suit a member of the family was required to pay a certain sum towards his share of the marriage expenses of each of his sisters. The member objected to pay the amount due under the decree because he was not given notice of the marriage:

Held, that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure. CHADALAVADA ANAND ARAMAYYA *v.* CHADALAVADA SUBBAIYA *Mad.* 112

Partnership Act (IX of 1932), ss 2 (b), 4, 69—*Solitary transaction of money-lending by some persons jointly—Persons, if become partners in firm—Their registration under s. 69, if essential.*

Section 2, cl. (*b*) read with s. 4, Partnership Act is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in s. 8 presumes the existence of a partnership as defined in s. 4 and therefore *a fortiori* the existence of a business mentioned in s. 2, cl. (*b*). A solitary transaction in which persons have jointly lent money even though entered into by more than one person would not make those persons partners in a firm so that their registration should be necessary under s 69, Partnership Act. KARAM DIN NAWAB DIN *v.* ANANT RAM LALA HUKUM CHAND DHAL *Pesh.* 51

——— **s. 4**—*Single transaction or venture—Whether business*

A single transaction or venture does not amount to business and consequently it does not come under "business" as mentioned in s. 4, Partnership Act. NATHI LAL *v.* SRI MAL *All.* 772

——— **s. 69.** SEE Partnership Act, 1932, s. 2 (*b*) 51

Patna High Court Rules, Chap. III, rr. 3, 13, 16 Chap. XIII, r. 10—*"Affidavit", meaning of—Petitioner verifying statements in petition by solemn affirmation—Person verifying petition must appear before Commissioner for oaths to verify it—O. VI, r. 15, Civil Procedure Code (Act V of 1908), if applies to applications to High Court.*

The word "affidavit" is comprehensive enough to include both statements sworn to and affirmed and although a distinction is drawn in r. 3 of the Patna High Court Rules between the verification of a petition by solemn affirmation and its verification by an affidavit, there are several rules in Chap. III which show that where the facts stated in a petition are verified by the solemn affirmation of the petitioner the procedure should be the same as when they are verified by an affidavit and it is obvious from rr. 13 and 16 that the person verifying the petition must appear before the Commissioner for Oaths to verify it. There is nothing in Chap. III or any other Chapter of the Rules to show that O. VI, r. 15, Civil P. C., has been made applicable to applications filed in the High Court. RADHAKRISHNA DAS *v.* HARI NAIK *Pat.* 12

——— **Chap. XIII, r. 10**—*Petition verified by petitioner himself, if requires court-fee under r. 10, Chap. XIII—Recasting of rules suggested.*

The rules of the High Court ought to be recast in plainer language and if in fact it is intended that a petition which is verified by the petitioner himself does not require a court-fee under r. 10 of Chap. XIII it must be said so in clear language. RADHAKRISHNA DAS *v.* HARI NAIK *Pat.* 12

Penal Code (Act XLV of 1860), s. 21 (10). See Criminal Procedure Code, 1898, s. 197 358

——— s. 34 —*Common intention—Necessity for—Proof of—Constructive liability under s* 34.

It is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. In order to make a person constructively liable with the aid of s. 34, I. P. C., for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under s. 34, I. P. C., for murder, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved, he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common. Emperor *v.* Mujjaffar Sheikh *Cal.* 302

——— s. 84—*Insanity—For applicability of s.* 84 *what is to be seen is whether accused knew that what he was doing was either wrong or contrary to law.*

For the application of s 84, I. P. C., what is to be seen is not only whether the accused knew the nature of his act, but whether he knew what he was doing was either wrong or contrary to law. The law will punish a man for doing something which he knows to be contrary to the law whatever his private opinion may be regarding its ethics. Again if an act is contrary to law ignorance of the law will not protect a man from punishment when it is shown that the man knew that what he was doing was wrong. Geron Ali *v.* Emperor *Cal.* 282

——— ss. 84, 302—*Accused killing two persons including his own daughter considering that he was doing meritorious deed qualifying him for heaven—Accused held protected by s.* 84.

The accused was a disciple of the Pir and called him father and the Pirani mother. The Pir said to him, "Take the head of those who dissuade you and come to your doors." At this time the Pirani, said to him that he would go to heaven if he offered a human head in sacrific, on that day which was an auspicious day being the first day of *Ramzan*. The accused cut off the heads of two persons including that of his own infant daughter and offered the same to the Pir and said: "Father, you asked me for one human head, I present you with two." The evidence showed that he considered that he was doing a meritorious act which qualified him for heaven;

Held, that the accused did not know that what he was doing was wrong or contrary to law and he was therefore, entitled to the protection of s. 84, I. P. C. Geron Ali v. Emperor *Cal.* 282

——— ss. 97, 99—*Accused going to certain house to commit offence fully prepared by arming himself with dagger, in case of eventuality—Accused discovered and apprehended—Accused killing deceased —Held there was no right of private defence and that offence was murder.*

M had gone to the house of *A* and his son *G* with the intention of committing an offence. *M* knew that the men of the family might discover him, and *M* went prepared for this eventuality. *M* went armed to this adventure with every intention of using his dagger if discovered. He was discovered and was pursued by *A* and *G*. *A* was killed by *M* and when *A's* son *G* tried to catch hold of *M* he was also killed:

Held, that when *M* had killed *A* the right of arrest at that moment would arise. When *G* was exercising that right, no right of self-defence would arise to *M* so as to justify his killing *G*. The killing of *G* therefore amounted to murder

Held, also that since *M* had gone prepared for any eventuality by arming himself, he could not be said to have right of private defence. Mohammad Khan Abbas Khan *v* Emperor *Lah.* 198

——— ss. 97, 102, 302—*Accused during altercation disarming deceased and stabbing him to death —No right of private defence can be claimed—Offence held murder.*

There was an altercation between the accused and the deceased who was armed with hatchet. The accused first wrested the hatchet from the hands of the deceased and then stabbed him to death while the other accused held the deceased:

Held, that the accused were not acting in the exercise of the right of private defence but were guilty of murder. Emperor *v.* Ashraf-ud Din *Lah.* 594

——— s. 99. See Penal Code, 1860, s. 97 198

——— s. 124— *Scope—Defamation of Government —Duty of Court—Speech held seditious—Sedition.*

The provisions of s. 124-A, I. P. C., are very wide and in strict law they would cover everything that amounts to defamation of the Govt. excluding any criticism in good faith of any particular measures or acts of administration. If the Govt. comes into Court and asks for a decision from a Judge or a Magistrate whether particular conduct is or is not within the terms of s. 124-A, the Court must express a perfectly fair opinion as between the parties apart from its own ideas of political expediency and the terms of s. 124-A are so wide that much that may generally be regarded as justifiable speech would come within its terms.

A speech suggesting generally that the Govt. established by law in British India was thoroughly dishonest and unfair and that steps should be taken either by violence or by threat of violence to abolish it comes within the provisions of s. 124-A. Parmanand *v.* Emperor *All.* 710

——— s. 149. See Penal Code, 1860, s. 302 666

——— s. 149—*S.* 149, *applicability.*

Section 149, I. P. C., cannot come into operation unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons. Emperor *v* Mujjaffar Sheikh *Cal.* 302

——— ss. 153 A, 295-A—*Book containing passages promoting enmity between classes — Intention of author, how to be judged—Preface of book, if guide.*

In a prosecution under s. 153-A, I. P. C., for publishing a book containing passages promoting enmity between different classes the preface can be no guide with regard to the intention of an accused person. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to produce. Shib Sharma *v.* Emperor *Oudh* 516

——— ss. 153-A, 295-A—*Rediculing Prophet of Muhammadans is offence under s.* 153-A.

A Hindu who ridicules Prophet of the Muham-

Penal Code—contd.

madans not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Muhammadans, promotes feelings of enmity and hatred between Hindus and Muhammadans and is guilty under s. 153-A, I. P. C. SHIB SHARMA v. EMPEROR *Oudh* 516

——— s. 193. SEE Criminal Procedure Code, 1898, s. 476 569

——— s. 201. SEE Penal Code, 1860, s. 300 814

——— s. 220—*Magistrate usurping jurisdiction—His duty—Whether mere irregularity.*

Where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a First Class Magistrate, however proper be his motives, should not himself remove that case, as it were from its proper Court, the Court of Session, and try it himself by merely altering the numbers of the sections, for, after all the numbers of the sections are mere lables, and what is to be looked at is the allegation of the facts. Where serious offences, such as one under s. 220 against the Sub-Inspector, are to be tried, it is desirable from all points of view, from the point of view of the public, from the point of view of the Police force, from the point of view of the officer concerned, from the point of view of justice, that these most serious cases, and they are most serious cases, should, so far as the law permits, be committed to the Court of Session even if a First Class Magistrate had power to try them.

The Magistrate has no jurisdiction to try an offence under s. 220. It is not a case of irregularity such as is referred to in s. 531, Criminal P. C, but is an illegality comparable to those irregularities under s, 530, Criminal P. C., which make proceedings void. MANSHARAM GIANCHAND v. EMPEROR *Sind* 454

——— ss. 220, 347, 342—*"Corruptly and maliciously" in s. 220 covers confinement for extortion under s. 347—Police Sub-Inspector wrongfully confining person on charge of gambling and extorting money from them by putting them under fear of prosecution—Offence falls under s. 220 and not under s. 347 or 342—It is triable by Court of Session.*

The words "corruptly and maliciously" in s. 220, I. P. C, are wide enough to cover confinement for the purpose of extortion. Where a Police Sub-Inspector wrongfully confines certain persons on charges of gambling in futures and extorts money from them by putting them in fear of being challaned in Court upon offences which he knew to be false, the offence falls under s. 220 and not s. 347 or s. 342 and is triable only by Court of Session. MANSHARAM GIANCHAND v. EMPEROR *Sind* 454

——— ss. 220, 348—*Conviction of accused under s. 220 and confederate under s. 384 read with s. 114, Penal Code—High Court quashing proceedings and committing case to Sessions Court—Proceedings against confederate, if should be ordered to be dropped merely because he has served part of sentence—Proper procedure.*

Where the Magistrate by usurping jurisdiction convicts an accused for an offence falling under s. 220, I. P. C., and his confederate under s. 348 read with s. 114, I. P. C, the High Court while quashing the proceedings and committing the case to the Court of Session, cannot order that no further proceedings be taken against the confederate merely because he has served a part of his sentence. It is in the interests of all concerned that the confederate and the accused should be tried together for offences which are all part of the same transaction. MANSJARAM GIANCHAND v. EMPEROR *Sind* 454

——— s. 295-A. SEE Penal Code, 1860, s. 153 516

——— s. 295-A—*Book published before enactment of s. 295-A—New edition published subsequent to its enactment—Author, if can be convicted under s. 295-A.*

Where a new edition of a book published before enactment of s. 295-A, I P. C., is published after its enactment, its author can be convicted under that section when his connection with the publisher is proved. SHIB SHARMA v EMPEROR *Oudh* 516

——— ss. 297, 441—*S. 297, whether to be interpreted by reference to s. 441—Meaning and scope of "trespass" in s. 297—S. 297, if limited to religious feelings—Feelings contemplated by it are limited by reference to place of worship on sepulture—Whether refers to intention only—Accused held committed trespass.*

Section 297, I. P. C, fully deals with offences to which it refers and is self-contained and requires interpretation by no reference to s. 441, I. P. C. The word "trespass" in s. 297, I. P. C., means any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Section 297, I. P. C., does not refer to "religious feelings," though the kind of feelings, which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. That s. 297, is not limited to feelings of a religious nature is clear by the fact that in s. 298, which follows it, "religious feelings" are expressly referred to. Section 297, does not refer only to "intention". It refers also to trespass which is likely to wound the feelings.

The complainant erected stones in memory over his dead daughter and two children, over their ashes in the cremation ground. The complainant's son-in law, eleven years after the death of his wife as a result of a dispute about money matters with the complainant went to the cremation ground and deleted the name of the complainant from all the stones on the ground that they were erected out of money provided by him:

Held, that on the evidence and circumstances of the case the accused's (son-in-law's) trespass was committed with something more than knowledge; it was committed with intent to wound the feelings of the complainant. It was done in a spirit of spite and vinditiveness, and it was by injuring the complainant's feelings that the accused's feelings of spite and vindictiveness had to be satisfied. This was not a case where the feelings which were wounded were merely worldly feelings of vanity and pride. The fact that the stones were erected out of the money provided by the accused did not give him the right to enter the cremation ground and delete the name of the complainant therfrom. SANOO MANAJI v. EMPEROR *Sind* 616

——— ss. 300, 201,—*First accused found guilty—Accused No. 2 meeting first accused on evening of day of murder and knowing where certain articles belonging to deceased which she carried with her on the*

evening of murder were to be found—Facts, if sufficient to warrant conviction of accused No. 2 either under s. 300 or s. 201.

Where an accused is found guilty of the offence of murder, the facts that 2nd accused met the first on the evening of the date of murder and knew the place where certain articles belonging to the deceased which she had carried with her on that fateful evening were to be found, lead to grave suspicion against accused No. 2 but are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. ABDUL BASHA SAHIB, *In re* *Mad.* 814

——— s. 302.

SEE Penal Code, 1860, s. 84 282

SEE Penal Code, 1860, ss. 97, 102 594

——— s. 302—*Murder—Circumstantial evidence.*

The case against two accused rested on circumstantial evidence which was not such as to leave one no alternative but to hold that they were guilty. There was no evidence to show that both of them killed the deceased or that both had the intention to kill him:

Held, that neither could be found guilty of murder. EMPEROR *v.* MUSJAFFAR SHEIKH *Cal.* 302

——— s. 302—*Provocation—Woman of low caste importuniting accused to instal her as his permanent mistress—Whether provocation, justifying awarding lesser sentence.*

A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion amounting to importunity—that he should instal her as a permanent mistress, which would result in heavy caste penalties. Then if on her insistence he loses control and gives a *lathi* blow on her head causing her immediate death, the accused is entitled to a lesser penalty and not that of death. BHAROSA *v.* EMPEROR *Nag.* 6

——— ss. 302, 149—*Number of persons participating in beating man with intention to kill him—Man dying—Man responsible for fatal blow unknown—All, if guilty of murder—Body of six persons with common object to abduct and murder going to house of deceased and separating into two bodies, one for abducting and another for murdering—Murder committed by latter body—Each body held guilty of murder.*

Where persons have been found guilty of deliberate intention to murder, there is no justification for refraining from passing the death sentence on all concerned merely because it cannot be said which of the accused struck the fatal blow.

A body of six persons went to the house of the deceased with the common object of abducting a woman and murdering the deceased. On their arrival they separated into two bodies, one entrusted to abduct and another to murder. The murder was committed by the latter body:

Held, that each gang was guilty of murder under s. 302, I. P. C., as the murder was committed in pursuance of the common object of the unlawful assembly. EMPEROR *v.* RAMJI LAL BUDHA *Lah.* 666

——— ss. 302, 318—*Prosecution seeking to prove offence under both s. 302 and s. 318—Charge should be framed under two heads—Accused found guilty under both charges—Conviction under both charges and not in alternative.*

A conviction in the alternative should be made where on the facts proved it is not certain under which section the offence falls. Where the prosecution set out to prove both that the accused had murdered her child (s. 302, I. P. C.) and had also secretly disposed of the body by throwing it into a well (s. 318, I. P. C.,) the charges should be framed under two heads and not in the alternative and where the accused is found guilty of both offences she should be convicted under both the sections and not in the alternative. HUSSAN PARI *v.* EMPEROR *Pesh.* 284

——— ss. 302, 404—*Accused in murder case charged with misappropriation of deceased's articles—Procedure, if good.*

In a case of murder, it is not a desirable procedure to charge the accused under s. 404 for misappropriating the articles of the deceased. SINGAMPILLI YERRANNA, *In re* *Mad.* 465

——— s. 304-A—*Heavy traffic—Road invisible due to dust raised—Duty of motor car driver pointed out—Rash and negligent driving*

When there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, it is the duty of all motorists under these conditions to stop the car. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood, particularly when the driver continues driving the car and manages to get on the wrong side of the road blocking the right of way of a car in the act of proceeding in the opposite direction and the act of driving amounts to undoubtedly a rash and negligent act. EMPEROR *v.* ABDUL QAYYUM *Lah.* 766

——— s 318. SEE Penal Code, 1860, s. 302 284

——— s. 332—*Ingredients of offence under—Constable assaulted while attempting to arrest accused without warrant or authority to do so—No offence under s. 332—No allegation by constable that he proceeded under s. 54 (1), Criminal Procedure Code (Act V of 1898)—S. 54 (1), Criminal Procedure Code does not apply.*

In order to bring the case within the purview of s. 332, I. P. C., it is necessary to establish that the public servant was acting at the time of the assault as such public servant and in the particular matter discharging a duty imposed upon him as such public servant. A constable who had no warrant of arrest in his possession at the time of the assault, nor had he been entrusted with the duty of arresting the accused, cannot be said to have been acting in the discharge of his duty if he intended or wanted to arrest the accused. Where there is no allegation by the constable in his deposition that he proceeded under s. 54 (1), Criminal P. C., s. 54 (1), Criminal P. C., does not apply. RAGHUBAR *v.* EMPEROR *Oudh* 887

——— s. 342. SEE Penal, Code 1860, s. 347 454

——— s. 347. SEE Penal, Code 1860, s. 220 454

——— ss. 347, 342—*S. 347 includes offence under s. 342.*

The offence under s. 342, I. P. C., is included in the offence under s. 347. MANSHARAM GIANCHAND *v.* EMPEROR *Sind* 454

——— s. 352. SEE Penal Code, 1860, s 383 241

——— ss. 383, 352, 324—*Extortion—What prosecution must prove—Accused assaulting victim and forcibly taking his thumb impression on blank paper—Offence, nature of—Whether amounts to extortion or robbery—Hurt with* bhala—*Fact that accused is student, if mitigation of offence.*

The definition of 'extortion' in s. 38, I. P. C. makes it necessary for the prosecution to prove that the victims were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing

Penal Code—contd.

their thumb impressions. The forcible taking of the victim's thumb impressions on blank piece of paper which can be converted into a valuable security does not necessarily involve inducing the victim to deliver papers with the thumb impressions. Hence, where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than the use of criminal force or an assault punishable under s. 352, I. P. C. Nor does the offence amount to robbery in the absence of proof that the papers were taken from the victim's possession.

The fact that the accused is a student, is no mitigation of the offence of causing hurt with a *bhala*. JADUNANDAN SINGH *v.* EMPEROR *Pat.* 241

——— ss. 383, 385 347, 342—*Extortion includes offence under s.* 385.

Extortion as defined in s. 383, I. P. C., includes putting any person in fear of injury and covers s. 385, I. P. C, which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under s. 384. MANSARAM GIANCHAND *v.* EMPEROR *Sind* 454

——— s. 404. SEE Penal Code, 1860, s. 302 465

——— s. 441. SEE Penal Code, 1860, s. 297 616

——— s. 467—*Prosecution under—Complaint of Court, if necessary.*

A complaint of the Court is not necessary for prosecuting the accused who were not parties to proceedings under Legal Practitioners' Act, for an offence under s 467 of the I. P. C. GURUSWAMI CHETTIAR, *In re* *Mad.* 322

——— ss. 482, 486—*Order as to costs or confiscation of goods, if can be passed of by High Court in revision.*

In cases of a prosecution for infringement of a trade mark the High Court will not pass any order in revision in respect of costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in Civil Court. ROSHAN SINGH *v.* EMPEROR *All.* 189

——— ss. 482, 486—*Trade mark—Infringement—Ingredients of ss.* 482 *and* 486, *stated—What prosecution must prove — False and counterfeit trade mark, distinction — Accused, if can be convicted under both ss.* 486 *and* 482—*Accused held not guilty under s.* 486 *but only under s.* 482.

To establish the charge under s 482, I. P. C, it is necessary to prove that the accused's article is marked in a manner reasonably calculated to be believed that they are the marks of the article manufactured by the complainant. An accused would render himself liable to conviction under s. 482 if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under s. 486 is the sale or exposing or possessing for sale, goods or things with a counterfeit trade mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section it will be necessary that goods should be sold or be possessed or exposed for sale. Therefore, it is perfectly legal to sustain the conviction under both sections provided that the mark on the goods of the accused is a false trade mark and also a counterfeit trade mark. The distinction between false trade mark and counterfeit trade mark is somewhat subtle. It depends on the degree of resemblance between the false and genuine trade marks.

Penal Code—concld.

Held, that the accused could not be convicted under s. 486 as it could not be said that the No 301 used by the accused as trade mark upon his goods was a counterfeit of No. 501 the registered mark of the complainant; nor could it be said that words "India" were a counterfeit of "tomco". The accused however could be convicted under s 482 as the accused's goods were a colourable imitation of the complainant's goods. ROSHAN SINGH *v.* EMPEROR *All.* 189

——— ss. 482, 486—*Trade mark—Infringement—What prosecution must prove.*

In the case of an infringement of a trade mark the prosecution must prove that the trade mark on the accused's goods is likely to deceive a purchaser who is acquainted with the complainant's "get-up" but who trusts to his memory. Mere differences in detail do not prevent the two designs being essentially the same. What degree of resemblance is necessary is a matter incapable of definition *a priori*. ROSHAN SINGH *v* EMPEROR *All.* 189

Pension. SEE Master and Servant 384

Perjury. SEE Criminal Procedure Code, 1893, s. 475 569

Personation. SEE Calcutta Municipal Act, 1923, Sch II, Part I 752

Pleadings SEE Practice 186

——— *Amendment—Defective verification.*

Where the verification of the plaint is defective amendment should be allowed if the defect is a mere irregularity and has prejudiced nobody. MITULAL SINGHANIA *v.* PURSOTOME DEBI BAGLA *Cal.* 193

——— *Amendment—Suit to set aside revenue sale—Amendment of plaint at stage of second appeal to the effect that ss* 55 *and* 56, *Lower Burma Land and Revenue Act (II of* 1876), *are* ultra vires, *cannot be allowed.*

In a suit to set aside a sale held by Township Officer in Lower Burma, the plaintiff cannot be allowed to amend his plaint at the stage of second appeal, to the effect that parts of ss. 55 and 56, Lower Burma Land and Revenue Act are *ultra vires*. AH TWE *v.* MA MAI SEIN *Rang.* 372 F B

Practice—*Case raised in plaint—No denial in written statement—Question not agitated in trial Court—Appellate Court, if can consider and decide it.*

Where the case was clearly made out in the plaint that defendant had failed to deposit the balance of the purchase money and there was no denial of the assertion in the written statement the facts necessary to be established must be taken to be admitted facts. Consequently the lower Appellate Court would be justified in considering the question and giving a decision thereon even though the question had not been agitated in the Court of first instance. ANNAPURNA DASI *v.* BAZALE KARIM FAZLEY MOULA *Cal.* 390

——— Evidence. SEE U. P. Municipalities Act, 1916, s. 189 121

——— *High Court—Full Bench when satisfied that view previously taken in High Court about law of limitation is wrong, can declare correct law especially when its effect is to enlarge period.*

If on a consideration of the decisions on the point in question the High Court is satisfied that the view previously taken is the wrong view, there is no reason why it should not accept and declare what is the correct view; more particularly is this the case where the effect is not to deprive persons who have lent money under a bond, of an extended period of limitation to which formerly they had been held

Practice—concld.

entitled but rather to enlarge the period of limitation, by doing which there can be no deprivation of rights. RAGHUNANDAN TEWARI *v.* SHEORAJI *Oudh* 481 F B

———*Issues—Joint family business—Transactions by manager challenged—Issue to be framed stated.*

In a case challenging transactions relating to joint Hindu family business in which the existence of a joint Hindu family is denied, that, of course, is a distinct issue. Where that is not disputed, the general issues which arise are these:—(1) Whether the business was 'ancestral'. (2) If the business was not 'ancestral' then whether it was a 'family' business at all or whether it was merely an 'individual' business. If it was merely an 'individual' business no question of 'need' or 'benefit' can arise. (3) If the business was not 'ancestral', but was a 'family' business, then: (*a*) Was there any 'actual' benefit or 'actual' need. If no 'actual' benefit is proved, then (*b*) whether the business was the 'mainstay' of the family; and (*c*) whether the mortgagee advanced the money in the *bona fide* belief that it was borrowed for the purpose of the 'need' of the business or for the purpose of the 'benefit of the estate or family', and (*d*) whether such belief, if any, was the result of *bona fide* inquiries which were reasonable and sufficient in the circumstances of the particular case. LACHHMI PRASAD *v.* BAIJNATH RAM *All.* 571

———*New plea—Important question of law, if can be taken for first time in second appeal.*

A point which was not directly raised in either of the Courts below but which involves an important question of law, can be raised in second appeal. TAMIZALI *v.* MD. NASARALI BHUIYA *Cal.* 451

———*Pleadings—Technicalities should not be insisted—Legal effect of facts stated by both sides should be determined.*

Too much insistence should not be laid on the technicalities of pleadings. If the facts on both sides are stated with sufficient correctness and precision, the legal effects which flow from them are a matter for determination by the Court which conducts the trial or hears any subsequent appeal. JALAL DIN *v.* NAWAB *Lah.* 186

———*Precedent—Applicability of equitable principles—English authorities can be looked to.*

A High Court is entitled to apply principles of justice, equity and good conscience and to look for such principles to English authorities. KALYAN DAS *v.* BRIJ KISHORE *All* 495

———*Precedents—Text books—Notes in, on a case—Reliability.*

It is sometimes dangerous to accept as accurate the notes appearing in text-books. It is always safer to refer to the decision itself on which the note is based. EMPEROR *v.* MUJJAFFAR SHEIKH *Cal.* 302

———*Subsequent events—Cause of action incomplete—If can be completed by anything arising after action.*

Nothing arising after action is brought, can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit. U BA MAUNG *v.* U CHIT HLAING *Rang.* 234

———*Withdrawal of application—Courts' duty.*

The Court cannot take away the right of a party to withdraw any application made by him on which no orders had been made at the time. MIDNAPORE ZAMINDARY CO. LTD. *v.* BIJOY SINGH DUDHURIA *Cal.* 578

Precedent. SEE Practice 495

———*Parties consenting not to canvass particular legal question—Decision in suit, if binding on inferior Courts as to answer to that question.*

Where by consent, parties to a suit do not canvass a particular legal question, the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that question is. MA KYIN SEIN *v.* MAUNG KYIN HTAIK *Rang.* 507

Pre-emption. SEE Custom (Assam) 82

———*Jurisdiction—Appeal—Pre-emption decree on payment of price and compensation for improvement—Appellate forum must be determined on basis of price.*

The value of a pre-emption suit which is decreed on payment of price and compensation for improvement, does not include the amount of compensation for improvement for purposes of appeal. The appellate forum must be determined on the basis of price made payable. AZIMULLAH JAN *v.* ABDUL HAKIM *Pesh.* 385

Presidency Small Cause Courts (Act IX of 1887), ss. 43, 46. SEE Landlord and Tenant 251

Presidency Towns Insolvency Act (III of 1909), s. 13—*Court must consider whether petitioning creditor has good debt—Mere existence of decree, if sufficient—Court, whether estopped from disputing decree.*

In insolvency the question which arises is not merely one between the petitioning-creditor and the judgment-debtor. The rights of other creditors of the judgment-debtor have to be considered. If an order of adjudication is made, the rights of those creditors to recover payment independently of their own debts are taken away. Therefore, the Court must consider whether the petitioning creditor in fact has a good debt, and it is not bound by any decree as between the creditor and the debtor. The debtor may be estopped from disputing the decree, but the Insolvency Court is not estopped; the Court must be satisfied about the validity of the debt in the interests of the other creditors. JETHMAL NARANDAS *v.* MAHADEO ANANDJI DHORIA *Bom.* 54

——— **s. 39 (2), cls. (a), (d) and (e)**—*Case falling under—Court's order should be one suspending discharge for specific time.*

The object of the order of the discharge is to enable a person to recommence with a clean slate, and it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that the man who has brought himself within the ambit of the Insolvency Act, should as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. Consequently, in a case falling under s. 39 (2), cls. (*a*), (*d*) and (*e*), Presidency Towns Insolvency Act, Court's order should be an order, suspending the discharge for a specific time. M. DO CARMO LOBO *v.* OFFICIAL ASSIGNEE *Rang.* 764

——— **ss. 108, 53**—*Construction—Proceedings under s. 103—Attaching creditor, position of—Attachment followed by sale—Attaching creditor, if entitled to proceeds.*

The administration in insolvency of a deceased debtor's estate under s. 108, Presi. Towns Insol Act, must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is

Presidency Towns Insolvency Act—concld.

entitled irrespective of s 53, to the money or so much of it as is necessary to meet his claim. D. D. JITALIA *v.* OFFICIAL ASSIGNEE *Mad.* 460

Presumption. SEE Grant 220

Principal and agent. SEE Conversion 356

——— *Suit against agent for accounts—Agent residing elsewhere—Cause of action, if arises where principal resides.*

The principle that the debtor is bound to seek out his creditor and pay his debt is not applicable in India for the purpose of determining the local jurisdiction of a particular Court. Even assuming that this English rule either in terms or by analogy could be applied in this country, it cannot be extended to a case, where the contract itself is not one of loan but one of agency. Where, therefore, a principal sues the agent for accounts it cannot be said that the cause of action arises at the place where principal resides. KOKA AUDINARAYANA RAO NAIDU *v.* BHAVARAJU LAKSHMINAYANA RAO *Mad* 81

Principal and Surety. SEE Contract Act, 1872, s. 60 206

——— *Contract of guarantee — Held, surety's liability was co-extensive with that of principal.*

A contract of guarantee entered into by a surety was in these terms: "If you supply any goods to the firm on credit or on *hundi* and are unable to realize the price thereof from the firm, I and my property will be responsible for that amount":

Held, that it was impossible to read into those words any condition that it was only if all remedies failed against the principal debtor that his liability would come into operation. That the liability of the surety was co-extensive with that of the principal debtor as in an ordinary contract of guarantee. KUCKREJA LTD. *v.* SAID ALAM *Lah.* 206

Private defence. SEE Penal Code, 1860, s 97 594

——— Right of. SEE Penal Code, 1860, s. 97 198

Professional misconduct. SEE Legal Practitioner 861

Provident Funds Rules, r. 17, Note 1—*Hindu wife obtaining decree for separate maintenance from husband, whether judicially separated from husband—Depositor's death—Proceedings to recover provident fund — Parties, if should obtain succession certificate.*

Main purpose of the Provident Fund Rules is to preserve for the members of the depositor's family the right to receive his provident fund, and the framers of the rules did not intend to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and there is no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should for any purpose be considered as outside the list of these who are entitled to benefit under the rules.

The parties to a proceeding to recover provident fund after depositor's death are under no liability to obtain any succession certificate; the amount vests in them upon the death of the depositor. SUBBADRAMMAL *v.* KANNAMMAL *Mad.* 329

Provincial Insolvency Act (V of 1920), s. 4—*Interpretation—Official Receiver party to civil proceedings as representative of estate—Decision against him—Decision, whether can be re-opened by application under s. 4—Proper remedy.*

It is left to the discretion of the Court to entertain a petition under s 4, Prov. Insol. Act. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under s 4. The procedure under s. 4 is only a substitute for a regular suit. The prior judgments against an insolvent are liable to be re-opened in the Insolvency Court at the instance of the Official Receiver only in cases in which before insolvency, judgments were obtained against debtor and they are sought to be re-opened on the daughter's adjudication to see whether they were binding on the Official Receiver as representing the general body of creditors. But where the Official Receiver is a party to a proceeding in his capacity as the representative of the estate, he is not entitled to re-open an adverse decision in an application under s. 4. His remedy is only to appeal as any other party to the proceeding against the order of the Civil Court if he is dissatisfied with it. P. S. AR. AR. ARUNACHALAM CHETTIAR *v.* OFFICIAL RECEIVER, COIMBATORE *Mad.* 138

——— s. 6 (e)—*Sale of debtor's property in execution of decree for rent, if act of insolvency.*

Sale of property which is vested in the debtor and is in his physical possession, in execution of decree for arrears of rent under Mad. Estates Land Act, operates as an act of insolvency under s. 6 (*e*), Prov. Insol. Act. MAYANDI VENKATESA MUDALI *v.* KONNE DESAPPA MUDALI *Mad.* 787

——— ss. 27, 43—*Time originally fixed under s. 27 for application for discharge—If can be extended after its expiry but before order of annulment.*

A Court has jurisdiction to extend the time originally fixed under s. 27 of the Prov. Insol. Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under s. 43 of the Act. S. HASAN ABBAS ALI KHAN PEARE SAHEB *v.* ABDUL RAHMAN *Oudh* 776

——— s. 28 (5)—*Transaction and deeds held created trust entitling beneficiary to priority.*

Under an oral will of his brother, one *K* an insolvent held a sum of Rs. 11,000 which his brother had instructed him to pay to his wife *R*. *K* formally handed over the amount of Rs. 11,000 to her for which she passed a receipt, and then she formally handed back Rs. 10,000 out of that amount to *K* to be kept by him as a deposit, and she created the trust deed in respect of the same. It was to bear interest at eight annas per cent. per month. Certain beneficiaries were mentioned in the trust deed, the principal one being *R* herself for the amount of Rs. 8,000 from the income of which she was to be maintained during her life-time. With regard to the balance of Rs. 2,000 she was to be given it in two instalments if she wanted to go on pilgrimage, and after her death the corpus was to be distributed to certain temples. It was further provided that the majority of the trustees, of whom *K* was one, was empowered to invest the trust moneys either in authorized securities or with several reputed merchants. That the trust deed was written on October 14, but its actual execution was on October 20. On the latter date *K* stated in the receipt of the amount passed by him to *R* that he had received the amount of Rs. 10,000 by way of deposit for which he was to pay

interest at eight annas per cent. per month, and he further stated that according to her husband's directions *R* was to make a trust deed in respect of the said amount, that he was to be one of the trustees, that as stated in the trust deed the amount was to be dealt with according to the opinion of the majority of the trustees and that he was bound to pay the amount on demand by them :

Held, that the deposit and the trust were parts of one and the same transaction and that even though the receipt might have been passed in order of time before the execution of the trust deed, the intention of the parties was to enter into one transaction on that date. It could not be said that *K* was not a trustee when the amount was deposited with him. As a trust had been created, *K* must be deemed to be holding the amount as a trustee, even though it was agreed that he was entitled to invest the trust fund in any security that he liked and pay interest to the beneficiary. The widow *R* was therefore entitled to claim priority under s. 28 (5), Pro. Insol Act. KRISHNADAS GOVARDHANDAS MADIVALE *v.* RATANBAI GOKULDAS LAXMANDAS *Bom.* 718

——— s. 41—*Court considering that discharge should be refused under cl.* (a) *of s.* 41 (2)—*Application of cl.* (b) *or* (c) *or both should be considered.*

If the Judge is of opinion that an absolute discharge should be refused under cl. (*a*), of s. 41 (2), Pro. Insol Act then he should consider the possible application of cls. (*b*) or (*c*), or both, to the case and pass an order accordingly. JIWACHH MAHTHA *v.* BANWARI SAH RAMLAGAN RAM *Pat.* 546

——— ss. 41, 42—*Application for discharge delayed—Petition giving reasons for delay filed—Application admitted and notices for hearing issued—Whether amounts to extending of time and condoning of delay.*

No doubt, even in a case where the application for time had not been filed until after the expiry of the time fixed, it is still open to the Court in a proper case to allow time, provided that the adjudication has never been actually annulled under s. 43. But whether that should or should not be done upon the merits is a question for consideration

An insolvent applied for his discharge beyond the time within which he was directed to so apply, explaining his failure to apply in time. Upon this petition the order passed by the Court was : "Separate petition showing cause of delay filed. Admit the discharge petition. Issue notice to creditors fixing February 19, for hearing." When the matter came up for hearing, the Court refused the final discharge on the ground that the application was time-barred and no sufficient cause was shown for the delay :

Held, that the order of the Court admitting the discharge petition and directing issue of notice for hearing, could not be taken to mean that the time was extended by the Court and the delay condoned. Until the order refusing discharge was passed the question of the sufficiency of the cause for delay had never received judicial consideration from the Court at all, and the order in the order-sheet was a mere routine order placing the whole matter for consideration after notice. JIWACHH MAHTHA *v.* BANWARI SAH RAMLAGAN RAM *Pat.* 546

——— ss 41, 42—*Insolvent directed to apply for discharge within certain time, making delay in applying—If ground for refusing absolute order of discharge.*

Where a person is adjudged insolvent and directed to apply for his discharge within certain time, the delay in so applying is not one of the grounds specified in s. 42, Pro. Insol. Act at all for refusing to grant an absolute order of discharge. It may be a ground for annulling the adjudication. JIWACHH MAHTHA *v.* BANWARI SAH RAMLAGAN RAM *Pat.* 546

——— s. 43. See Madras Local Boards Act, 1920, s. 55 (2) (*b*) 147

——— s. 43—*Insolvency Court specifying period of one year within which to apply for discharge—Order challenged by way of appeal and revision to High Court—High Court's order and not that of Insolvency Court, is final—Limitation for application of discharge runs from such final order.*

The order of the Insolvency Court specifying the period of one year within which an application for discharge was to be made is not a final order when the same was challenged originally by way of an appeal to the District Judge and later by a revision petition to the High Court. In such a case the order passed by the High Court in revision must be deemed in law to be the final order, furnishing the starting point of the limitation for an application of discharge. In this respect no distinction can be drawn between orders and decrees passed under the Civil P. C., and an order passed under the provisions of the Prov. Insol. Act specifying the time within which an insolvent must apply for discharge. S. HASAN ABBAS ALI KHAN *v.* ABDUL RAHMAN *Oudh* 776

——— s. 51 (1) and (3)—*S.* 51 (3), *if restricted to sale in execution of decree — Sub-ss.* (1) *and* (3), *whether refer to same classes of cases.*

Section 51 (3), Prov. Insol. Act, does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the Registrar or the arbitrator under the Mad. Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the Receiver in insolvency. Both ss. 51 (1) and 51 (3) refer to the same classes of cases. GOVADA BALABHARATHI CO-OPERATIVE CREDIT SOCIETY, GOVADA *v.* ALAPATI VENKATAKRISHNAYYA *Mad.* 555

——— s. 53—*Creation of* waqf *by debtor, a day prior to insolvency, in favour of wife and children* —Waqf *held* mala fide.

The deed of transfer purported to be a *waqfnama* executed by the debtor just one day before he applied for insolvency. Although he could retain considerable benefits out of the properties, he divested himself of all the rights therein and conferred them almost wholly on his wife and children.

Held, that the transaction was *mala fide* and without consideration and was liable to be annulled under s. 53, Prov. Insol. Act. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHOUDHURY *Cal.* 540

——— s. 53—*Transfer in pursuance of contract prior to insolvency—Transfer not in terms of contract—Transfer, if voluntary*—Waqf *in pursuance of contract found to be invalid—Transfer can be set aside.*

A transfer which the debtor is bound to make in pursuance of a contract entered into prior to his insolvency petition is voluntary within the meaning of s. 53, Prov. Insol. Act if it is not in terms of the contract. Consequently where a *waqf*, which the debtor was found to create under a contract, is found to be invalid, the transfer is voluntary and is liable to be annulled if it falls within the mis-

chief of s. 53. MAHAMMAD ALI *v.* DINESH CHANDRA ROY CHAUDHURY *Cal.* 540

——— s. 66 (2)—*Allowance under—Discretion of Court—Insolvent claiming expenses in lump sum for his daughter's marriage—Application, if falls under s* 66 (2)—*Proper procedure stated.*

The making of the allowance is left to the discretion of the Court. It is not possible to hold that an application where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of s. 66 (2), Prov. Insol. Act. But under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought Therefore, the proper course for the insolvent to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under s. 66 (2). The claim can certainly not be made as a matter of right. MATTAPALLIAPPA RAO *v.* RAMAMURTHI *Mad.* 521

——— s. 73. SEE Madras Local Boards Act, 1920, s. 55 (2) (*b*) 147

——— s. 78 (2)—*Proof of debt—Meaning and nature of.*

Before a party can claim the benefit of the exclusion enacted by s. 78, Prov. Insol Act, two conditions have to be satisfied. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. Proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the Schedule and none other. Evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by s. 49, his name cannot be entered in the Schedule; and, however, true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not proved the debt in the sense explained above. SAIT SOGMULL LACHIRAM FIRM, TENALI *v.* VALLABHANENI PARANDHAMAYYA *Mad* 705

——— s. 78 (2)—*S.* 78 (2) *incorporates principle of s.* 14, *Limitation Act* (*IX of* 1908).

Section 78 (2), Prov. Insol. Act was intended to incorporate the principle of s. 14, Lim. Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say a failure to prove for the debt, would deprive a party of the benefit of the section. SAIT SOGMULL LACHIRAM FIRM, TENALI *v.* VALLABHANENI PARANDHAMAYYA *Mad.* 705

Provincial Small Cause Courts Act (IX of 1887), s. 25—*Revision, scope*

The revisional powers under s. 25 of the Prov. Small Cause Court should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. ELSIE, C. GRIFFIN EDWARD *v.* WILLIAM AINSLIE CANNON HOWARD *Oudh* 38

——— s. 25—*Revisional powers under, extent of.*

Under s. 25, Prov. Small Cause Courts Act, the High Court has wider powers of interference than those given by s 115, Civil P C., and it will interfere in exercise of that power on grounds similar to those which would justify interference under s. 115, Civil P. C., or, apart from those grounds, when there is reason to think that there has not been a fair trial or that a palpable injustice has been committed or even in the case of a simple error of law if it is a matter of general importance. Section 25 however, cannot, be used in such a way as to give an ordinary right of appeal on points of law. VITHALBHAI MOTIBHAI *v.* NADIAD ELECTRIC SUPPLY CO. LTD. *Bom.* 35

——— s. 35—*New Small Cause Court Judge having no pecuniary jurisdiction to execute decree of predecessor can transfer it to himself on regular side and deal with it as Sub-Judge—He can order attachment in latter capacity.*

Where a new Small Cause Court Judge has no pecuniary jurisdiction to execute the decree passed by his predecessor he can transfer it to himself on the ordinary side and deal with it as a Sub-Judge. Hence an attachment order by him in his latter capacity would be perfectly valid. SOHAN LAL GULAB RAI *v.* FIRM MUHAMMAD DIN MUHAMMAD YUNIS *Pesh.* 712

——— Art. 35 (j)—*Suit for compensation for illegal attachment — Jurisdiction of Small Cause Court to try—Suit held exempted from jurisdiction of Small Cause Court — Property wrongfully attached, damaged while in custody of* supurdar—*Decree-holder held liable for compensation.*

A decree-holder in execution of his decree attached a machine belonging not to the judgment-debtor but to the plaintiff. The plaintiff's objection under O. XXI, r. 58, Civil P. C, was allowed and the machine was ordered to be released and the *supurdar* in whose possession it was, was ordered to hand it over to the plaintiff. When the plaintiff went to see the machine he learnt that many parts were missing, and some were broken, and the machine had become quite useless. The plaintiff brought a suit against the decree-holder stating in the plaint that he suffered a great loss owing to the improper acts of the decree-holder and the *supurdar*, that the machine had become useless, and so he was entitled to recover its price; the plaint further stated that the cause of action arose on the day when his machine was attached, on the day it was ordered to be released and on the day he learnt of the damage caused to it:

Held, that the wrongful act of the decree-holder alleged by the plaintiff could be no other but that he caused his machine to be attached in execution of his decree, and although the plaintiff claimed the price of the machine, yet he had assessed the damages on that amount. The suit was therefore for compensation for illegal attachment and exempted from the jurisdiction of the Small Cause Court.

Held, further that the decree-holder was liable for compensation. His liability arose because he got the plaintiff's property attached, and he was bound to restore it in the condition it was at the time of the attachment. PRITHI NATH *v.* M. H. NOWROJI *Oudh* 654

Provocation. SEE Penal Code, 1860, s. 302 6

Public policy. SEE Contract 112

Punjab Court of Wards Act (II of 1903), s. 13—*Joint proprietor, if can sue Court of Wards for partition of his share in joint property.*

Punjab Court of Wards Act—concld.

The Punjab Court of Wards Act does not expressly bar the right of a joint proprietor to bring a suit for partition of his share in joint property. It may be that the Court of Wards is entitled to take possession of the property of a joint proprietor along with a ward of the Court of Wards; it may be that they can execute leases of such property, but there is nothing in the Act which specifically bars the right of the co-proprietor to bring a suit for partition which is a statutory right conferred on him by the Partition Act and there is no reason either in law or in equity, that the Court of Wards Act contemplated that the joint proprietor should not bring such a suit to partition his share and thereby avoid the need of superintendence of his property by the Court of Wards. QAISAR JAHAN BEGUM *v.* DEPUTY COMMISSIONER, DEHLI PROVINCE *Lah.* 829

——— s. 32—*Modification of order—Awarding additional and future interest.*

Awarding additional and future interest would not amount to modification of the order of the Deputy Commissioner. COURT OF WARDS ESTATE OF MALIK AMIR KHAN *v.* TEHLA RAM *Lah.* 149

Punjab Government Notification No. 29 of July 4, 1888, s. 17 (1) (d). See Registration Act, 1908, s. 17 (1) 786

Punjab Motor Vehicles Rules, rr. 24 (1), 48 and 49. See Motor Vehicles Act, 1914, s. 16 673

Punjab Municipal Act (III of 1911), s. 61—*Only tax actually being levied is saved and not tax that could be levied*

It is the tax that was actually being levied that is saved under s. 61 and not a tax that could be levied under the old Municipal Act. DAULAT RAM *v.* MUNICIPAL COMMITTEE, LAHORE. *Lah.* 72

——— ss. 61, 62 (12)—*Tax on salt—Municipality if can impose it.*

The combined effect of ss. 100, 140, sub-s. (1) and the Federal Legislative List Item No. 47 is that salt is a matter which is within the jurisdiction of the Federal Legislature alone and cannot therefore by virtue of sub-s. (1) of s. 100 be dealt with in any manner by a Provincial Legislature. Consequently, a Municipal Committee cannot legally impose a tax on salt. DAULAT RAM *v* MUNICIPAL COMMITTEE, LAHORE *Lah.* 72

——— s. 62 (12)—S. 62 (12), *if precludes enquiry into question whether tax is legal or otherwise.*

All that sub-s (12) of s. 62, Punjab Municipal Act lays down is that a notification of the imposition of a tax under the Municipal Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act and does not preclude an enquiry into the question whether the tax is legal or otherwise. DAULAT RAM *v* MUNICIPAL COMMITTEE, LAHORE *Lah.* 72

——— s. 93—*Fire brigade, if agent of Municipal Committee — It is independent unit under Crown.*

The fire brigade maintained by the Peshawar Municipal Committee is not the agent of the Peshawar Municipal Committee. The fire brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Peshawar Municipal Committee pays for it does not make it liable for its acts or omissions. MUNICIPAL COMMITTEE, PESHAWAR *v.* ABDULLAH JAN MIAN AGHA JAN *Pesh.* 593

——— s. 172. See Punjab Municipal Act, 1911, s. 226 365

——— s. 195-A—*Expression "delivered to" if means "served upon"*

The words "service" or "served" are technical terms implying a definite process of the law and where those terms are used, that process has to be carried out. The words "delivered to" do not appear to me to mean or to be intended to mean the same as "served upon." They are words of much wider meaning. SURAIN SINGH *v.* EMPEROR *Lah.* 317

Punjab Municipal Act—concld.

——— s. 195-A—*Notice, if should specify in detail how sanctioned plans had been contravened.*

There is nothing in the language of s 195-A of the Act, as it now stands, which requires the notice to state any more than that the sanction has been contravened. The notice is invalid if it does not specify in detail how the sanctioned plans had been contravened. SURAIN SINGH *v* EMPEROR *Lah.* 317

——— ss. 195-A, 215—*Notice under s. 195-A signed on behalf of executive officer by person authorized to do so, is valid—Presumption in such cases.*

Where notice under s. 195-A, Punjab Municipal Act has not been signed by the executive officer but by another person who has been specially authorised by the executive officer to sign such notices, the notice is valid.

The legal maxim *omnia praesumuntur rite esse actæ* has been embodied in an illustration to s. 114, Evi. Act, and if a person receives a notice purporting to be signed by somebody on behalf of the executive officer, the presumption is that it is signed by a person who has been authorized to sign it, and if the person receiving that notice presumes otherwise and disobeys the notice, he is taking a risk. The burden lies on him to rebut the presumption of regularity. SURAIN SINGH *v.* EMPEROR *Lah.* 317

——— ss. 228, 172—*Municipal Committee giving sanction in general terms for prosecution of petitioner for offence set out in sanction—Offence not mentioned by section but by facts constituting offence under s. 172—S. 228 held sufficiently complied with.*

The sanction of the Municipal Committee for a prosecution was given in general terms without mentioning any section but after reciting the facts which the committee considered to constitute an offence and which were found to constitute an offence under s. 172, Punjab Municipal Act. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts:

Held, that in these circumstances the committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them. Therefore, there was no defect of non-compliance with the provisions of s. 228 of the Act which were sufficiently complied with. DOST MUHAMMAD QUTAB DIN *v.* MUNICIPAL COMMITTEE, HARIPUR HAZARA *Pesh.* 365

Punjab Relief of Indebtedness Act (VII of 1934), s. 35—*House let out—Onus lies on judgment-debtor to prove length of occupation.*

The house of an agriculturist judgment-debtor is exempt under s. 35 unless it has been let out on rent for a period of a year or more. The mere negative form of s. 35 would not, shift the onus from the judgment-debtor. Even if it did do so, still once it is proved that the property had been let on rent, the period for which it had been rented being a matter specifically within the knowledge of the

judgment-debtor, the onus would lie on him to show the length of the period. BHOLA SINGH *v.* RAMAN MAL . *Lah.* 312

——— s. 35—*Words 'for a period..... more'—Construction.*

The words "for a period of a year or more" in s. 35 only qualify the words "left vacant." BHOLA SINGH *v.* RAMAN MAL *Lah.* 312

Rangoon City Municipal Act (VI of 1922), s. 194—*Applicability—There must be tax claimable—Jurisdiction of Civil Court to decide whether person is in arrears of municipal tax.*

Before s. 194, Rang. City Municipal Act comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court may enquire whether a person is in arrear with payment of a municipal tax, for, if he is not, the Land Revenue Acts have no application. AH TWE *v.* MA MAI SEIN *Rang.* 372 F B

Rateable distribution.

SEE Civil Procedure Code, 1908, s. 73 38, 536

Registration—*Sub-Registrar making endorsement that executant admitted execution, whether attesting witness.*

A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution, is an attesting witness. GANPATRAO *v.* NAGORAO *Nag.* 41

Registration Act (XVI of 1908), s. 17—*Equitable mortgage—Letter signed and delivered to mortgagee at time of depositing title-deeds, by way of security for loans—Letter, held required registration.*

One *S* borrowed money on a promissory note and deposited with the creditor title deeds of certain property as security. At the time of the deposit *S* signed and delivered to the mortgagee a letter which stated that *S* had received the amount in cash and for that amount had kept with the mortgagee as security, the original title-deeds relating to certain property. The letter further stated that at the time of the discharge of the bond, *S* would take back the letter as well as the title deeds. In a subsequent mortgage the said letter was described not only as collateral security letter but as security for the loan:

Held, that the letter constituted the bargain between the parties and operated to declare the rights of the mortgagee in the property. Consequently, the memorandum fell within s. 17, Regis. Act, and ought to have been registered. Not having been registered it could not be admitted in evidence with the result that the equitable mortgage could not be proved. VISALAKSHI AMMAL *v.* C. KRISHNAVENI AMMAL *Mad.* 152

——— ss. 17, 49—*Document connected with partition not registered—Inadmissible to prove actual partition or share of party—Admissible to prove jointness or otherwise of person.*

A document connected with a partition is not admissible in evidence in the absence of registration, to prove actual partition and to prove what was allotted to any person by that partition: It is, however, clearly admissible to establish the status of a party to the document or to establish separation in the family and to rebut any case that such party died in a state of jointness. BESAR KUAR *v.* RAMBIT SINGH *Pat.* 538

——— ss. 17, 49—*Unregistered simple mortgage deed—Admissibility of, to obtain money decree.*

The personal covenant to pay is distinctly divisible or separable in a simple mortgage, from its hypothecation clauses and the bond so regarded, is clear evidence of the debt. Therefore, though a simple mortgage deed creating charge on immovable property over Rs. 100 is unregistered, the deed is admissible in evidence to support the mortgagee's claim for a money decree. OM PARKASH *v.* MUKHTAR AHMAD *Lah.* 789

——— s. 17 (1), Proviso and s. 17 (1) (d)—*Punjab Government Notification No. 29 of July 4, 1888—The word "reserve"—Meaning explained.*

The word "reserve" in s 17 (1) (*d*), Regis. Act, and also in the Punjab Govt Notification No 29 of July 4, 1888, is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee and in common parlance it is equivalent to the word "fix". ISLAMUDDIN JUMMA DIN *v.* FIRM JIWA SHAH RAM CHAND *Pesh.* 786

——— ss. 17 (1) (d), 17 (2) (vi), 49—*Exemption under s. 17 (2) (vi) does not extend to decrees embodying lease—Compromise decree embodying fresh lease—Decree must be registered and if unregistered it cannot be relied upon to prove rent of tenancy.*

It is true that s. 17 (2) (*vi*), Regis. Act exempts a decree or order of Court from registration but the exemption does not extend to decrees embodying leases. This is perfectly clear from the wording of sub-s. (2) of s. 17 which expressly limits the operation of the exemption therein contained to documents dealt with in cls. (*b*) and (*c*) of sub-s. (1). Sub-clause (*d*) of sub-s. (1) which deals with leases is excluded from the operation of sub-s. (2).

Where after annulling the tenancy by notice under s. 167, Ben. Ten. Act, the plaintiff sues the tenant as trespasser for rent arrears but the suit is compromised by the defendant taking a fresh lease, the compromise decree is not the recognition of an old lease but a new lease and hence is compulsorily registrable under s. 17 (1) (*d*). Where the compromise decree is not registered, it cannot be relied upon by the tenant for proving the rent of the tenancy. ATUL KRISHNA BOSE *v.* ZAHED MONDAL *Cal.* 635

——— s. 17 (1) (e)—*Charge, creation of, by decree—Assignment of such decree, if falls under s. 17 (1) (e).*

An assignment of a decree creating a charge on immovable property falls within the purview of s. 17 (1) (*e*), Regis. Act, as a charge is a right to or in immovable property within the meaning of that Act. RAYCHAND JIVAJI *v.* BASAPPA VIRAPPA BELLARY *Bom.* 740

——— s. 17 (1) (e)—*Decrees made prior to or simultaneously with assignment, whether covered by s. 17 (1) (e).*

Per *N. J. Wadia, J.*—There is nothing in the language of s. 17 (1) (*e*), Regis Act to indicate that only assignments of decrees which are simultaneous with the making of the decrees are covered by that section, and where the decree had already created the interest long before the assignment was made, the assignment would not be governed by cl. (*e*). The language of the clause is wide enough to cover all decrees whether made prior to the assignment or simultaneously with the assignment. RAYCHAND JIVAJI *v.* BASAPPA VIRAPPA BELLARY *Bom.* 740

Registration Act—concld.

——— s. 17 (2) (vi). See Registration Act, 1908, s. 17 (1) (d) 635

——— s. 49.

See Registration Act, 1908, s. 17 538, 789

See Registration Act, 1908, s. 17 (1) (d) 635

——— s. 49—*Unregistered sale deed—If can be used to explain nature of possession taken under it.*

Though an unregistered deed of sale is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It may operate as starting point for adverse possession of vendee, if he has set up independent title in himself. Umar Haji Karim v. Badridas Ramrai *Nag.* 306

——— s. 97—*Registered document when takes effect—Position of parties to document and third parties in the matter, explained.*

It is undoubtedly true that as between the transferor and the transferee the registered document takes effect from the date of execution; and if there is a competition between two documents relating to the same property both of which are registered, the one executed earlier in point of time will have priority, but as regards third party the point of time at which the deed is to be effective is when it is registered. Gobardhan Bar v. Gukadhar Bar *Cal.* 530

Religious endowment. See Hindu Law 200, 882 P C

Res judicata. See also Civil Procedure Code, 1908, s. 11 44

——— *Issue made subject of final order—That order cannot be ignored by succeeding Court.*

Section 11, Civil P. C. is not exhaustive of the applicability of the principle of *res judicata*. When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review. Karnam Subramanya Rao v. Fulla Rami Reddi *Mad.* 44

——— *Party's estate vesting in his mortgagee prior to suit to which mortgagee was not party—Decision is not binding on him.*

The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; consequently the decision in the suit is not binding on the mortgagee. Ganpathao v. Nagorao *Nag.* 41

——— *Question of limitation not raised in transferee Court — If barred in decree Court.*

Even if the plea that application for execution is time-barred is not raised in the Court to which the decree is transmitted for execution, the plea cannot be *res judicata* in the Court which passed the decree because the plea can be raised at any time in the transferee Court. P. L. S. P. Subramanian Chettiar v. L. N. Chettyar Firm *Rang.* 318

Retracted Confession. See Confession 265

Reversioner. See Hindu Law 193

Revision.

See Criminal Procedure Code, 1898, s. 435 564

See Criminal Procedure Code, 1898, s. 439 46

See Criminal trial 189

Riot. See Criminal Procedure Code, 1898, s. 297 375

River—*Navigable river—Property in bed.*

The property in the river bed of a navigable river is in the Crown. Midnapore Zamindary Co. Ltd. v, Bijoy Singh Dudhuria *Cal.* 578

Riwaj-i-am—*Entries in—Presumption — Judicial decision, value of in rebutting presumption.*

A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption enjoyed by the *riwaj-i-am*. In such a case, the value of the decision arises from the fact not that it is relevant under ss. 13 and 42 of the Evi. Act as forming in itself a "transaction by which the custom in question was "recognised, etc., etc" but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties of proving a custom. Subhani v. Nawab P C 436

——— *Entries in—Presumption of correctness—Extent of—Rebuttal of—Nature of evidence required — Rights of females who had no opportunity of being consulted by officer compiling* riwaj-i-am, *adversely affected — Custom recorded not in conformity with general customary law — Presumption is weakened.*

Though the entries in the *riwaj-i-am* are entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded was in accord with the general custom the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case. Where, for instance, the *riwaj-i-am* laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this is not the case and the custom as recorded in the *riwaj-i-am* is opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it.

The effect of the statements in the *riwaj-i-am* (Wilson's Manual) is weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law and by the fact that the custom recorded was not in conformity with the general customary law though the degree of the weakening would depend upon the facts of each case. Subhani v. Nawab P C 436

Sarais Act (XXII of 1867), s. 3. See Criminal Procedure Code, 1898, s. 435 564

Second appeal. See Civil Procedure Code, 1908, s. 102 633

——— New plea. See Practice 451

——— *New plea—Plea of undue influence cannot be raised for first time.*

Where undue influence is not pleaded in the lower Courts it cannot be raised for the first time in second appeal because evidence would have been necessary to prove or disprove the exercise of undue influence if it had been taken up in the trial Court. Karam Din Nawab Din v. Anant Ram Lala Hukum Chand *Pesh.* 51

——— *Question of law—Deed document of title and foundation of suit —Its construction is question of law.*

Where a deed is the document of title in the case and is the foundation of the plaintiff's suit, the construction of such a document is a question of law, which can be raised in second appeal. Om Parkash v. Mukhtar Ahmad *Lah.* 789

——— *Question of law or fact—Terms of document*

Second Appeal—concld.

—*Intention to be inferred from—Question is one of law.*

Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law, depends on the circumstances of each particular case. The general rule is quite clear Where intention is to be inferred from the terms of a document, the question is one of law, or mixed question of fact and law ; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact, or again, may be a question of mixed fact and law. MUNICIPAL COMMITTEE, HAFIZABAD *v.* GOPAL DAS *Lah.* 334

———*Rent suit—Finding of lower Courts that plaintiff was unable to prove rate of rent—No interference in second appeal.*

The High Court cannot interfere in second appeal with the conclusion which has been arrived at by the Courts of fact, that the plaintiff in the rent suit has been unable to prove the rate of rent which is payable by the defendants, although the reasoning of such Courts in rejecting the documents filed by the plaintiff are not quite satisfactory. RAMGOBIND SAHU *v.* MOSO DHOBI *Pat.* 780

Security Bond. SEE Criminal Procedure Code, 1898, s. 514 627

Shebait. SEE Hindu Law—Religious endowment 200

Sind Sagar Doab Colonisation Act (I of 1902) SEE Custom (Punjab) 684

Specific performance—*Agreement to mortgage. Obiter.*—Specific performance of an agreement to mortgage can be granted. GAJADEAR PRASAD *v.* UDAICHAND *Nag* 401

Specific Relief Act (I of 1887), s. 9—*Suit under—Each party claiming exclusive possession—Neither claiming joint possession — Court, if can pass decree for exclusive possession.*

Where in a suit under s. 9, Specific Relief Act, neither side contends that within the six months preceding the suit either had been in joint possession but each claims to be in exclusive possession, the Court is right in not going into the question of joint possession and in placing that party in exclusive possession which on the facts before it, it considers to have been in possession at the date of the dispossession.

It may well be that a joint owner of property is still at the date of suit under s. 9 entitled to the property and would be given possession in a suit probably instituted for that purpose. But nevertheless it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under s. 9, then for the purposes of s. 9 that ouster would hold good even though the title of the plaintiff may not be extinguished. Consequently the admission of the defendants which go to the question of title do not oust the jurisdiction of the Court, and where neither side contends that they were in joint possession within six months before the suit is filed, the lower Court is right in placing the plaintiff in exclusive and not in joint possession. ABDUL AZIZ *v.* AMIR *Nag.* 805

Stamp Act (II of 1899), ss. 33, 42—*Civil Court admitting document under proviso (a) to s. 35 and granting certificate under s. 42 (1)— Collector if can impound that document again under s. 33 (1) or proceed to assess further deficiency and penalty under s. 40.*

When a Civil Court has collected the deficiency and penalty which appears to the said Court to be due on any document and has admitted the document in evidence under proviso (*a*) to s. 35 of the Act, and has granted a certificate under sub-s. (1) of s. 42 of the Act that the proper duty and penalty have been levied in respect of the said document, it is not open to the Collector, on the document being subsequently produced before him in the performance of his official functions, to impound the same under sub-s. (1) of s. 33, Stamp Act, and to proceed thereafter to assess further deficiency and penalty under s. 40, Stamp Act. NAND LAL *v.* EMPEROR *Lah.* 368 S B

———ss. 40 (1) (a), 33, 42—*Collector's certificate under s. 40 (1) (a), if can be reviewed either by himself or by any other authority.*

Where the Collector is of opinion that the instrument is duly stamped or is not chargeable with duty and gives a certificate to that effect, that certificate is final and the decision cannot be reviewed either by the Collector himself or by any other authority or by another Collector before whom the document appears. NAND LAL *v.* EMPEROR *Lah.* 363 S B

———s. 42—*Collector's endorsement that document is properly stamped—Court, if can refuse to admit it on the ground that it is not properly stamped.*

It is clear from the terms of s. 42 (2), Stamp Act, that the Court at any rate cannot refuse to admit a document in evidence on the ground that such document is not properly stamped where the Collector's endorsement appears that it is properly stamped or that the duty has been levied on it. NAND LAL *v* EMPEROR *Lah.* 368 S B

Substituted Security. SEE Mortgage 748

Succession Act (XXXIX of 1925), s. 63—*Will—Attestation—Will held not properly attested.*

A will which was jointly executed by two persons who were illiterates was signed by one *P* on behalf of the executants against their thumb-impressions. One *K* signed the will as a scribe and merely said that he read over the contents of the document to the executants. *K* did not say under his signature that he attested the signatures of the executants. The signature of one *L* also appeared on the will. But his signature was from the pen of *K* and there was a mark just below it. There was no evidence that this mark below *L's* name written by *K* was made by *L* himself. The only other signature, was that of, *P* but he was the person who also signed for the executants :

Held, that in the circumstances the signatures on the will were not properly attested as required by s. 63 of the Succession Act.

Held, further that even if the endorsement by the Registrar before whom the document was registered was taken to amount to attestation, yet as there was no other witness who could be said to have attested the will, the will was not properly attested. BULAKI MAHTON *v* DULIA *Pat.* 463

———s. 283—*Application for probate—Probate Court cannot decide whether property dealt with by testator in fact belonged to him.*

In an application for probate of a will or for the grant of letters of administration with a copy of

Succession Act—concld.

the will annexed, the sole question that arises is whether or not the will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact belonged to him. KASHI NATH SINGH v. DULHIN GULZARI KUER *Pat.* 856

——— s. 283—*Person claiming adversely to testator or disputing his right to deal with property—Whether can be deemed to claim interest in estate of deceased within meaning of s.* 283.

A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of s. 283 of the Succession Act and he is not, therefore, entitled to oppose the grants of probate or letters of administration. KASHI NATH SINGH v. DULHIN GULZARI KUER *Pat.* 856

——— s. 292—*Assignment of bond under s.* 292, *Succession Act* (*XXXIX of* 1925)—*Effect—Whether confers on assignee new cause of action and fresh starting point.*

Section 292, Succession Act, does not have the effect of conferring a new cause of action on the assignee, and therefore does not provide a fresh starting point for the purposes of limitation. It is wrong to say that the condition of the bond is not broken for the purposes of the Lim Act until the date of the assignment. THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD. v. JANMAHOMED ABDUL RAHIM P C 225

Suits Valuation Act (VII of 1887), s. 8—*Mortgage—Redemption suit—Value for jurisdiction*

In a suit for redemption of a mortgage of immovable propeity the value for jurisdiction is the amount of money which is found to be due on the mortgage. The market value of the property mortgaged can on no account be ever the value for jurisdiction in a redemption suit. MOTAI v. MOHD AKBAR KHAN CHIEF OF HOTI *Peth* 871

——— ss. 8 and 9. SEE Court Fees Act, 1870, s. 7 (iv) (c) 641 F B

Surety. SEE Contract Act, 1872, s. 137 344

———*Discharge of—Composition between principal debtor and creditor—Surety is not absolved from liability when he has expressly contracted to remain liable even after principal's discharge*

Although a composition bond between the principal debtor and the creditor extinguishes the debt to the principal debtor, yet it does not absolve the liability of the surety under the surety bond where the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal. In such a case it cannot be contended that the discharge of the principal is an implied discharge of the surety. A. R. KRISHNASWAMI AYYAR v. TRAVANCORE NATIONAL BANK, LTD. *Mad.* 332

——— *Liability of—Surety representing principal to be major and agreeing to compensate plaintiff if representation proved false—Principal found to be minor—Liability of surety.*

Where the sureties represent to the plaintiff that principal is competent to contract and make the plaintiff enter into a transaction, agreeing to compensate if their (sureties') representations proved false or any defect was discovered in the contract thereafter the sureties must under the terms of their contract compensate the plaintiff. The suretyship contract is a collateral and almost an independent contract and can be enforced TIKKI LAL v. KOMALCHAND *Nag.* 178.

Surety Bond. SEE Criminal Procedure Code, 1898, s. 499 471

Surrender SEE Hindu Law—Widow 419

Trade Mark—Infringement. SEE Penal Code, 1860, s. 482 189

——— *Infringement—Defendant's goods colourable imitation of plaintiff's goods—Actual deception, if must be proved.*

Where defendants' goods are colourable imitation of the plaintiff's goods, it is not necessary for the plaintiff to prove actual deception especially when the defendants sold their goods not openly in shops but in a hole and corner manner by canvassers and by a lorry upcountry. J. C. ENO. LTD v VISHNU CHEMICAL CO. *Bom.* 392

——— *Infringement—Imitation of words—Tests—Copy of words used as trade-mark in any other language intended to deceive or likely to deceive, can be restrained—Words "Fruit salt" distinctive mark of plaintiff's saline—Defendant selling saline under name "Falaxar", meaning in Marathi "Fruit Salt"—Defendants held could be restrained from using that word.*

If traders in India have acquired in any language the exclusive right to the use of certain particular marks not merely as descriptive of but as distinctive of their goods, they have the right to restrain another trader from copying those words for use in connection with a similar class of goods in any other language in India If traders attempt to deceive by mis-spelling or distorting any word in any shape or form, it being obvious what word they are in fact intending to indicate, they are in fact attempting to deceive. This is the real test which has got to be applied not only to the use of words in the same language, but to the use of words in any other language which may be a colourable imitation of words in the language from which the evidence may establish that they were in fact taken. If the Court comes to the conclusion that the use of the words in a foreign language was an intention to deceive and in fact was likely to deceive, then the Court ought to restrain the use of such words.

The plaintiff's saline was well-known in India and was very commonly asked for as "Fruit Salt", the words "Fruit Salt" were well-known in the trade to belong exclusively to the plaintiff's saline, and those words were not merely descriptive of, but were a distinctive mark of, the plaintiff's saline. The defendants had been selling and offering for sale in Bombay and other places in India saline not of the plaintiffs' manufacture under the name "Falaxar", and that word was the Marathi equivalent of the plaintiffs' mark "Fruit Salt":

Held, that the word "Falaxar" was the Marathi equivalent of the mark "Fruit Salt", and the defendants could therefore be restrained from using such name. Though any one may use the word "Fruit" and the word "Salt" in any language in India as he pleases, yet he is not permitted to use those words as indicative of a class of goods similar to the plaintiffs' goods, the reason being that those words in the English language had become distinctive of their goods, and if those words were used in any other language in India in connection with a similar class of goods, the use of the words might be liable to cause deception:

Held, further that it could not be said that any one could possibly have sought to register in England in connection with goods similar to the plaintiffs' goods the words "Fruit Salt" in any foreign language. J. C. ENO. LTD. v. VISHNU CHEMICAL CO. *Bom.* 392

——— *Infringement—Passing-off action—Plaintiff can make choice of either account and payment*

of profits gained by defendant or enquiry as to damage occasioned to plaintiff.

In a passing off action the plaintiff is entitled to make his choice of either an account and payment to him of the profits which the defendant has gained by his wrongful conduct, or an enquiry as to, and payment of the damages occasioned to the plaintiff by reason of it. J. C. ENO. LTD. *v* VISHNU CHEMICAL CO. *Bom.* 392

Transfer of Property Act (IV of 1882), s. 8—*Entire* patti *of* zamindar *sold*—Abadi *included in* patti, *if passes to purchaser.*

Where the entire *patti* of a *zemindar* constituting a distinct unit has been sold by auction, the *abadi* numbers whose area was included in the area of the *zemindari patti* which are a part and parcel of the latter also pass to the purchaser. SHEORAJ *v.* GANGA PRASAD *Oudh* 675

——— s. 53—*Sole and only creditor, if can maintain representative suit.*

Even if the plaintiff is the only creditor, he can bring a representatives suit for the benefit of or on behalf of all the creditors. DEOKALI PATTAH *v.* RAMDEVI *Rang.* 286

——— s. 53—*Suit under—Decree held cancelled deed and not merely declared it void between creditors and parties to deed.*

A decree was passed in a suit to set aside a deed of assignment, brought by the creditors under s. 53, that the deed of assignment was bogus and fraudulent and declaring it as cancelled and of no effect against the creditors :

Held, that the Court intended to cancel the assignment and not merely to declare it void in part leaving it effective as between the assignors and the assignee and ineffective only against the creditors.

[Proper form of decree in such cases stated.] RAMCHANDRA KRISHNAJI CHANDOLE *v.* VITHU GOVIND PANHALH *Bom.* 79

——— s. 53—*Transfer challenged as void under s. 53—Material question to be considered—Fact that all creditors have been paid off since transfer, if material.*

Where a transfer is challenged as void under s. 53 what the Court has to consider is whether the action of the transferee on the date of the transfer was intended to defeat or delay the creditors and not whether the creditors have been defeated since. The fact that all creditors have been paid off since the date of the transfer is immaterial. DEOKALI PATTAH *v.* RAMDEVI *Rang.* 286

——— s. 58 (d). SEE Mortgage 272

——— s. 65-A—*Lease by mortgagor for unusual term to defeat creditors, is void—Lessee has no right to redeem.*

A lease is void, unless it is one granted in the ordinary course of management A lease by the mortgagor for an unusual term to defeat the creditors is void and would not be binding on the mortgagee. The lessee in such a case will have no right to redeem. PANDELA FUNDARIKAKSHUDU *v.* SONTINENI KONDAYYA *Mad.* 366

——— s. 65-A—*Mortgage before s. 65-A but lease after it—Section has no application.*

Where the mortgage took place before s 65-A was introduced in T P. Act, that section would not apply, even if the lease was actually after s. 65-A was introduced. PANDELA FUNDARIKAKSHUDU *v.* SONTINENI KONDAYYA *Mad.* 366

——— s. 67-A. SEE Court Fees Act, 1870, s. 17 711

——— s. 68. SEE Mortgage 272

——— s 76 (h)—*Essentials for applicability of s 76 (h)—Mortgagee in possession of mortgaged property as mere tenant under lease-deed—S. 76 (h) does not apply—Equitable set-off, if can be allowed.*

Before s. 76 (*h*), T. P. Act can be applied it must be shown that the possession of the mortgagee is by way of security for the debt, or in some way referable to the mortgage.

A mortgagee had entered into possession of the mortgaged property under a lease-deed as a mere tenant and not in his capacity of the mortgagee, on agreement of paying certain rent. In the suit on the mortgage the subsequent transferee from the mortgagor contended that the rents from the mortgagee should be set-off against him in reduction of the interest on mortgage money under s. 76 (*h*), T. P. Act:

Held, that the transaction referred to in the lease-deed was merely a lease with a provision for the payment of rent in advance and could in no sense be described as a mortgage of any sort. There was no question of property being held in mortgage unless it was held as security for the debt, and to constitute a mortgage there must also be provision, express or implied for a right of redemption. As in the lease-deed there was neither any provision whereby the property was held as security for the debt nor for redemption, the lessee came in purely as tenant, and not as mortgagee.

Held also, that even if it could be held that the possession under the lease-deed was possession as mortgagee, it was not as mortgagee under the mortgage in suit, and possession was in no way referable to the mortgage upon which the suit had been brought. Hence as the mortgagees were not in possession as mortgagees, but as tenants upon rent under a lease which had nothing whatever to do with the mortgages in suit, s. 76, T. P. Act did not apply to the case for s. 76 (*h*) to be applicable the possession of the mortgagee must be *qua* mortgagee.

Held further, that there was no question of equitable set-off as it had not been shown that the rent was due to the subsequent transferee nor had the transferee shown that he had any right, legal or equitable, to raise the plea of set off. GULAB CHAND PRASAD *v.* RAM KUMAR *Pat.* 533

——— s. 100—*Principles underlying O. XXXIV, Civil Procedure Code (Act V of 1908), applicability of, to charges created by decree—Charge created by act of parties—Rule applicable to—Held, right to proceed personally against judgment-debtor was not independent of charge and could only arise after exercising right against property charged.*

The principles underlying O. XXXIV, Civil P. C., although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy but in addition to it. In every case it must be essentially a question of construction of the decree, but unless the contrary appears, the ordinary rule should be that when a charge is created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only or at any rate against the property charged in the first instance.

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Hence, where a decree creating a charge on the immovable property provides expressly that in case the defendant fails to pay the amount at the time fixed he would be entitled to recover the amount out of the property charged.' The right to proceed against the judgment-debtor personally cannot be said to be independent of the charge but only arises, if at all, after the right against the charged property has been exercised. RAYCHAND JIVAJI *v.* BASAPPA VIRAPPA BELLARY *Bom.* 740

——— s. 100—*U. P. Municipalities Act (II of 1916), s. 177—Execution sale of immovable property—Municipal taxes in arrears—Auction-purchaser should be presumed to have constructive notice of charge—His failure to make enquiry—Effect—Duty of Municipality — Bye-laws of Lucknow Municipality — Municipality, if can follow property in hands of auction-purchaser in execution of decree.*

The principle of constructive notice in the case of a transaction relating to immovable property which is required by law to be and has been registered by a registered instrument, should be applied to arrears of taxes which form a charge under the Municipalities Act on property sold at an auction sale. Even if any difficulty had been experienced by the auction-purchaser or was likely to be experienced by him in obtaining information regarding arrears of Municipal taxes standing against the immovable property, directly from the Municipal authorities, that would not be a valid defence. Rule 19 of the Municipal Account Code provides for the affixation to the assessment list of fly-leaves containing columns 5 to 13 of Form 3 appended to that Code. This form clearly shows what arrears are due. There are bye-laws of the Lucknow Municipality regulating inspections and the giving of copies of Municipal records and documents, and although permission has to be given by the Executive Officer, it may be presumed that where a house is being sold in execution of a Civil Court decree permission would be given. If on application being made permission was refused and the would-be purchaser could not otherwise obtain the necessary information, constructive notice could not of course be imputed to him. Intending purchaser is not bound to presume that the taxes have been paid. It must be presumed that a person who buys house property situated in a Municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. When a charge has been expressly imposed in the Municipalities Act upon property for the payment of Municipal taxes, the Municipality is entitled to follow the property in the hands of a transferee who has not cared to make any enquiry as to whether payment of the taxes is in arrears. MUNICIPAL BOARD OF LUCKNOW *v.* RAMJI LAL *Oudh* 290

——— s. 108 (c)—*Property leased for cultivation and settling tenants thereon—Right of lessee to collect and sell surface stones.*

Where property is leased for the purpose of cultivation and settling tenants thereon, the lessee is only entitled to a reasonable right to user in the soil but he has no right to dig or quarry stone or to collect and sell surface stones. Right to collect and sell surface stones can be established only by custom. KUSUM KAMINI DEBYA *v.* JAGDISH CHANDRA DEO DHABAL DEB *Pat.* 760

Trust—*Breach of—Trustee mixing up trust funds relating to separate and distinct trusts — Whether guilty of breach of trust.*

Trust—concld.

Where a trustee in respect of separate and distinct trusts mixes up the trusts funds he is guilty of breach of trust OFFICIAL TRUSTEE *v.* RAEBURN *Rang.* 61

——— *Investment—Duty of trustee—Appointment of surveyor or valuer by trustee, if proper—Tests in such cases.*

It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. If a surveyor or valuer is appointed for the purpose of enabling a trustee to obtain a true valuation, the only question is whether in all the circumstances of the case the trustee has appointed a person whose advice he can with prudence take into account in arriving at his decision. OFFICIAL TRUSTEE *v.* RAEBURN *Rang.* 61

Trustee—*Person accepting trust in relation to specific sum and agreeing to invest it in his firm and undertaking duties of trustee—Whether can plead that transaction was not trust—Insolvency of such person—Beneficiary and co-trustees if entitled to preferential charge over outstanding debts.*

Per *Wassoodew, J.*—Where a person accepts a trust in relation to a specific sum of money and agrees to invest it in his firm and also undertakes the duties of a trustee in respect thereto and further agrees to conform to the terms of the instrument creating the trust, the defence that the transaction in relation to the amount is not a trust is not open to him. In those circumstances the beneficiary and the co-trustees will be entitled to a preferential charge over the outstanding debts in the event of his bankruptcy. It is not open to the trustee to claim that the character in which he holds the property is different from that of a trustee. KRISHNADAS GOVARDHANDAS MADIVALE *v* RATANBAI GOKULDAS LAXMANDAS *Bom.* 718

Trusts Act (II of 1882), ss. 13, 33—*Suit challenging trust decreed—Mesne profits, awarding of, against trustees—Trustees, if can be ordered to pay costs of suit out of their own pockets.*

Trustees are bound to carry out the provisions of the trust deed and are justified in continuing to do so even after the suit is brought, challenging the trust at least until the passing of the decree and hence mesne profits should not be ordered against them. They are bound by law to defend the suit which sought to put an end to the trust. It is therefore unreasonable that they should be made to pay the costs of the suit out of their own pockets. DAMODAR VISHNU *v.* SHRIRAM LAKSHMAN *Bom.* 413

——— s. 20 (e)—*"Value of property" how calculated—Advance on security of immovable property—Trustee must consider value of security itself and should not be guided by character or solvency of borrower.*

For the purposes of s. 20, Trusts Act, the value of the property does not mean what would be obtained at a forced sale of it, the risk of a forced sale, though an element to be taken into consideration in deciding whether the security is one upon which a trustee might wisely advance money, is something which does not and cannot affect the actual value of the property at the time of the advance.

A person making an advance upon his own account upon the security of immovable property may no doubt be influenced to do so partly by the value of the security itself and partly by his estimate of the solvency and character of borrower. But a trustee may not blend these considerations together. He must not allow the character or solvency of the

Trusts Act—concld.

borrower to weigh with him so as to make his advance, in effect, an advance not upon the security offered, but upon a consideration of other matters which seems to make it safe not to rely upon the security alone. OFFICIAL TRUSTEE *v.* RAHBURN *Rang.* 61

——— ss. 63, 66—*Mixing of trust amount with other assets of trustee—Insolvency of trustee—Assets in hands of Official Assignee, whether can be followed for amount of trust.*

Where a trustee mixes up trust amount with his other assets which on his insolvency vest in the Official Assignee the assets can be followed in the hands of the Official Assignee for the trust amount and the right to do so does not depend upon whether the trust property had been properly or improperly disposed of. KRISHNADAS GOVARDHANDAS MADIVALE *v* RATANBAI GOKULDAS LAXMANDAS *Bom.* 718

——— ss. 88, 90—*Ss.* 88 *and* 90 *how far exhaustive.*

The terms of ss. 88 and 90, Trusts Act are not exhaustive only in the sense that if a person cannot be brought within these sections, and held liable as a trustee, he must be found to fall under the residuary section *i. e.*, s. 94. In other words where no trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is termed in English Law, as a constructive trustee. NALLANGAL v. ARASAPPAPPILLAIPATTI *Mad.* 314

——— ss. 88, 90, 94—*Person applying for issue of* pattah *depositing amount for survey stones and trees and dying—His widow making fresh application and obtaining* pattah—*Land attached by husband's decree-holder—Ss.* 88, 90 *and* 94, *if apply.*

A person applied to the Govt. for issuing a *pattah* and deposited certain amount for the value of survey stones and of the trees growing on the land but before the grant could be made he died. His widow made a fresh application for the same purpose and a *pattah* was issued to her. The husband's decree-holder attached this land on the ground that it was liable to be sold in execution of his decree:

Held, that the widow could not be said to have acquired the property for the benefit of her husband's estate. The widow could not be said to be a person holding any fiduciary character and of such a nature as to be bound to protect the interests of the creditor of her deceased husband and s. 88, Trusts Act did not apply. Nor did s. 90 apply as a Hindu widow could neither be described to be a tenant for life nor qualified owner in the sense in which these expressions have been used in that section. Morever the expression "persons interested" did not cover the creditors of the widow's deceased husband:

Held, further that since the widow could not be held to have owed any duty to the creditor of her husband or to be holding the property for his benefit, the provisions of s. 94 of the Act were not applicable. NALLANGAL *v.* ARASAPPAPPILLIPATTI *Mad.* 314

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 23—*Section does not bar revision against appellat order under the section.*

Revision is maintainable against a decision of the District Judge setting aside a decree passed by an Assistant Collector under s. 12 of the U. P. Agri.

U. P. Agriculturists' Relief Act—concld.

Relief Act, though an appeal against the appellate order under s. 23 is barred under that section of the Act LALTA SINGH *v.* SRIDHAR SUKUL *Oudh* 214

——— s 33. SEE Court-fee 300

——— s. 33—*Debtor whether must be agriculturist at date of loan and suit.*

For the purpose of s. 33, U. P. Agri. Relief Act, an agriculturist debtor must be an agriculturist at the date of the loan as well as at the date when the suit is brought. KAZIM HUSAIN *v* MANGALA DEVI *Oudh* 59

U P. Encumbered Estates Act (XXV of 1934), ss. 9, 13—*Rejection of written statement filed beyond time prescribed—Court-fee payable on appeal from such order is under Sch. II, Art.* 11, *Court Fees Act* (*VII of* 1870).

The rejection of a written statement beyond the time prescribed by the Act cannot have the force of a decree of a Civil Court. It is only when an order is passed under s. 14, U. P Encum. Estates Act that the order becomes a decree. The creditor who is aggrieved by an order of the Special Judge rejecting his written statement filed beyond the prescribed time is entitled to appeal on payment of court-fee payable under Art. 11, Sch. II, Court Fees Act. GANGA KUER *v* SUKHJIT SINGH *All.* 867

——— s. 14. SEE Court Fees Act, 1870, Sch. I, Art. 1 354

——— s. 45—*Revision against appellate order of District Judge passed before amendment of Act, filed subsequent to amendment, is incompetent—It cannot even be treated as second appeal.*

Where an application for revision of an order of the District Judge passed in appeal on August 31, 1939, was filed on October 6, 1939 and the Encum. Estates Act as amended by Act XI of 1939, had come into force on September 30, 1939:

Held, that the revision was incompetence and it could not even be treated as a second appeal as under s 45, a second appeal could lie only in respect of appellate orders or decrees passed after the amending Act came into force and not to those passed before it. SHEO NATH *v.* TIRBENI SHANKAR *Oudh* 159

——— s. 45 (2). SEE Civil Procedure Code, 1908, s. 115 464 F B

——— s. 46. SEE Civil Procedure Code, 1908, s. 115 464 F B

U. P. Land Revenue Act (III of 1901), s. 36—*Ex-proprietary rent—Liability to pay, when arises.*

Tenant's liability to pay ex-proprietary rent arises from the date when ex-proprietary tenancy arises and from the date when mutation of names is effected. The new *zemindar* becomes liable to pay revenue from the date of his purchase and if it has been realized from the former *zemindar* the latter can recover it. DAYA SHANKAR *v.* BADRI PRASAD *Oudh* 150

——— s. 106 *Agreement providing that on partition revenue shall be paid through* taluqdar lambardar—*Validity of condition.*

The condition in the deed of agreement to the effect that on perfect partition the Govt. revenue shall be paid through the *taluqdar lambardar*, imposes a restraint upon partition and consequently cannot be enforced; at any rate it is not binding upon the successors to the contracting parties. MOHAMMAD RAZA *v.* AHMAD ABBAS *Oudh* 689

——— ss. 109, 111, 112—*Application for perfect partition—Rejection of, on ground that such partition was excluded by certain agreement—Order falls under s.* 111 (1) (o) *and is appealable.*

An application was made for perfect partition of a *taluqdari* village. An objection having been raised the Deputy Commissioner heard the parties, considered the report of the Sub-Divisional Officer and came to the conclusion that the right to perfect partition was excluded by a certain agreement and that the previous decision of the Commissioner was *res judicata* and hence he rejected the application:

Held, that the objection raised the question of proprietary title and the Deputy Commissioner acted under cl. (c) of sub-s. (1) s. 111 of the Land Revenue Act and under the first portion of sub-s. (1) of s. 111. An appeal, therefore, was competent from his order rejecting the application. MOHAMMAD RAZA *v.* AHMAD ABBAS *Oudh* 689

U. P. Motor Vehicles Rules, 1940, r. 2 (g). SEE Motor Vehicles Act, 1914, s. 112 50

——— **r. 79 (VIII).** SEE Motor Vehicles Act, 1914, s. 112 50

U. P. Municipalities Act (II of 1916), s. 8 (1) (j). SEE U. P. Municipalities Act, 1916, s. 189 121

——— **s. 120.** SEE U. P. Municipalities Act, 1916, s. 189 121

——— **ss. 166, 177**—*Liability of tax-payer to pay tax, if depends upon municipality presenting a bill to tax-payer—Liability, when arises.*

The liability of the tax-payer to pay municipal tax is not made to depend upon the Board presenting a bill to the tax-payer. The liability arises the moment the tax-payer has been assessed and the money becomes due upon the date on which the Municipality have declared by their rules that the tax is payable. There is nothing in the U. P. Municipalities Act disentitling the Municipality from executing its charge because it has failed to present a bill for the tax to the tax-payer. BADRUNNISSA *v.* MUNICIPAL BOARD, AGRA EXECUTIVE OFFICER *All.* 822

——— **s. 177.**

SEE Transfer of Property Act, 1882, s. 100 290
SEE U. P. Municipalties Act, 1916, s. 166 822

——— **ss. 189, 120, 8 (1) (j)**—*S. 189, if refers to out-fall of drain—Ss. 189, 120 and 8 (1) (j) whether empower Municipality to acquire land outside Municipal limits for drain or sewage works without owner's consent and without notice and compensation—Drain constructed by Municipality for draining sewage and rain water into plaintiff's* jheel *without his consent—Plaintiff's suit for injunction on ground that drain water would pollute* jheel *and damage plants and fish in it—Municipality must prove to the contrary—It cannot be allowed to adduce expert evidence that drain water would not pollute* jheel, *after close of evidence—Municipality held acted negligently and arbitrarily—Practice—Evidence.*

Section 189, U. P. Municipalities Act does not refer to the out-fall of any drain which may be constructed by a Municipality. It does not empower a Municipality to take its sewage outside the Municipal boundaries and dispose of it where it likes upon private property regardless of the rights of the property owner. Sections 189 and 120 read with s. (8) *i*; (*j*) do not confer upon the Municipality the power to take land outside the Municipality for the purposes of a drain or a sewage works without notice to the owner or the occupier of that land and without his consent and without compensation.

A Municipal Board constructed a drain for running the sewage and rain water of the city into the plaintiff's *jheel* situated outside the Municipal limits. The plaintiff who derived an income from the *jheel* brought a suit for injunction against

the Board. The Court found that the dirty water would pollute the *jheel* and prove deleterious to the plants and fish in the *jheel*:

Held, that even if the Board were within its rights in using the plaintiff's *jheel* for the disposal of the sewage of the city, it was acting arbitrarily and negligently in that it did not consult the plaintiff or offer him compensation and, secondly, it did not take ordinary and reasonable steps to purify the sewage before running it on to the plaintiff's property. Injunction could therefore be granted.

Held, further that it was for the Municipality to prove that the sullage was so mixed with pure rain water that what flowed into the *jheel* would not have any deleterious effect upon the plants and fish, but after the evidence was closed the Municipality could not be allowed to adduce expert evidence to show that the drain water would not pollute the *jheel* as the Municipality knew well what case it had to meet. MUNICIPAL BOARD, GORAKHPUR *v.* RAI KAMLAPATI RAI *All.* 121

U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937), s. 2—*Stayed Arrears of Rent (Remissions) Act (XVIII of 1939), s. 3—Suit for arrears of rent—Appeal pending when Act IV of 1937 came into force—No stay order passed—S. 3 of Act XVIII of 1939 does not apply.*

The words "which have been stayed" in s. 3 of U. P. Act XVIII of 1939, do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been under s. 2 of U. P. Act IV of 1937. Hence where an appeal against a decision in a suit for arrears of rent was pending when Act IV of 1937, (U. P. Stay of Proceedings (Revenue Courts) Act) came into force but no stay order was passed, the provisions of s. 3 of Act XVIII of 1939, (Stayed Arrears of Rent (Remission) Act) do not apply to the suit and the suit cannot be dismissed. DAYA SHANKAR *v.* BADRI PRASAD *Oudh* 150

U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939), s. 3. SEE U. P. Stay of Proceedings (Revenue Courts) Act, 1937, s. 2 150

Upper Burma Land and Revenue Regulation (III of 1889), s. 41. SEE Upper Burma Land and Revenue Regulation, 1889, s. 53 (2) (*xii*) 417

——— **ss. 53 (2) (xii), 41**—*Default in payment of revenue by fishery lessee—Surety's land resumed without notice for payment of revenue and without attachment or sale—Surety's claim is not barred by s. 53 (2) (xii).*

The words "connected with or arising out of the collection of revenue" in s. 53 (2) (*xii*) must be construed reasonably. Their meaning cannot be extended so as to include any consequence however indirect, or however unjustified by law of action taken to collect revenue. The words "collection of revenue" mean collection by payment in the ordinary course or recovery of arrears in the way allowed by s. 41, Upper Burma Land and Revenue Regulation. Consequently where on default by a fishery lessee in the payment of revenue his surety's land is resumed without serving any notice to pay the revenue and without attachment or sale of the land within the meaning of s. 41, the claim of the surety cannot be said to be connected with or arising out of collection of revenue. The claim is not therefore barred by s. 53 (2) (*xii*). MAUNG SHWE THIN *v.* MAUNG THA OK *Rang.* 417

Usurious Loans Act (X of 1918), as amended by C. P. Amendment Act (XI of 1934), s. 3—*Suit instituted after amendment in respect of*

Usurious Loans Act—concld.

transactions prior to amendment—Amendment, if applies—Court, if bound to re-open such transactions if interest is excessive.

The provisions of the Usurious Loans Act as amended by the Central Provinces Amendment of 1934 will apply to a suit instituted long after the amendment came into force but in which transactions of dates prior to the amendment are called in question and sought to be re-opened on the only ground that interest is excessive within the meaning of the amendment. Consequently the Court is bound to re-open the transactions if it finds that interest alone is excessive as defined in the amendment. SHEOSHANKER SAHAI v. SURAJMAL *Nag.* 623

Waqf.

SEE Muhammadan Law 131, 323

Whipping Act (IV of 1909), ss. 3, 5—*Offence punishable with imprisonment under Penal Code—Whipping in lieu of punishment for aforesaid offence—Age limit—Ss. 3 and 5, Whipping Act (IV of 1909), should be read together with provisions of Criminal Procedure Code, relating to whipping.*

Section 3, Whipping Act, permits whipping in lieu of any punishment for which the offender is liable under the Criminal P. C. to imprisonment, irrespective of age. Hence for whipping for an offence of theft there is no age limit. Sections 3 and 5 should be read together along with s. 393, Criminal P. C. and other provisions contained in the aforesaid Code which relate to whipping. EMPEROR v. ACHAR HAMZO KUMBHAR *Sind* 341

Will—Attestation. SEE Succession Act, 1925, s. 63 463

——— *Construction—Intention—Memorandum held neither will nor gift but contract.*

In construing a document alleged to be a will the intention of the person executing it must be deduced from the language of the document itself. It is entirely wrong for a Court to interpret a document in a particular way because some one taking under the document chooses to put that interpretation upon it The intention of a party to a document must be deduced from the document itself by giving the words therein their ordinary natural meaning.

On the objection of the son to the father's application for revocation of the settlement of his properties under the Ben Settled Estates Act, the son and the father entered into a transaction on condition that the son should withdraw his objections. The transaction was embodied in a memorandum which was executed by both the parties. By its terms the son was to withdraw his objections if he was allotted roughly one-third of the property. The father agreed to this, provided, the son did not take possession of the property till after the father's death and provided, the son undertook to execute a suitable *waqf* of the remaining two-thirds when he got the property. The son accepted these terms and the settlement was accordingly revoked by their joint application After the father's death the son created a *waqf* of the properties in pursuance of the agreement appointing his son as *mutwalli*. It was contended that the document operated as a will:

Held, that the terms of the memorandum were irrevocable. The memorandum was not a will since it was executed both by father and son who took benefit under it and it took effect during the lifetime of the father, nor was it a gift. The memorandum

Will—concld.

evidenced a contract between the parties for which there was a consideration given by both parties. MUHAMMAD ALI v. DINES CHANDRA ROY CHOUDHURY *Cal.* 540

Words and Phrases.

——— "Damosh Koha", *meaning explained.*

The word '*damosh*' means a *beel* or inland pool of shallow water being a part of the deserted bed of a river. Hence the words "*damosh kohi* etc." cannot include the bed of a large flowing navigable river. MIDNAPUR ZAMINDARY CO. LTD v BIJOY SINGH DUDHURIA *Cal.* 578

——— "Taraf" *or* 'pergunnah', *whether signify co-terminous villages or compact area of land.*

The word *taraf* does not signify a collection of co-terminous villages, villages forming a compact block of land. The word means a sub-division of a *pergunah* including several villages. A *pergunah* which usually covers a very large tract and means a large local division of the Muhammadan times, which corresponds in idea, though not in extent, with a district of modern times, does not convey the idea of a compact area of land with no public and navigable river cutting through it. MIDNAPORE ZAMINDARY CO. LTD v BIJOY SINGH DUDHURIA *Cal.* 578

—— —— "*Tax*" *and* "*Cess*".

"Cess" means, specially in relation to India, "a tax" levied for a specific object. "Tax" in legal parlance also means nothing more than money which individuals are compelled to pay for public pusposes. It is impossible, therefore, to distinguish "tax" from "cess" or "duty." DAULAT RAM v. MUNICIPAL COMMITEE, LAHORE *Lah.* 72

Workmen's Compensation Act (VIII of 1923), s. 8 (8)—*Mother, widow and minor son of deceased Muhammadan awarded compensation—Minor's share put in post office by the direction of the Commissioner—Mother and minor dying—Commissioner, if can order minor's share to be transferred to widow and open account in widow's name—Widow remarrying, effect of—Jurisdiction of Civil Court in the matter of distribution of minor's share.*

The mother, widow and a minor son of deceased Muhammadan were awarded compensation as dependents. The minor's share of the compensation was deposited in the post office by the Commissioner. After the death of the mother and the minor the Commissioner ordered the minor's share to be allotted to the widow and directed the postal authorities to cancel the minor's account and open a fresh account in the name of the widow.

Held, that the order was perfectly valid, as the alteration of the widow's circumstances by the death of the other dependents amounted to a variation of circumstances within the meaning of s 8 (8), Workmen's Compensation Act. The fact that the widow had remarried was immaterial.

Held, also under s. 8 (8) of the Act the Commissioner for Workmen's Compensation was the proper authority to make a re-distribution of the money which had been allotted to the share of the deceased minor. Consequently, the Civil Court of the Munsif had no jurisdiction to deal with the matter at all. Hence as far as the Commissioner of Workmen's Compensation was concerned, the decree of the Civil Court (though a consent decree) in such *v.* suit was of no effect DEFENDANTS OF RAHIM BUX JAMES FINLAY & CO. LTD. *Cal.* 57

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TESTAMENTARY GIFTS TO CLASSES

In complicated cases the practitioner will naturally resort to such works as Jarman, Hawkins or Theobald on Wills or S. J. Bailey's Law of Wills, but it may be useful to have some of the simpler rules for determining the constitution of classes set out here. These rules are often called "Rules" or collectively "The Rule of Convenience," as it is convenient for the personal representatives or the trustees to distribute the funds, and for the persons included in the class to receive their shares as soon as possible. It will be conceded, however, that persons who expected to be in the class, but are excluded cannot be expected to regard the excluding rule other than as one of great inconvenience. The rules naturally yield to any testamentary directions (express or implied) that they are not to apply, and the whole will should be looked at to see if the testator has excluded any of them.

It may not be easy to define a gift to a class. In *Kingsbury* v. *Walter* (84 L. T. Rep. 697; (1901) A. C. 187) Lord Davey said: "*Prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator." In a subsequent part of his speech he stated: "Another principle which is, I think, established in this branch of the law, is, that all the interests of members of the class must vest in interests at the same time. For instance, if there is a gift to *A.* for life, and afterwards to *B.* and the children of *C.*, the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of *C.* during the lifetime of the tenant for life." The importance of the difference between a gift to a class and one to individuals is that in the latter case, if the gift is to them as tenants-in-common and one of them dies in the testator's lifetime, his share lapses and falls into the residue, or if it is a share of residue is treated as undisposed of, while if one of a class predeceases the testator the share intended for him passes to the other members of the class. There is the well-known exception to the law as to lapse introduced by the Wills Act, 1837, s. 33, under which gifts to the testator's issue who die in his lifetime, but leave issue living at his death "shall not lapse" but shall take effect as if the legatee had died immediately after the testator. The persons interested in the estates of the child (or issue) who predeceased the testator naturally hoped that the benefit of s. 33 would be extended to a class gift. There are earlier decisions of Kindersley, V. C. and Wood, V. C., and in *Re Sir E. Harvey's Estate* (68 L. T. Rep. 562; (1893) 1 Ch. 567) Mr. Justice Chitty, as he then was, said: "A gift by will to a class is taken...to be a gift, where it is immediate to those only who survive the testator; and where it is not immediate, but postponed, to be a gift to those only who servive the testator, or come into being before the period of distribution...and, according to the decisions already cited, the 33rd section does not apply although the child leaves issue that survive the testator. The principle acted upon was that the section leaves the construction of these class gifts unaltered; and that these gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the testator's lifetime."

In *Re Chartres* (137 L. T. Rep. 52; (1927) 1 Ch. 466) Mr. Justice Astbury formulated the rule of convenience as follows: "First, if there is an immediate gift in a will to *A's.* children, the rule lays down that only those children in

existence at the testator's death shall take, although his intention was obviously different. By way of exception to this first head, if there are no children of *A.* in existence at the testator's death, then the rule of convenience ceases to operate, and all subsequently born children take in accordance with the testator's intention. The second head of the rule may be stated as follows. If the gift is in future, as for instance, to *A.* for life with remainder to *B's* children, the rule provides that only those children of *B.* shall take who come into existence before *A's* death. Here again there is an exception that if there are no children of *B.* in esse before *A's* death, then the rule ceases to operate and all subsequently born children take. The third head may be stated as follows: where there is a gift to *A.* for life and after his death to *B's* children who attain 21, then if at *A's* death there are children of *B.* who have attained 21 or the representatives of such children, the rule applies and the class closes. If at *A's* death there are only infant children of *B.* who subsequently attain 21, then again the class closes when the first child so attains that age; and in all cases the rule is excluded if there is an express intention of the testator to [the contrary." It is strange that the rule should be recognised as not carrying out the testator's [intention, and yet prevail in a court which endeavours to find out from the will what that intention was. How unfairly the rule may work out can be seen by a simple illustration. A testator bequeathes a fund to his mother for life and after her death to the children of his young sister in equal shares. The mother dies soon after the testator when the young sister has only one child, whom we will call *A.* Obviously the testator intended all the children of the sister to take, but by the rule of convenience *A.* takes the whole of the fund.

Fortunately, any one who is alive to the danger can easily provide against it by making the bequest in favour of the children living at the testator's death or born afterwards (2 Key and Elphinstone, 13th edit., Vol. 2, p. 797). It is true that *A.* may in such a case have to wait before any capital can be paid over to him, but that is better than depriving *B C. D.* &c. of any interest in a fund intended for them all and making one rich at the expense of the others. Although the law of lapse does not apply to gifts to a class, it is probably desired that the children of a deceased member of this class should stand in the shoes of their parent. We recommend a form in Key and Elphinstone (*sup.*) p. 799, "In trust for all or any the children or child of the said living at the death of the survivor of the said and and the children or child then living of any then deceased child of the said who whether children or grandchildren being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares as tenants-in-common, but so that the children of any deceased child of the said shall take equally between them as tenants-in-common, only the share which their parent would have taken had he or she survived the survivor of the said and and attained a vested interest." This form, it will be observed, makes *B's* grandchildren stand in the shoes of their parents as primary beneficiaries, and does not make the share which the deceased child would have taken part of the estate of the deceased child, as the 33rd section of the Wills Act, 1837, does. Words of distribution should be employed in respect of the children of a deceased child, otherwise they may be stranded with a joint tenancy (*Re Yates*, 64 L. T. Rep. 819; (1891) 3 Ch. 53). In the last mentioned case Mr. Justice North said: "The court has held, time after time, that when words of distribution occur only once, there being two classes to take, those words apply to the first class only (that is, here the sons and daughters); and not to the second class, in this case the issue who are to take the share which a deceased son or daughter would have taken if alive." Mr. Justice Simonds has, however, recently decided in *Re Froy* (158 L. T. Rep. 518; (1938) 1 Ch. 566), where the testator directed that the unappointed part of a fund "shall fall into, and form part of my residuary estate and be divided among my children then living or the issue of a deceased child, and on the death of such husband the residue shall be so divided and applied," that the words of double severance were in such a case unnecessary. In the opinion of the learned judge the gift opened with words of severance "which can properly be construed as applying equally to substitutional as original shares. Therefore, contrary to the opinion I first formed, I hold that the gift to the issue of Mr. Dunfee is a gift to those issue as tenants-

in-common." It is safer to have the double severance expressed, as it might be held that *Re Froy* did not apply in a particular case.—*L. T.*

IMPERIAL ACTS.

ACT No. 1 of 1941.

THE INSURANCE DEPOSITS (TEMPORARY REDUCTION) ACT, 1941.

Received the assent of the Governor General on the 3rd March, 1941, and is published in the Gazette of India, *Part IV, dated 8th March, 1941.*

An Act to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938.

Whereas, in consequence of conditions arising out of the present war, it is expedient to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938;

It is hereby enacted as follows:—

1. *Short title and extent.*

(*1*) This Act may be called the Insurance Deposits (Temporary Reduction) Act, 1941.

(*2*) It extends to the whole of British India.

2. *Definition.*

In this Act "insurer" means an insurer as defined in clause (*9*) of section 2 of the Insurance Act, 1938, except that it does not include a Mutual Insurance Company or a Co-operative Life Insurance Society to which Part IV of that Act applies.

3. *Reduction of instalments of deposit.*

(*1*) An insurer entitled to the benefits of this Act shall, subject to the provisions of section 5, be deemed in respect of any instalment of the deposit to be made by him under section 7 of the Insurance Act, 1938, which he was required to pay during the year commencing on the 1st day of January, 1940, or which he may be required to pay at any time after the end of that year and so long as this section continues to have effect, to have complied with the provisions of the said section 7 as to payment of instalments of deposits, if he has paid or pays in accordance with the provisions of that section not less than one half the total amount which would have been required by that section as the instalment, had the insurer not availed himself of the provisions of this Act.

(*2*) If an insurer entitled to the benefits of this Act, when paying an instalment of deposit, has, in respect of any instalment due during the year commencing on the 1st day of January, 1940, paid more than one half the total amount required by the said section 7 as the instalment, he may at his option have the amount of any such surplus payment appropriated to the payment of the next or any subsequent instalment of deposit required from him under the said section 7 read with sub-section (*1*) of this section.

(3) This section shall cease to have effect on the expiration of one year from such date as may be fixed, for the purposes of this Act, by the Central Government by notification in the official Gazette as the date of termination of the present hostilities.

4. *Insurers entitled to the benefits of this Act.*

An insurer shall be entitled to the benefits of this Act only if—

(*a*) he carries on life insurance business only, and

(*b*) the date on which he first assumed risk on any policy issued by him was earlier than the 3rd day of September, 1939, but not earlier than the 3rd day of September, 1929.

5. *Cesser of title to the benefits of this Act.*

(*1*) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in any year if in the preceding year his total premium income, including annuity considerations, as shown in the revenue-account prepared under the Insurance Act, 1938, exceeded rupees thirty thousand.

(*2*) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in respect of any future instalment—

(*a*) if after the 1st day of January, 1941, he declares any bonus or dividend at a rate higher than the rate at which such bonuses or dividends were last declared by

him before the 3rd day of September, 1939, or

(*b*) if the proportion of his renewal premium income spent by him in payment of commission and other expenses including capital expenditure, determined in accordance with Rule 25 of the Insurance Rules, 1939, exceeds in any year the proportion as so determined for the accounting period ending on the 31st day of December, 1939.

6. *Resumption of payment of instalments in accordance with Act IV of* 1938.

(*1*) When section 3 ceases to have effect, or if before that date an insurer ceases under clause (*a*) or clause (*b*) of sub-section (*2*) of section 5 to be entitled to the benefits of this Act, instalments of deposits shall be paid in accordance with the provisions of section 7 of the Insurance Act, 1938 (except that no insurer shall be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act), until the last instalment required to be paid under the said section 7 has been paid, and the balance of the deposit then remaining unpaid in consequence of the reduced instalments authorised under this Act shall be paid by the insurer in such further instalments, of such amount and at such times, as the Central Government may direct.

(*2*) If while section 3 continues to have effect an insurer ceases in any year under sub-section (*1*) of section 5 to be entitled to the benefits of this Act, instalments of deposit in that year shall be paid by him in accordance with the provisions of section 7 of the Insurance Act, 1938, except that he shall not be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act, and the provisions of sub-section (*1*) of this section shall apply to the payment by such insurer of any balance of the deposit due from him which remains unpaid after the last instalment required to be paid under the said section 7 has been paid.

7. *Saving in respect of delayed payments of instalments of deposits.*

For the purposes of the Insurance Act, 1938, an insurer entitled to the benefits of this Act who has failed to pay before the 1st day of January, 1941, an instalment of deposit due in the year 1940 shall not be liable to any consequences on that account in respect of a failure to comply with the provisions of section 7 of the said Act as to deposits if before the 15th day of February, 1941, he has paid as such instalment not less than one half the total amount required by the said section 7.

8. *Removal of difficulties.*

If any difficulty arises in determining the amount payable as an instalment of deposit by an insurer under this Act, the matter shall be decided by the Central Government whose decision shall be final.

ACT No. II of 1941.

THE INDIAN MERCHANDISE MARKS (AMENDMENT) ACT, 1941.

Received the assent of the Governor-General on the 11th March, 1941, and is published in the Gazette of India, *Part IV, dated 15th March, 1941.*

An Act further to amend the law relating to fraudulent marks on merchandise.

Whereas it is expedient further to amend the law relating to fraudulent marks on merchandise;

It is hereby enacted as follows:—

1. *Short title and commencement.*

(*1*) This Act may be called the Indian Merchandise Marks (Amendment) Act, 1941.

(*2*) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. *Amendment of section 2, Act IV of* 1889.

In section 2 of the Indian Merchandise Marks Act, 1889 (hereinafter, in sections 3 to 9 inclusive, referred to as the said Act),—

(*a*) for clause (*1*) the following clauses shall be substituted, namely :—

'(*1*) "mark" has the meaning assigned to that expression in clause (*f*) of sub-section (*1*) of section 2 of the Trade Marks Act, 1940;

(*1A*) "trade mark" means a "registered trade mark" as defined in clause (*j*) of sub-section (*1*) of section 2 of the Trade Marks Act, 1940, or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark:';

(*b*) in sub-clause (*c*) of clause (*2*), for

the words "numeral, word or mark" the word "mark" shall be substituted.

3. *Amendment of section 4, Act IV of 1889.*

In section 4 of the said Act,—

(*a*) in sub-section (*1*), for the words "numerals, words or marks", in both places where they occur, the word "marks" shall be substituted;

(*b*) in sub-section (*2*), after clause (*b*) the following word and clause shall be added, namely:—

"and

(*c*) being the name or initials of a fictitious person or of a person not carrying on business in connection with goods of the same description."

4. *Amendment of section 7, Act IV of 1889.*

In section 7 of the said Act,—

(*a*) after the words "things to which a false trade description is applied" the following words shall be inserted, namely :—

"or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification";

(*b*) in clause (*a*), after the words "trade description" the following words shall be inserted, namely :—

"or that any offence against this section had been committed in respect of the goods".

5. *Insertion of new section 7-A in Act IV of 1889.*

After section 7 of the said Act the following section shall be inserted, namely :—

"7-A. *Penalty for tampering with, altering or effacing a mark applied in pursuance of section 12-A.*

If a person tempers with, alters or effaces a mark which has been applied to any goods to which it is required to be applied by notification made under section 12-A, he shall, unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, and, in the case of a second or subsequent conviction, with imprisonment which may extend to two years, or with fine, or with both."

6. *Amendment of section 9, Act IV of 1889.*

In sub-section (*1*) of section 9 of the said Act, after the words "any goods or things to which a false trade description is applied" the following words shall be inserted, namely :—

"or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification."

7. *Substitution of new section and heading for section 12 and heading in Act IV of 1889.*

For section 12 of the said Act and the heading preceding that section the following section and heading shall be substituted, namely :—

"*Stamping of Piece-goods, Cotton Yarn and Thread.*

12. *Stamping of piece-goods, cotton yarn and thread.*

(*1*) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards, and a fraction of such a yard, according to the real length of the piece, and, except when the goods are sold from the factory for export from British India, without being conspicuously marked on each piece with the name of the manufacturer, or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(*2*) Cotton yarn such as is ordinarily sold in bundles, and cotton sewing or darning thread, which have been manufactured, bleached, dyed or finisded in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from those premises unless, in accordance with any rules made under section 20 of this Act, in the case of yarn the bundles are conspicuously marked with an indication of the weight of yarn in each bundle and the count of the yarn contained in the bundle and in the case of thread each unit is conspicuously marked with the weight of thread in the unit and the grist

number and, except where the goods are sold from the factory for export from British India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchaser in India of the goods.

(3) If any person removes or attempts to remove or causes or attempts to cause to be removed for sale from such premises or sells or exposes or has in possession for sale any such piece-goods or any cotton yarn or any cotton sewing or darning thread which is not marked as required by sub-section (1) and sub-section (2), every such piece and every such bundle of yarn and all such thread, and everything used for the packing thereof, shall be forfeited to His Majesty and such person shall be punished with fine which may extend to one thousand rupees."

8. *Insertion of new heading and section* 12-A *in Act IV of* 1889.

After section 12 of the said Act the following heading and section shall be inserted, namely :—

"*Power to require goods to show indication of origin.*

12-A. *Power to require goods to show indication of origin.*

(1) The Central Government may, by notification in the official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of British India and imported into British India, or which are made or produced within the limits of British India, shall, from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced.

(2) The notification may specify the manner in which such indication shall be applied, that is to say whether to the goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary, that is to say whether on importation only, or also at the time of sale, whether by wholesale or retail or both.

(3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interests of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, nor without such inquiry as the Central Government may consider necessary.

(4) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the issue of a notification under this section as they apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.

(5) A notification under this section shall not apply to goods made or produced beyond the limits of British India and imported into British India if in respect of those goods the Chief Customs Officer is satisfied at the time of importation that they are intended for exportation whether after transhipment in or transit through British India or otherwise."

9. *Amendment of section* 20, *Act IV of* 1889.

In section 20 of the said Act, after sub-section (1) the following sub-section shall be inserted, namely :—

"(1-A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton sewing or darning thread shall be marked with the particulars required by that section."

10. *Amendment of section* 18, *Act VIII of* 1878.

In section 18 of the Sea Customs Act, 1878,—

(*a*) in clause (*e*),—

(*i*) for the words "the United Kingdom, British India and British Burma", in both places where they occur, and for the words "the United Kingdom or in British India or in British Burma" the words "British India" shall be substituted ;

(*ii*) in sub-clause (*ii*), for the words "in the same language and character as the name or trade mark" the words "in the English language" shall be substituted ;

(*b*) in clause (*f*),—

(*i*) sub-clauses (*ii*) and (*iii*) shall be re-numbered as sub-clauses (*iii*) and (*iv*), respectively, and the following shall be inserted as sub-clause (*ii*), namely :—

"(*ii*) have not been conspicuously marked on each piece with the name of the manufacturer, exporter or wholesale purchaser in India of the piece, and", and

(*ii*) In sub-clause (*iv*) as so re-numbered, for the words and figures "Indian Factories Act, 1881" the words and figures "Factories Act, 1934" shall be substituted ;

(*c*) after clause (*g*) the following clauses shall be added, namely :—

"(*h*) goods which are required by a notification under section 12-A of the Indian Merchandise Marks Act, 1889, to have applied to them an indication of the country or place in which they were made or produced, unless such goods show such indication applied in the manner specified in the notification :

(*i*) cotton yarn such as is ordinarily imported in bundles, if—

(*i*) the bundle containing such yarn has not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(*ii*) such bundle has not been conspicuously marked with an indication of the weight and the count of the yarn contained in it, in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(*iii*) the yarn has been manufactured beyond the limits of India, or

(*iv*) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934 ;

(*j*) cotton sewing or darning thread, if—

(*i*) the units in which the thread is supplied have not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(*ii*) if each unit has not been conspicuously marked with an indication of the weight of thread contained in it and the grist number in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(*iii*) the thread has been manufactured beyond the limits of India, or

(*iv*) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934."

11. *Amendment of section* 19-*A, Act VIII of* 1878.

In sub-section (*3*) of section 19-A of the Sea Customs Act, 1878,—

(*a*) for the words "British India", in both places where they occur, the word "India" shall be substituted ;

(*b*) for the words "and in the same language and character" the words "in the English language" shall be substituted.

12. *Substitution of new section for section* 478, *Act XLV of* 1860.

For section 478 of the Indian Penal Code the following section shall be substituted, namely :—

"478. *Trade mark.*

For the purposes of this Code, the expression "trade mark" includes a trade mark registered under the Trade Marks Act, 1940, and any mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark."

13. *Amendment of section* 480, *Act XLV of* 1860.

In section 480 of the Indian Penal Code, for the words "are the manufacture or merchandise of a person whose manufacture or merchandise they are not" the following words shall be substituted, namely :—

"have a connection in the course of trade with a person with whom they have not any such connection".

Extracts from Contemporaries.

Law and Lawyers in Literature.

Readers of Sir Walter Scott's great novel, "Guy Mannering"—one of the best of the series — may recall that when Colonel Mannering went to consult Counsellor Playdell in Edinburgh he was shown into a room hung with a portrait or two by Jamieson, the Caledonian Vandyke, and surrounded with books, the best editions of the best authors, and in particular an

admirable collection of the classics, as to which their fortunate owner said: "These are my tools of trade. A lawyer without history or literature is a mechanic; a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." Happily, law and literature have time and again been felicitously linked together, and even law treatises, usually reputed by the public as the acme of aridity, have been rendered literature in the real sense by the lucidity and even charm of their language, as witness the writings of such distinguished lawyers as Sir Henry Maine, F. W. Maitland, and others.

In Quotation Books.

That the law and lawyers have a very conspicuous place in the various books of quotation may be seen by a glance through the index of such a work as Bartlett's "Familiar Quotations," on the title page of which is the happy but modest avowal, "I have gathered a posie of other men's flowers, and nothing but the thread that binds them is my own." It is an admirable collection with which to spend an occasional hour, and in which the lawyer will find a host of references to his calling, sometimes jocularly critical, but in the main recognising the important role which the man of law enacts in this work-a-day world. We are there reminded that it is in Cibber's "Woman's Wit" that the familiar phrase "Possession is eleven points in the law" appears. In graver mood we find Chatham's great declaration that "where law ends, tyranny begins." "The law is the last result of human wisdom acting upon human experience for the benefit of the public," came from Dr. Johnson, when in a benign mood. On the other hand, we have the jibe from Shakespears at "the law's delay"—a criticism levelled against it by each generation. Selden warns us that "ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man, can tell how to refute him." Coke assures us that "reason is the life of the law; nay, the common law itself is nothing else but reason.... The law, which is the perfection of reason"—a pronouncement which has not invariably been placidly accepted by the defeated litigant. In the old days, it is said that a disappointed suitor as he emerged from a Court of law might be heard to mutter. "If this is law, give me equity," while if he came defeated from a Chancery Court he might be heard moaning. "If this is equity, give me law."

Jocular References.

In "Love a la Mode," Charles Macklin gaily announced that "the law is a sort of hocus-pocus science, that smiles in your face while it picks your pocket; and the glorious uncertainty of it is of more use to the professors than the justice of it." In another and more recent collection of quotations, that by Sir Gurney Benham, is a short section headed "Forensic," which starts off with the cheerful statement that "the law of England is the greatest grievance of the nation, very expensive and dilatory," Bishop Burnet being the author. Thus, law is represented by his dictum that "corporations have neither bodies to be punished nor souls to be damned; they therefore do as they like." Lord Westbury, the author of many caustic sayings, is represented by his description of a witness from the College of Arms as "a silly old man who did not understand even his silly old trade." The authorship of this, however, has also been fathered on Lord Chesterfield and Whately. More practicial was Westbury's injunction to his coachman when the horses got out of hand, "drive into something cheap."—*L. T.*

Wit & Humour.

Ultimate Proof.—"It is embarrassing sometimes to pursue a direct line of questioning," said a lawyer in telling about a recent visit to New York. He had just dined at a hotel in Fifth Avenue, where the girl who takes care of the hats at the dining-room door is celebrated for her memory about the ownership of headgear.

"How do you know this is my hat?" the collegian asked as his silk tile was presented to him.

"I don't know it," said the hat girl.

"Then why do you give it, to me?" insisted President Eliot.

"Because you gave it to me," replied the young lady.—*Case and Comment.*

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[*Editors do not hold themselves responsible for the views expressed by the contributors.*]

EVIDENCE IN REBUTTAL

In courts of summary jurisdiction, it is rarely that the prosecution offers or is allowed to give evidence to rebut the case for the defence. Yet s. 14 of the Summary Jurisdiction Act, 1848, evidently contemplates that such evidence may be given. That section, after prescribing the procedure for hearing the prosecutor or complainant and such witnesses as he may call, as well as the defendant and any witnesses he may call, goes on to direct the justices "also to hear such witnesses as the prosecutor or complainant may examine in reply, if such defendant shall have examined any witnesses or given any evidence other than as to his the defendant's general character."

This does not confer a general right upon prosecutors or complainants to call further evidence after the defendant has closed his case, but it recognises the right of the prosecutor or complainant in summary proceedings to call evidence to rebut the evidence for the defence, subject to certain restrictions.

As our answer to a practical point at p. 407, *ante*, indicated, the cases limiting the right to call rebutting evidence apply to courts of summary jurisdiction. The principles are the same whether the trial be on indictment or in a court of summary jurisdiction, but it may be that their application should in practice be to some extent different, in the two kinds of trial. It is, therefore, worthwhile to examine the principles that have been laid down in the various cases, and to see how they ought to be applied to summary proceedings.

The prosecution is never allowed to call further evidence for the purpose of strengthening its case where that case has been weakened by the defence, unless the new evidence be in reply to some fresh issue raised by the defence, which the prosecution could not have dealt with when giving its evidence. That is to say, evidence in reply must not be merely confirmatory of evidence already given.

There are many cases quoted in the text books illustrating the foundation principle that rebutting evidence is admissible only in respect of matters arising *ex improviso*. Some of these decisions were upon civil actions, others upon criminal trials. It will suffice to quote a few of the authorities dealing with criminal cases.

R. v. *Stimpson* (1826), 2 C. & P. 415, was a trial at assizes for larceny. The case is thus summarized "On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, then the prisoner calls a witness to prove that he (the prisoner) bought them of J. T., if the prosecutor call J. T., he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft."

The reason for the decision, no doubt, was that it was always open to the prosecutor to call the witness to prove he saw the prisoner commit the offence, but that it was not known to the prosecutor that the defendant would state in his defence that he bought the goods from that witness. Upon the defence raising that issue, the prosecutor, taken by surprise, might call a witness to deny the prisoner's statement.

In *R.* v. *Shrimpton* (1851), 2 Den. C. C., p. 319; 169 Eng. Rep. 521, it was decided that where the prisoner, by his counsel, seeks to establish the prisoner's good character through cross-examination of a witness for the prosecution, the prosecution, may give evidence of bad character in rebuttal. After referring to "the scandalous attempts we have all seen made by persons repeatedly convicted, to establish a good character for honesty before the jury, either by calling witnesses, or by cross-examining the witnesses for the prosecution," Lord Campbell, C. J., stated that the prisoner

had given evidence of his own good character when his counsel elicited such evidence by cross-examination, and Alderson, B., pointed out that the relevant statute spoke of "giving evidence" and not of "calling witnesses." It is clear from this and other authorities that in general the prosecution may give evidence to rebut the testimony of the defendant's good character, whether such evidence comes from cross-examination of witnesses for the prosecution or from witnesses called for the defence.

The defence of alibi frequently opens the way for evidence by the prosecution in rebuittal. *R.* v. *Froggatt* (1910), 4 Crim. App. Rep. 115, is a good illustration. The headnote begins "When the defence sets up an alibi, it may be contradicted (even as to an immaterial date) by rebutting evidence." In delivering the judgment of the court, Bucknill, J., pointed out that the evidence given by the prosecution by way of rebutting the evidence for the defence as to the prisoner's whereabouts, though admissible at that stage, might not have been admissible if it had been tendered as evidence in chief. During the course of the argument, Phillimore, J., observed "In some cases it would be impossible for the prosecution to deal with the alibi except by way of rebutting evidence, because the prosecution does not know that at the trial the prisoner may not set up some defence other than, and inconsistent with, an alibi, even though before the justices he set up an alibi." He recalled a case he tried on circuit where the defence to a charge of rape was an alibi before the justices, but consent before the court of trial.

The most recent case is *R.* v. *Day* (1940), 104 J. P., 181. The headnote to that case runs as follows: "After the close of the case for the defence of a prisoner charged with forgery and with obtaining money by a forged cheque, the trial was adjourned. On the adjourned hearing, the judge allowed the prosecution to call a handwriting expert, who pointed out similarities between the signature on the cheque and certain specimens of the prisoner's admitted handwriting, which the prosecution had had in their possession before the beginning of the proceedings. The case for the prosecution had hitherto rested on the uncorroborated evidence of an accomplice.

Held, that the additional evidence should not have been admitted at that stage of the trial, as it did not relate to anything which had arisen *ex improviso* in the course of the proceedings, but the necessity for that kind of evidence should have been obvious from the beginning. As it was impossible to say that the verdict must have been the same if the evidence had not been admitted, the conviction must be quashed."

Hilbery, J., delivering the judgment, observed that a question might arise in the course of a trial, as to the proper time at which evidence ought to be received, and that the judge then had to exercise a judicial discretion; but that in this case it was an attempt to remedy, an obvious defect in the evidence for the prosecution. This was supplementary evidence, and it had been in the hands of the prosecution from the beginning.

It is clear from many authorities that evidence to rebut the defence is admissible only in respect of matters arising *ex improviso*, which could not by ordinary human ingenuity be foreseen and this applies not only to witnesses called by the prosecution, but even to witnesses called by the court. It has been said that the prosecution must stand or fall by the case it presents, and cannot supplement its evidence after the defence has been closed. The only exception is in respect of matters arising *ex improviso*. As was pointed out in one case, if the rule were otherwise, enquiries might go on interminably, first one side, and then the other, calling further evidence to contradict what had just been given in evidence. In courts of summary jurisdiction, it is likely that there will be more matters arising *ex improviso* than in trials on indictment. Before a trial on indictment proceedings before examining justices have taken place, and there are depositions upon which any evidence for the defence has been recorded, and if the defence has not called evidence there may have been cross-examination of witnesses for the prosecution sufficient to indicate the lines upon which the defence will be conducted at the trial. The prosecution should normally be in a position to call all the necessary evidence at the trial, save in such cases as a defence of alibi or the giving of evidence of good character which has not been anticipated. In summary proceedings the prosecutor is quite likely to be completely in the dark as to the nature of the defence that will be set up, and not infrequently it is true to say that the prosecution could not by ordinary ingenuity have anticipated the evidence for the defence. In such cases it is reason-

able and proper to allow the prosecution to give evidence in rebuttal of the defence, and this is covered by the words of s. 14 of the Summary Jurisdiction Act, 1848:—*J. P.*

IMPERIAL ACTS

ACT No. III of 1941

THE PETROLEUM (AMENDMENT) ACT, 1941.

Received the assent of the Governor General on the 17th March, 1941, and is published in the Gazette of India, *Part IV, dated 22nd March, 1941.*

An Act further to amend the Petroleum Act, 1934.

Whereas, it is expedient further to amend the Petroleum Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

1. *Short title.*

This Act may be called the Petroleum (Amendment) Act, 1941.

2. *Amendment of section 23, Act XXX of 1934.*

For clause (c) of sub-section (1) of section 23 of the Petroleum Act, 1934, the following clause shall be substituted, namely:—

"(c) being the holder of a licence issued under section 4 or a person for the time being placed by the holder of such licence in control or in charge of any place where petroleum is being imported or stored, or is under transport, contravenes any condition of such licence or suffers any condition of such licence to be contravened, or".

ACT No. IV of 1941.

THE BERAR LAWS ACT, 1941.

Received the assent of the Governor General on the 17th March, 1941, and is published in the Gazette of India, *Part IV, dated 22nd March 1941.*

An Act to extend certain Acts to Berar.

Whereas, by orders made under the Indian (Foreign Jurisdiction) Order in Council, 1902, the provisions of certain Acts in force in British India have from time to time been applied to, and are now, by virtue of such application, in force in, Berar;

And whereas, it is expedient that those and certain other Acts should be extended to, and be, by virtue of such extension, in force in, Berar:

It is hereby enacted as follows:—

1. *Short title and commencement.*

(1) This Act may be called the Berar Laws Act, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. *Extension of certain Acts to Berar.*

(1) The Acts specified in the First Schedule and so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws are hereby extended to, and shall be in force in, Berar; and in any enactment so extended any reference by whatever form of words to subjects of His Majesty shall be deemed to include a reference to Berari subjects of His Exalted Highness the Nizam of Hyderabad, and notwithstanding anything contained in clause (7) of s. 3 of the General Clauses Act, 1897, any reference to British India shall be construed as a reference to British India and Berar.

(2) The Acts specified in the Third Schedule shall be amended in the manner set forth in the second column of that Schedule.

3. *Cesser of application of certain Acts to Berar.*

The application, if any, to Berar, made by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, of the Acts specified in the First Schedule, of so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws, and of the Indian Cotton Cess Act, 1923, shall cease to have effect:

Provided that all appointments, delegations, notifications, orders, bye-laws, rules and regulations, which have been made or issued under, or in pursuance of, any provision of any of the said Acts as applied to Berar by order under the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar.

4. *Removal of doubt.*

For the removal of doubt it is hereby declared that the Acts specified in the Fourth Schedule have ceased to have effect and are repealed in Berar.

THE FIRST SCHEDULE

[*See* sections 2 (*1*) and 3.]

Acts Extended to Berar.

Year.	Number.	Short Title.
1850	XIX ...	The Apprentices Act, 1850.
1850	XXI ...	The Caste Disabilities Removal Act, 1850.
1855	XIII ...	The Indian Fatal Accidents Act, 1855.
1856	XI ..	The European Deserters Act, 1856.
1856	XV ...	The Hindu Widows' Re-marriage Act, 1856.
1860	XLV ...	The Indian Penal Code.
1864	III ...	The Foreigners Act, 1864.
1865	III ...	The Carriers Act, 1865.
1866	XXI ...	The Native Converts' Marriage Dissolution Act, 1866.
1867	XXV ...	The Press and Registration of Books Act, 1867.
1869	IV ...	The Indian Divorce Act.
1872	I ...	The Indian Evidence Act, 1872.
1872	III ...	The Special Marriage Act, 1872.
1872	IX ...	The Indian Contract Act, 1872.
1872	XV ...	The Indian Christian Marriage Act, 1872
1873	V ...	The Government Savings Banks Act, 1873.
1873	X ...	The Indian Oaths Act, 1873.
1874	IX ...	The European Vagrancy Act, 1874.
1875	IX ...	The Indian Majority Act, 1875.
1875	XVIII ...	The Indian Law Reports Act, 1875.
1876	IX ...	The Native Coinage Act, 1876.
1877	I ...	The Specific Relief Act, 1877.
1878	VIII ...	The Sea Customs Act, 1878.
1878	XI ...	The Indian Arms Act, 1878.
1879	XVIII ...	The Legal Practitioners Act, 1879.
1881	XXVI ...	The Negotiable Instruments Act, 1881.
1882	II ...	The Indian Trusts Act, 1882.
1882	XII ...	The Indian Salt Act, 1882.
1884	IV ...	The Indian Explosives Act, 1884.
1888	III ...	The Police Act, 1888.
1889	IV ...	The Indian Merchandise Marks Act, 1889.
1890	VIII ...	The Guardians and Wards Act, 1890.
1890	IX ...	The Prevention of Cruelty to Animals Act, 1890.
1891	XVIII ...	The Bankers' Books Evidence Act, 1891.
1898	V ...	The Code of Criminal Procedure, 1898.
1901	II ...	The Indian Tolls (Army) Act, 1901.
1903	VII ...	The Indian Works of Defence Act, 1903.
1903	XV ...	The Indian Extradition Act, 1903.
1904	VII ...	The Ancient Monuments Preservation Act, 1904.
1905	IV ...	The Indian Railway Board Act, 1905.
1906	III ...	The Indian Coinage Act, 1906.
1908	V ...	The Code of Civil Procedure, 1908.
1908	VI ...	The Explosive Substances Act, 1908.
1908	IX ...	The Indian Limitation Act, 1908.
1908	XIV ...	The Indian Criminal Law Amendment Act, 1908.
1908	XVI ...	The Indian Registration Act, 1908.
1909	IV ...	The Whipping Act, 1909.
1910	IX ...	The Indian Electricity Act, 1910.
1911	II ...	The Indian Patents and Designs Act, 1911.
1911	VIII ...	The Indian Army Act, 1911.
1912	IV ...	The Indian Lunacy Act, 1912.
1913	II ...	The Official Trustees Act, 1913.
1913	III ...	The Administrator-General's Act, 1913.
1914	III ...	The Indian Copyright Act, 1914.
1916	VII ..	The Indian Medical Degrees Act, 1916.
1917	II ...	The Motor Spirit (Duties) Act, 1917.
1917	XVIII ...	The Post Office Cash Certificates Act, 1917.
1918	XXII ...	The Bronze Coin (Legal Tender) Act, 1918.
1919	XII ...	The Poisons Act, 1919.
1920	V ...	The Provincial Insolvency Act, 1920.
1920	XIV ...	The Charitable and Religious Trusts Act, 1920.
1920	XV ...	The Indian Red Cross Society Act, 1920.

THE FIRST SCHEDULE—*concld.*

Year.	Number.	Short Title.
1920	XLVII ...	The Imperial Bank of India Act, 1920.
1920	XLVIII ...	The Indian Territorial Force Act, 1920.
1920	XLIX ...	The Auxiliary Force Act, 1920.
1921	XVIII ...	The Maintenance Orders Enforcement Act, 1921.
1922	XI ...	The Indian Income Tax Act, 1922.
1922	XII ...	The Indian Finance Act, 1922.
1922	...	The Indian State (Protection against Disaffection) Act, 1922.
1923	IV ...	The Indian Mines Act, 1923.
1923	V ...	The Indian Boilers Act, 1923.
1923	VIII ...	The Workmen's Compensation Act, 1923.
1923	XXIII ...	The Legal Practitioners (Women) Act, 1923.
1924	VI ...	The Criminal Tribes Act, 1924.
1925	XXXIX ...	The Indian Succession Act, 1925.
1926	XI ...	The Promissory Notes (Stamp) Act, 1926.
1926	XVI ...	The Indian Trade Unions Act, 1926.
1926	XXI ...	The Legal Practitioners (Fees) Act, 1926.
1926	XXXVIII ...	The Indian Bar Councils Act, 1926.
1929	VII ...	The Trade Disputes Act, 1929.
1929	XIX ...	The Child Marriage Restraint Act, 1929.
1930	II ...	The Dangerous Drugs Act, 1930.
1930	III ...	The Indian Sale of Goods Act, 1930.
1930	XVII ...	The Silver (Excise Duty) Act, 1930.
1930	XIX ...	The Indian Companies (Amendment) Act, 1930.
1930	XXIV ...	The Indian Lac Cess Act, 1930.
1931	...	The Indian Finance Act, 1931.
1931	...	The Indian Finance (Supplementary and Extending) Act, 1931.
1931	XVI ...	The Provisional Collection of Taxes Act, 1931.
1931	XXIII ...	The Indian Press (Emergency Powers) Act, 1931.
1932	IX ...	The Indian Partnership Act, 1932.
1932	XI ...	The Public Suits Validation Act, 1932.
1932	XII ...	The Foreign Relations Act, 1932.
1932	XIII ...	The Sugar Industry (Protection) Act, 1932.
1932	XXIII ...	The Criminal Law Amendment Act, 1932.
1933	II ...	The Children (Pledging of Labour) Act, 1933.
1933	VII ...	The Indian Finance Act, 1933.
1933	XVII ...	The Indian Wireless Telegraphy Act, 1933.
1933	XXVII ...	The Indian Medical Council Act, 1933.
1934	II ...	The Reserve Bank of India Act, 1934.
1934	VIII ...	The Khaddar (Name Protection) Act, 1934.
1934	IX ...	The Indian Finance Act, 1934.
1934	XI ...	The Indian States (Protection) Act, 1934.
1934	XIV ...	The Sugar (Excise Duty) Act, 1934.
1934	XVI ...	The Matches (Excise Duty) Act, 1934.
1934	XX ...	The Indian Carriage by Air Act, 1934.
1934	XXII ...	The Indian Aircrafts Act, 1934.
1934	XXIII ...	The Mechanical Lighters (Excise Duty) Act, 1934.
1934	XXV ...	The Factories Act, 1934.
1934	XXXI ...	The Iron and Steel Duties Act, 1934.
1934	XXXII ...	The Indian Tariff Act, 1934.
1935	...	The Indian Finance Act, 1935.
1936	...	The Indian Finance Act, 1936.
1936	III ...	The Parsi Marriage and Divorce Act, 1936.
1936	IV ...	The Payment of Wages Act, 1936.
1936	XIV ...	The Geneva Convention Implementing Act, 1936.
1937	I ...	The Agricultural Produce (Grading and Marking) Act, 1937.
1937	VI ...	The Arbitration (Protocol and Convention) Act, 1937.
1937	...	The Indian Finance Act, 1937.

THE SECOND SCHEDULE.

[*See* sections 2 (*1*) and 3.]

Acts partially extended to Berar.

Year.	Number.	Short title.
1843	V ..	The Indian Slavery Act, 1843.
1850	XII ...	The Public Accountants' Default Act, 1850.
1850	XXXVII ...	The Public Servants (Inquiries) Act, 1850.
1855	XXIV ...	The Penal Servitude Act, 1855.
1870	VII .	The Court-fees Act, 1870.
1871	XXIII ...	The Pensions Act, 1871.
1881	XI ...	The Municipal Taxation Act, 1881.
1882	IV ...	The Transfer of Property Act, 1882.
1885	XIII ...	The Indian Telegraph Act, 1885.
1886	VI ...	The Births, Deaths and Marriages Registration Act, 1886.
1886	XI ...	The Indian Tramways Act, 1886.
1890	I ..	The Revenue Recovery Act, 1890.
1890	VI ...	The Charitable Endowments Act, 1890.
1890	IX ...	The Indian Railways Act, 1890.
1895	XV ...	The Crown Grants Act, 1895.
1897	III ...	The Epidemic Diseases Act, 1897.
1897	X ...	The General Clauses Act, 1897.
1897	XIV ...	The Indian Short Titles Act, 1897.
1898	VI ...	The Indian Post Office Act, 1898.
1899	II ...	The Indian Stamp Act, 1899.
1899	IV ...	The Government Buildings Act, 1899.
1913	VII ..	The Indian Companies Act, 1913.
1914	IX ...	The Local Authorities Loans Act, 1914.
1916	XV ...	The Hindu Disposition of Property Act, 1916.
1917	V ...	The Destruction of Records Act, 1917.
1918	II ...	The Cinematograph Act, 1918.
1920	X ...	The Indian Securities Act, 1920.
1920	XXXIX ...	The Indian Elections Offences and Inquiries Act, 1920.
1923	III ...	The Cotton Transport Act, 1923.
1923	XIX ...	The Indian Official Secrets Act, 1923.
1924	XIII ...	The Indian (Specified Instruments) Stamp Act, 1924.
1925	IV ..	The Indian Soldiers (Litigation) Act, 1925.
1925	XII ...	The Cotton Ginning and Pressing Factories Act, 1925.
1925	XIX ...	The Provident Funds Act, 1925.
1927	XVI ...	The Indian Forest Act, 1927.
1928	XII ...	The Hindu Inheritance (Removal of Disabilities) Act, 1928.
1929	II ..	The Hindu Law of Inheritance (Amendment) Act, 1929.
1930	XXX ...	The Hindu Gains of Learning Act, 1930.
1936	V ...	The Decrees and Orders Validating Act, 1936.

THE THIRD SCHEDULE.

[*See* section 2 (*2*).]

Acts Amended.

Name of Act.	Amendments.
The Code of Civil Procedure, 1908 (Act V of 1908).	In section 7 and in rule 1 of Order L in the First Schedule —
	(*a*) after the figures "1887" the words and figures "or under the Berar Small Cause Courts Law, 1905" shall be inserted, and
	(*b*) for the words "under that Act" the words "under the said Act or Law" shall be substituted.
The Indian Limitation Act, 1908 (IX of 1908).	In Article 161 of the First Schedule, the word "Provincial", in both places where it occurs, shall be omitted, and after the words "Small Causes", where they occur for the first time, the brackets and words "(other than Presidency Small Cause Court)" shall be inserted.

THE FOURTH SCHEDULE.

(*See* section 4.)

Acts which have ceased to have effect and are repealed in Berar.

Year.	Number.	Short title.
1841	XIX ...	The Succession (Property Protection) Act, 1841.
1847	XX ...	The Indian Copyright Act, 1847.
1860	IX ...	The Employers and Workmen (Disputes) Act, 1860.
1865	X ...	The Indian Succession Act, 1865.
1865	XXI ...	The Parsi Intestate Succession Act, 1865.
1881	V ...	The Probate and Administration Act, 1881.
1881	VI ...	The District Delegates Act, 1881.
1889	VII ...	The Succession Certificate Act, 1889.
1911	XII ...	The Indian Factories Act, 1911.
1912	V ...	The Provident Insurance Societies Act, 1912.
1912	VI ...	The Indian Life Assurance Companies Act, 1912.
1914	VIII ...	The Indian Motor Vehicles Act, 1914.
1919	X ...	The Excess Profits Duty Act, 1919.
1923	X ...	The Indian Paper Currency Act, 1923.
1926	XIX ...	The Indian Finance Act, 1926.
1927	V ...	The Indian Finance Act, 1927.
1928	XX ...	The Indian Insurance Companies Act, 1928.
1929	X ...	The Indian Census Act, 1929.
1933	XIII ...	The Safeguarding of Industries Act, 1933.
1935	... ...	The Criminal Law Amendment Act, 1935.
1936	I ...	The Italian Loans and Credits Prohibition Act, 1936.

ACT No. V of 1941.

THE ASSAM RIFLES ACT, 1941.

Received the assent of the Governor General on the 17th March 1941, and is published in the Gazette of India, *Part IV, dated 2nd March 1941.*

An Act to provide for the regulation of and the maintenance of discipline in the Assam Rifles.

Whereas it is expedient to provide for the regulation of and the maintenance of discipline in the Assam Rifles;

It is hereby enacted as follows:—

1. *Short title, extent and application.*

(*1*) This Act may be called the Assam Rifles Act, 1941.

(*2*) It extends to the whole of Assam and applies to all members of the Assam Rifles wherever they may be serving.

2. *Definitions.*

In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "active service" means service at outposts, or against hostile tribes or other persons in the field;

(*2*) "Commandant" or "Assistant Commandant" means a person appointed by the Central Government to be a Commandant or an Assistant Commandant of the Assam Rifles;

(*3*) "District Magistrate" includes a Deputy Commissioner, the Superintendent of the Lushai Hills, the Political Agent in Manipur and the Political Officer of the Sadiya and of the Balipara Frontier Tracts;

(*4*) "rifleman" means a person appointed as such under section 4 after he has signed the statement in the Schedule in accordance with the provisions of sub-section (*2*) of section 4, and includes a rifleman appointed under the Assam Rifles Act, 1920, and a Military Police Officer appointed under the Eastern Bengal and Assam Military Police Act, 1912;

(*5*) "superior officer" means, in relation to any rifleman,—

(*a*) an officer of a higher class than, or of a higher grade in the same class as, himself, and

(*b*) any Assistant Commandant or Commandant;

(*6*) the expressions "reason to believe", "criminal force", "assault", "fraudulently" and "voluntarily causing hurt" have the meanings assigned to them respectively in the Indian Penal Code.

3. *General Superintendence and control of the force.*

General superintendence and control of the Assam Rifles shall be exercised by such person or authority as the Central Government may appoint in this behalf, and, in the exercise of such superintendence and control, the person or authority so

appointed shall be governed by such rules and orders as the Central Government may make in this behalf.

4. *Appointment and discharge.*

(*1*) The appointment of all riflemen shall rest with the Commandant.

(*2*) Before any person is appointed to be a rifleman, the statement in the Schedule shall be read and if necessary explained to him in the presence of a Magistrate, Commandant or Assistant Commandant, and shall be signed by him in acknowledgment of its having been so read to him.

(*3*) A rifleman shall not be entitled to be discharged except in accordance with the terms of the statement which he has signed under this Act or under the Assam Rifles Act, 1920.

5. *Classes and rank.*

There may be all or any of the following classes of riflemen, who shall take rank in the order mentioned, namely :—

(*i*) Subadars-Major,
(*ii*) Subadars,
(*iii*) Jemadars,
(*iv*) Havildars-Major,
(*v*) Havildars,
(*vi*) Naiks,
(*vii*) Buglers and riflemen,

and such grades in each class as the Central Government may from time to time direct.

6. *Heinous offences.*

A rifleman who—

(*a*) begins, excites, causes or joins in any mutiny or being present at any mutiny does not use his utmost endeavours to suppress it, or knowing or having reason to believe in the existence of any mutiny does not without delay give information thereof to his Commanding or other superior officer ; or

(*b*) uses, or attempts to use, criminal force to, or commits an assault on, his superior officer, knowing or having reason to believe him to be such, whether on or off duty ; or

(*c*) shamefully abandons or delivers up any garrison, fortress, post or guard, which is committed to his charge or which it is his duty to defend ; or

(*d*) in the presence of an enemy or of any person in arms against whom it is his duty to act, shamefully casts away his arms or his ammunition, or intentionally uses words or any other means to induce any other rifleman to abstain from acting against the enemy, or to discourage any other rifleman from acting against the enemy ; or

(*e*) directly or indirectly holds correspondence with, or communicates intelligence to, or assists or relieves any person in arms against the State, or omits to discover immediately to his Commanding or other superior officer any such correspondence or communications coming to his knowledge ; or

(*f*) directly or indirectly assists or relieves with money, victuals or ammunition, or knowingly harbours or protects, any enemy or person in arms against the State ;

or who, while on active service,—

(*g*) disobeys the lawful command of his superior officer ; or

(*h*) deserts or attempts to desert the service ; or

(*i*) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave ; or

(*j*) leaves his Commanding Officer, or his post or party, to go in search of plunder ; or

(*k*) quits his guard, picquet, party or patrol without being regularly relieved or without leave; or

(*To be continued*)

REVIEW.

The Arbitration Act, 1940.—By N. L. Gupta, Published by Law Publishing House, Allahabad.

Arbitrations have been in vogue in all countries and specially in commercial transactions, their utility cannot be minimized. But the law on the subject is rather confusing. This necessitated the enactment of the Act X of 1940. The learned author has attempted in his commentary on the Act, to place before the reader the plain meaning of the various sections of the Act. The spirit of the law has been explained with reference to the recent case-law. The English Law has been added in various appendices. The book shall be found very useful to the legal profession and also to the men in the commerce. Hon'ble Mr. Justice Braund, of the Allahabad High Court has written a lucid foreword to the book.

IMPERIAL ACTS

(*Concluded from page* 16)

(*l*) uses criminal force to, or commits an assault on, any person bringing provisions or other necessaries to camp or quarters, or forces a safeguard, or breaks into any house or any other place for plunder, or plunders, destroys or damages any property of any kind ; or

(*m*) intentionally causes or spreads a false alarm in action or in camp, garrison or quarters;

shall be punished with transportation for life, or with imprisonment which may extend to fourteen years, or with fine which may extend to five hundred rupees, or with both such imprisonment and fine.

7. *Other offences including acts prejudicial to good order and discipline.*

A rifleman who—

(*a*) is in a state of intoxication when on or detailed for any duty, or on parade, or on the line of march ; or

(*b*) strikes, or forces or attempts to force, any sentry ; or

(*c*) being in command of a guard, picquet or patrol, refuses to receive any prisoner duly committed to his charge, or, whether in such command or not, releases any prisoner without proper authority or negligently suffers any prisoner to escape ; or

(*d*) being deputed to any guard, picquet or patrol, quits it without being regularly relieved or without leave ; or

(*e*) being in command of a guard, picquet or patrol, permits gambling or other behaviour prejudicial to good order and discipline ; or

(*f*) being under arrest or in confinement, leaves his arrest or confinement before he is set at liberty by proper authority ; or

(*g*) is grossly insubordinate or insolent to his superior officer in the execution of his office ; or

(*h*) refuses to superintend or assist in the making of any field work or other military work of any description ordered to be made either in quarters or in the field ; or

(*i*) strikes or otherwise ill-uses any rifleman subordinate to him in rank or position ; or

(*j*) being in command at any post or on the march and receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person, or has committed any riot or trespass, fails, on proof of the truth of the complaint, to have due reparation made as far as possible to the injured person and to report the case to the proper authority ; or

(*k*) designedly or through neglect injures or loses or fraudulently or without due authority disposes of his arms, clothes, tools, equipment, ammunition, accoutrements or other necessaries, or any such articles entrusted to him or belonging to any other person ; or

(*l*) malingers, feigns or produces disease or infirmity in himself, or intentionally delays his cure, or aggravates his disease or infirmity ; or

(*m*) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person ; or

(*n*) commits extortion, or without proper authority exacts from any person carriage, porterage, or provisions ; or

(*o*) designedly or through neglect kills, injures, makes away with, ill-treats or loses his horse, or any animal used in the public service ;

or who, while not on active service,—

(*p*) disobeys the lawful command of his superior officer ; or

(*q*) plunders, destroys or damages any property of any kind ; or

(*r*) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave ; or

(*s*) deserts or attempts to desert the service ; or

(*t*) neglects to obey any battalion or other orders, or commits any act or omission prejudicial to good order and discipline, such act or omisesion not constituting an offence under the Indian Penal Code or other Act in force in Assam,

shall be punished with imprisoment for a term which may extend to one year, or with fine which may extend to two hundred rupees, or with both.

8. *Minor offences and punishments.*

(*1*) A District Magistrate or a Commandant, or subject to the control of the Commandant, an Assistant Commandant, or subject to the control of the Commandant an officer not below the rank of a Jemadar commanding a separate detachment or an outpost or in temporary command at the headquarters of a Distrtct during the absence of the District Magistrate, Commandant and Assistant Commandant, may, without a formal trial, award to any rifleman below the rank of a Naik, who is subject to his authority, any of the following punishments for the commission of any petty offence against discipline, which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to call for prosecution before a Criminal Court, that is to say,—

(*a*) imprisonment in the Quarter Guard, or such other place as may be considered suitable, for a term which may extend to twenty-eight days when the order is passed by a District Magistrate or a Commandant or to seven days when it is passed by any other officer ;

(*b*) punishment drill, extra guard, fatigue or other duty, not exceeding twenty-eights day in duration, with or without confinment to lines ;

(*c*) forfeiture of pay and allowances for a period not exceeding twenty eight days.

(*2*) Any of the punishments specified in sub-section

(*1*) may be awarded separately or in combination with any one or more of the others, but no award or awards including imprisonment and confinement to lines shall exceed twenty-eight consecutive days.

9. *Manner of imprisonment.*

Any rifleman sentenced under this Act to imprisonment for a period not exceeding three months shall, when he is also dismissed from the Assam Rifles, be imprisoned in a civil jail, but when he is not also dismissed from the Assam Rilfles he may, if the convicting Court or the District Magistrate so directs, be confined in the Quarter Gurad or such other place as the Court or Magistrate may consider suitable.

10. *Privileges of Commandants and Assistant Commandants.*

A Commandant or Assistant Commandant shall be entitled to all the privileges which a police officer has under sections 42 and 43 of the Police Act, 1861, section 125 of the Indian Evidence Act, 1872, and any other enactment for the time being in force.

11. *Members of the Assam Rifles to be deemed part of His Majesty's Army for certain purposes.*

For the purposes of sections 128, 130 and 131 of the Code of Criminal Procedure, 1898, a Commandant, Assistant Commandant, Subadar-Major, Subadar or Jemadar of the Assam Rifles shall be deemed to be an officer, a Havildar-Major, Havildar or Naik shall be deemed to be a non-commissioned officer and a bugler or rifleman shall be deemed to be a soldier of His Majesty's Army.

12. *Power of Central Government to make rules.*

The Central Government may, as regards the Assam Rifles, make such orders and rules consistent with this Act, as it thinks expedient, relative to the several matters respecting which the Inspector General of Police, with the approval of the Provinicial Government, may, as regards the Police Force, frame orders and rules under section 12 of the Police Act, 1861.

13. *Cesser of Assam Act I of* 1920 *and of appoinment of riflemen as police officers.*

The Assam Rifles Act, 1920, shall cease to apply to the Assam Rifles and to riflemen, and all riflemen shall, on the commencement of this Act, cease to be police officers under the Police Act, 1861.

THE SCHEDULE.

STATEMENT.

[*See* sections 2 (*4*) and *4* (*2*).]

1. After you have served for four years in the first instance in the Assam Rifles you have the option of extending the term of your service in the Assam Rifles indefinitely, so long as the Commandant is satisfied with your services,

or of claiming your discharge at any time, making your application through the officer to whom you may be subordinate, to a Commandant of the Assam Rifles or to the Magistrate of the District in which you may be serving; and you will be granted your discharge after two months from the date of your application, unless you are on active service or unless your discharge would cause the vacancies in the Assam Rifles to exceed one-tenth of the sanctioned strength. In either of the above cases you must continue to serve in the Assam Rifles until the objection is waived by competent authority or removed.

2. On your enlistment, appointment or training as a musician (piper, drummer, or bandsman), bugler, signaller, writer, soldier-clerk, havildar-compounder or as an artificer (armourer, mochi, carpenter, stone-mason, or motor dirver) you must, in spite of the provisions of paragaph 1 above, serve in the Assam Rifles for eight years from the date of your enlistment or the completion of your training, as the case may be.

3. On your deputation for a specialist course at an Army Training Centre you must sign an undertaking, before leaving the battalion to proceed on the course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the four years following your attendance at the Army Training Course.

4. On your deputation to the Educational or Veterinary Course you must sign an undertaking, before leaving the battalion to proceed on the Course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the eight years following your attendance at the Course.

5. In the event of your re-enlistment after you have been discharged, you will have no claim to reckon for pension or any other purpose your service previous to your discharge.

Signature of rifleman in acknowledgment of the above having been read to him. .....
A. B.

Signed in my presence after I had ascertained that A. B. understood the purport of what he signed. .....
C. D.
Magistrate, Commandant or Assistant Commandant.

ACT No. VI of 1941

THE INDIAN RAILWAYS (AMENDMENT) ACT, 1941.

Received the assent of the Governor General on the 17th March, 1941, and is published in the Gazette of India, *Part IV, dated 22nd March,* 1941.

An Act further to amend the Indian Railways Act, 1890.

Whereas it is expedient further to amend the Indian Railways Act, 1890, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

1. *Short title.*

This Act may be called the Indian Railways (Amendment) Act, 1941.

2. *Amendment of section* 68, *Act IX of* 1890.

(*1*) Section 68 of the Indian Railways Act, 1890 (hereinafter referred to as the said Act), shall be re-numbered as sub-section (*1*) of that section and in the said section as so re-numbered after the word "enter" the words "or remain in" shall be inserted.

(*2*) To the said section as so re-numbered and amended the following sub-section shall be added, namely :—

(*2*) A railway servant when granting the permission referred to in sub-section (*1*) shall ordinarily, if empowered in this behalf by the railway administration, grant to the passenger a certificate that the passenger has been permitted to travel in such carriage upon condition that he subsequently pays the fare payable for the distance to be travelled."

3. *Amendment of section* 112, *Act IX of* 1890.

(*1*) Section 112 of the said Act shall be re-numbered as sub-section (*1*) of that section and in the sub-section as so re-numbered—

(*a*) in clause (*a*), for the words and

figures "in contravention of section 68 any carriage on a railway" the words and figures "or remains in any carriage on a railway in contravention of section 68" shall be substituted; and

(*b*) after the words "shall be punished" the words "with imprisonment for a term which may extend to three months, or" shall be inserted.

(*2*) To the said section as so re-numbered and amended the following sub-section shall be added, namely :—

"(*2*) Notwithstanding anything contained in section 65 of the Indian Penal Code, the Court convicting an offender under this section may direct that the offender in default of payment of any fine inflicted by the Court, shall suffer imprisonment for a term which may extend to three months".

4. *Amendment of section* 113, *Act IX of* 1890.

In section 113 of the said Act,—

(*a*) for sub-section (*3*) the following sub-section shall be substituted, namely :—

"(*3*) The excess charge referred to in sub-section (*1*) and sub-section (*2*) shall be a sum equivalent to the amount otherwise payable under those sub-sections, or eight annas, whichever is greater :

Provided that where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge shall be one-sixth of the excess charge otherwise payable calculated to the nearest anna, or two annas, whichever is greater:

Provided further that if the passenger has with him a certificate granted under sub section (*2*) of secton 68, no excess charge shall be payable.";

(*b*) in sub-section (*4*), for the words beginning with "the sum payable by him shall" and ending with "be paid to the railway administration" the following words shall be substituted, namely :—

"any railway servant appointed by the railway administration in this behalf may apply to any Magistrate of the first or second class for the recovery of the sum payable as if it were a fine, and the Magistrate if satisfied that the sum is payable shall order it to be so recovered, and may order that the person liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month. Any sum recovered under this sub-section shall, as it is recovered, be paid to the railway administration".

5. *Insertion of new section* 113-A *in Act IX of* 1890.

After section 113 of the said Act the following section shall be inserted, namely :—

"113A. *Power to remove persons from railway carriage.*

Any person who, without having obtained the permission of a railway servant, travels or attempts to travel in a carriage without having a proper pass or ticket with him, or in a carriage of a higher class than that for which he has obtained a pass or purchased a ticket, or in a carriage beyond the place authorised by his pass or ticket, or who being in a carriage fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under section 69, may be removed from the carriage by any railway servant authorised by the railway administration in this behalf or by any other person whom such railway servant may call to his aid, unless he then and there pays the fare and the excess charge which he is liable to pay under section 113 :

Provided that nothing in this section shall be deemed to preclude a person removed from a carriage of a higher class from continuing his journey in a carriage of a class for which he holds a pass or ticket :

Provided further that women and children, if unaccompanied by male passengers shall not be so removed except either at the station at which they first enter the train or at a junction or terminal station or station at the headquarters of a civil district and only between the hours of 6 A. M. and 6 P. M."

INDIAN CASES

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[*Editors do not hold themselves responsible for the views expressed by the contributors.*]

TEMPORARY NUISANCE : WHETHER ACTIONABLE

In a recent case, which will be considered more fully at the conclusion of the present article, Mr. Justice Atkinson remarked that a temporary nuisance was not necessarily actionable. If a man was doing something which he had a right to do and caused a nuisance of a temporary kind, that was not actionable; but if he did something which was unreasonable and which he had not a right to do, he might be guilty of nuisance.

The temporary character of the acts complained of would appear to be bound up with their reasonableness, and this consideration involves the introduction of a wider problem which has not been treated by the authorities with complete consistency.

Thus, in *Reinhardt* v. *Mentasti* (42 Ch. 685) Mr. Justice Kekewich said: "Notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own property reasonably or otherwise." The defendant who was as conducting the business of an eating house—reasonably, having regard to the activities involved—put up a stove which rendered the cellar of the adjoining house unfit for storing wine. In doing that which was for the convenience of his customers he was creating a nuisance and, the learned judge said, "it seems to me that once you establish that he was creating a nuisance the fact that he was doing what was reasonable from his point of view is no defence."

In *Bull* v. *Ray*, (30 L. T. Rep. 1; 8 Ch. App. 467) Lord Selborurne, L.C., made the following statement: "In making out a case of nuisance ... there are always two things to be considered, the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his property; and his neighbour, showing substantial injury is entitled to protection."

The defendant in the case occupied a dwelling-house, the ground floor of which had, many years prior to the action, been converted into a stable. This stable was altered by the defendant in such a manner that the noise of the horses was an annoyance to the plaintiff who lived next door and prevented the plaintiff from using his premises as a private hotel. The court held that the fact that horses had previously been kept in the stable did not deprive the plaintiff of his right to have the nuisance abated. The Lord Chancellor did not regard it "as a reasonable or usual manner of using the front portion of a dwelling-house in such a street as [that in question], that it should be turned into a stable for horses." If it was so used, the proprietor was bound to take care that it was so used as not to be a substantial annoyance, detrimental to the comfort and value of the neighbouring property.

Bull v. *Ray* was cited by Mr. Justice Vaughan Williams in the course of his judgment in *Harrison* v. *Vauxhall Water Company* (64 L. T. Rep. 864; (1891) 2 Ch. 409)—a case which is also important from the viewpoint of our inquiry in providing an example of a temporary nuisance being held not actionable. The plaintiff had suffered substantial discomfort from the

noise caused by lift pumps used by the defendants in sinking a shaft in land adjacent to his house. On the plaintiff launching an action, the defendants substituted centrifugal pumps which made less noise. They might have used pumps of the latter type from the beginning but for various reasons they were less convenient, particulary when the work was in its early stages. It was held that the annoyance, being temporary and for a lawful object, did not amount to an actionable nuisance.

The shaft had been sunk in exercise of the defendants' statutory power and the court held that this power included all things necessary for the execution of the work, but the excerpt from the judgment which is important for our purpose deals with the position apart from any justification on this ground. "It seems to me," Mr. Justice Vaughan Williams said, "that if the defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land, they would not have been responsible for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary use of the land, a considerable amount of temporary annoyance to their neighbours but they are not necessarily on that account to be held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if that were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next-door neighbour during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance: *Bull* v. *Ray*."

The plaintiff in *Sanders-Clark* v. *Grosvenor Mansions Company Limited* and *D'Allesandri* (82 L. T. Rep. 758; (1900) 2 Ch. 373) was the lessee of a flat on the first floor of the first defendants' building. When her occupation began the adjoining flats were occupied exclusively for residential or professional purposes. Some six years later the second defendant took a lease of the floor immediately underneath the plaintiff's flat and there carried on a restaurant business. For this purpose he made a number of alterations, including the erection of a large cooking range (for which the flat was not property adapted) and the substitution of wire gaze for glass in one of the windows. The action was discontinued against the first defendants, but the plaintiff alleged that the second defendant conducted his business so as to be an intolerable nuisance to her by noise, heat and smell. The nuisance from heat had been removed since the commencement of the action, by alterations to the premise. The court held that nuisance from noise had not been proved, that the plaintiff had been unnecessarily exposed to nuisance from smell which constituted a substantial interference with her comfort, and that, while the nuisance from heat had been removed, the alterations constituted a nuisance in respect of which she was entitled to relief.

Mr. Justice Buckley observed that when the defendant entered upon the premises and altered the building he was exposing his neighbour to an amount of heat which the flue was not constructed to bear and which might have been dangerous. That was not a reasonable use of the building. "The question," his lordship continued, "is whether he is liable for that, and in my opinion he is. I am not saying that the alteration was not such as he might properly make for the purpose of carrying on a restaurant, but that by so doing he was exposing his neighbour to a burden which she ought not be called upon to bear." The learned Judge preferred to guide himself by Lord Selbourne's judgment in *Bull* v. *Ray* (*sup.*) then by the opinion expressed by Mr. Justice Kekewich in *Reinhardt* v. *Mentasti* (*sup.*). The court must consider whether the defendant was using his property reasonably or not. "If he is using it reasonably," Mr. Justice Buckley said, "there is nothing which at law can be considered a nuisance; but if he is not using it reasonably, if he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief."

In a later case, *Attorney-General* v. *Cole and Son* (83 L. T. Rep. 725; (1901) 1 Ch. 205), Mr. Justice Kekewich said that his words had been misunderstood. Nothing could be further from his intention than to differ from Lord Selbourne. The decision in *Reinhardt* v. *Mentasti* had been founded on the judgment in *Bamford* v. *Turnley* (3 B. & S., 62), from which Mr. Justice Buckley seemed to think that he (Mr. Justice Kekewich) differed. The question was, could a man reasonably create a nuisance? "I think," Mr. Justice Kekewich said, 'the answer to be derived from the case of *Bamford* v. *Turnley*, from which, so far as I am aware, there has never been any departure at all, is that he cannot. If he commits a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory." In the result an injunction was granted against a fat-melter whose business caused noxious gases, notwithstanding that it was carried on in a proper manner and precautions were taken to minimise the nuisance.

It is possible that the difference of view above considered is little more than one of terminology. Mr. Justice Kekewhich in *Reinhardt's* case speaks of the defendant doing something which is "reasonable from his point of view." In the other cases which have been considered, the test of reasonableness is not the defendant's convenience but the charcter of the property occupied. It would seem, moreover, that Mr. Justice Kekewich recognised the possibility of a temporary nuisance not being actionable. "If it is really a nuisance", he said in the case last cited, "then it seems to follow as a matter of course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or passing character."

Whether or not there is a difference of view, there can be little doubt that Lord Selbourne's presentation of the matter is to be preferred. The problem was recently considered by Mr. Justice Atkinson in *Newman* v. *Real Estate Debenture Corporation* (162 L. T. Rep. 183). One of the questions arising in the case was whether the carrying out of extensive alterations so as to adopt for trading purposes a number of floors of a building constituted a nuisance to one who occupied a flat in the building for residential purposes. The plaintiff was bound by covenant to use his premises for residential purposes only and, as his Lordship held, the defendants were bound by the same covenant. The learned judge answered the above question in the affirmative. "The point is," he saide, "that if a man is doing something which he has a right to do, and causes a nuisance of a temporary kind, it is not actionable, but, if he is doing something which is unreasonable and which he has not the right to do, he may then be guilty of a nuisance." The nuisance in the present case had not been caused by a lawful and proper execrise of the defendants' powers, but by an exercise which was in breach of their duty to the plaintiff. The nuisance could not therefore be excused on the ground that it was only of a temporary character.— *L. T.*

Extracts from Contemporaries.

Judicial Robes

There is on record somewhere a story handed down from a past generation that, on the announcement of the appointment of a new judge, an older member of the Bench, instead of offering his congratulations to the newly appointed colleague, remarked in somewhat gloomy tones, 'Your robes will cost you a deal of money." It was certainly true, but doubtless also the judicial newcomer viewed the expense entailed in providing himself with the necessary sartorial equipment with comparative indifference. But it certainly is the fact that the number and variety of the judicial gowns of many colours that fill the judge's wardrobe involve considerable expenditure; furthermore, the Bar wig has to be jettisoned and replaced by one without the many curls in its tail, and that again has, of course, to be paid for. So that the new judge begins his career with an expenditure that must make a fair inroad on his first year's salary.

The United States Supreme Court.

When the constitutional organisation of the Supreme Court of the United States had been settled, the question of a court dress cropped up. Should the judges wear gowns and wigs as did their English confreres? This momentous question gave rise to a somewhat heated debate,

Jefferson was stoutly against any needless apparel, but if the gown was to be adopted, he said, "For Heaven's sake discard the monstrous wig which makes the English judges look like rats peeping under bunches of oakum." On the other hand, Hamilton was in favour of the adoption of the English wig and the English gown, while Aaron Burr was in favour of the English gown but strongly opposed what he called the "inverted woolsack termed a wig." Eventually it was decided that the gown should be taken and the wig discarded, and as one writer on the subject said, "all who see the court in session will agree that the flowing black silk gowns worn by the Justices help to preserve in the court room that decorum and sense of solemnity which should always characterise the place of judgment." In Scotland judges are, like the rest of their countrymen, a frugal race, and a member of the Bar, when promoted to the Bench, does not, or, at all events, did not have to provide himself with a new wig of the pattern adopted by the judges in England but contented himself with the wig which he wore at the Bar. Lord Young is said to have taken to the English pattern of the judicial wig, but the circumstance was observed upon at the time and not very favourably.

Jettison of a Judicial Wig

Like other mundane things, even judicial wigs have on occasion suffered mishap. One of the most noted of these occurred in the judicial career of Lord Ellenborough. On that occasion the Chief Justice was being accompanied by Lady Ellenborough in the tour of the circuit. Like quite ordinary persons, the Chief Justice had a profound and not unreasonable antipathy to his carriage being encumbered—so he put it—with unnecessary band—and other boxes containing the numerous hats and other paraphernalia of a lady's wardrobe. On this occasion his Lordship's foot, after a while en route, came in contact with one of the obnoxious receptacles, whereupon, uttering some ejaculations of an objurgatory character, he jettisoned the box, at the same time commanding the coachman to drive on. On reaching the circuit town the Chief proceeded to array himself for the Bench and demanded his wig, a request which was meekly answered by the attendant with the statement that "It was thrown out of the carriage window!" What is the moral? Surely this, that even Chief Justices sometimes act hastily, quite like ordinary mortals, and have to repent at leisure.

Dispensing With Forensic Costume

There have been occasions, a few indeed in number, when the full forensic costume has been temporarily dispensed with on account of the oppressive heat of an unusually hot summer. One such occurred in 1868, when the "Times" had a paragraph stating that during two days in one court the judge and members of the Bar dispensed with their wigs. Sir Robert Collier, who was engaged in the case, called attention to the innovation and apologised for not appearing in full forensic dress. The judge stated that he had set the example of leaving off his wig in consequence of the almost unprecedented heat, there being, he thought limits to human endurance. Sir Robert went on to express the hope that the precedent might be followed, a hope in which not a few others heartily concurred. That was a long time ago, but the wig still flourishes like a green bay tree, giving no sign of superannuation or being consigned to the law's lumber room.—*L. T.*

Wit & Humour.

The Inquisition.—"If I go on trial," said the prisoner, "do I have to sit here and hear all the hypothetical questions asked by the lawyers?"

"Certainly," said the judge.

"And hear all the handwriting experts?"

"Of course."

"And follow the reasoning of the chemistry and insanity experts?"

"Very probably," said the judge.

"Well, then, Judge, I will enter my plea."

"What is it?" asked the judge.

"Guilty!"—*Case and Comment.*

IMPERIAL ACTS

ACT No. VII of 1941.

THE INDIAN FINANCE ACT, 1941.

Received the assent of the Governor General on the 31st March, 1941, and is published in the Gazette of India, *Part IV, dated 5th April, 1941.*

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.

Whereas it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged ;

It is hereby enacted as follows ;—

1. *Short title and extent.*

(*1*) This Act may be called the Indian Finance Act, 1941.

(*2*) It extends to the whole of British India.

2. *Fixation of Salt Duty.*

The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1941, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

3. *Excise Duty on Matches.*

For section 4 of the Matches (Excise Duty) Act, 1934, the following section shall be substituted, namely :—

"4. The duty payable under section 3 shall be levied at the following rates, namely :—

(*a*) on matches in boxes or booklets containing on an average not more than eighty—

(*i*) if the average number is forty or less, at the rate of two rupees per gross of boxes or booklets,

(*ii*) if the average number is more than forty, but not more than sixty, at the rate of three rupees per gross of boxes or booklets, and

(*iii*) if the average number is more than sixty, at the rate of four rupees per gross of boxes or booklets ;

(*b*) on all other matches, at such rate as the Central Government may prescribe."

4. *Excise Duty on Mechanical Lighters.*

In section 3 of the Mechanical Lighters (Excise Duty) Act, 1934, for the words "one rupee and eight annas" the words "three rupees" shall be substituted.

5. *Import Duty on Artificial Silk Yarn and Thread.*

In the First Schedule to the Indian Tariff Act, 1934, in Item No. 47 (2), for the entry

"25 per cent., *ad valorem* or 3 annas per lb., whichever is higher" in the fourth column the following entry shall be substituted, namely :—

"25 per cent, *ad valorem* or 5 annas per lb, whichever is higher".

6. *Inland Postage rates.*

For the year beginning on the 1st day of April, 1941, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

7. *Income-tax and Super-tax.*

(*1*) Subject to the provisions of sub-sections (*2*) and (*3* —

(*a*) income-tax for the year beginning on the 1st day of April, 1941, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate;

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1941, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939, increased—

(*i*) in the case of the rate applicable to a company, by a surcharge amounting to one-third of that rate, and

(*ii*) in the case of every other rate, by a surcharge for the purposes of the Central Government amounting to one-third of each such rate;

Provided that in the case of an association of persons being a co-operative society, other than the Sanikatta Salt-owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1941, shall be the rates of super-tax specified in the Proviso to clause (*b*) of sub-section (*1*) of section 7 of the Indian Finance Act, 1940, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate.

(*2*) In making any assessment for the year ending on the 31st day of March, 1942,—

(*a*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (*1*) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income;

(*b*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (*2*) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (*1*) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income.

(*3*) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (*1*) of this section, and in accordance with the provisions of sub-section (*2*) of this section where applicable.

(*4*) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

8. *Continuance of and rate of Excess Profits Tax.*

(*1*) In sub clause (*a*) of clause (*6*) of

section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1941," the words and figures "31st day of March, 1941," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 6.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES

[*See* section 7.]

Letters.	
For a weight not exceeding one tola	One and a quarter annas.
For every tola, or fraction thereof, exceeding one tola	Half an anna.
Postcards.	
Single	Nines pies.
Reply	One and a half annas.
Book, Pattern and Sample Packets.	
For the first five tolas or fraction thereof	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas	Three pies.
Registered Newspapers.	
For a weight not exceeding ten tolas	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—For a weight not exceeding ten tolas	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office	
Parcels.	
For a weight not exceeding forty tolas	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ...	Four annas."

ACT No. VIII of 1941.

THE PROTECTIVE DUTIES CONTINUATION ACT, 1941.

Received the assent of the Governor General on the 31st March, 1941, and is published in the Gazette of India, *Part IV, dated 5th April,* 1941.

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect.

Whereas it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect;

It is hereby enacted as follows:—

1. *Short title.*

This Act may be called the Protective Duties Continuation Act, 1941.

2. *Amendment of the First Schedule, Act XXXII of* 1934.

In the First Schedule to the Indian Tariff Act, 1934, in Item No. 17, and in Item No. 61 (5), and in Items Nos. 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25) and 63. (27), and in Item No. 74, for the entry or entries in the seventh column "March 31st, 1941"

the entry or entries "March 31st, 1942" shall be substituted.

3. *Amendment of section 3, Act XIII of 1932.*

In section 3 of the Sugar Industry (Protection) Act, 1932, for the figure "1941" the figure "1942" shall be substituted.

ACT No. IX of 1941.

THE INDIAN TARIFF (AMENDMENT) ACT, 1941.

Received the assent of the Governor General on the 31st March, 1941, and is published in the Gazettte of India, *Part IV, dated 5th April, 1941.*

An Act further to amend the Indian Tariff Act, 1934.

Whereas it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

1. *Short title.*

This Act may be called the Indian Tariff (Amendment) Act, 1941.

2. *Amendment of the First Schedule, Act XXXII of 1934.*

In the First Schedule to the Indian Tariff Act, 1934, in Items Nos. 10 (1) and 11§ (1), in the last column, for the figure "1941" the figure "1942" shall be substituted.

ACT No. X of 1941.

THE TYRES (EXCISE DUTY) ACT, 1941.

Received the assent of the Governor General on the 31st March, 1941, and is published in the Gazette of India, *Part IV, dated 5th April 1941.*

An Act to provide for the imposition and collection of an excise duty on tyres.

Whereas it is expedient to provide for the imposition and collection of an excise duty on tyres;

It is hereby enacted as follows:—

1. *Short title and extent.*

(*1*) This Act may be called the Tyres (Excise Duty) Act, 1941.

(*2*) It extends to the whole of British India.

2. *Definitions.*

In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "manufactory" means any premises wherein tyres are manufactured;

(*b*) "owner" includes any person expressly or impliedly authorised by an owner of a manufactory to be his agent in respect of the manufactory;

(*c*) "tyre" means a pneumatic tyre in the manufacture of which rubber is used, and includes the inner tube and the outer cover of such a tyre.

3. *Imposition of and amount of duty.*

(*1*) A duty of excise at the rate of ten per cent. on the value thereof shall be levied on all tyres manufactured in any manufactory in British India and issued out of such manufactory on or after the 1st day of April, 1941, and shall be payable by the owner of the manufactory.

(*2*) For the purposes of levying the duty imposed by sub-section (*1*) the Central Government may, by notification in the Official Gazette, fix the values of tyres or of any class of tyres; and where no such value has been fixed the value of a tyre shall be deemed to be the wholesale cash price, less trade discount, for which a tyre of the like kind and quality is sold or is capable of being sold by a manufactory without any abatement or deduction whatever except the amount of the excise duty payable on it at the time of issue out of the manufactory.

4. *Recovery of duty with penalty.*

(*1*) If any duty payable under section 3 is not paid within the time fixed by a notice issued in accordance with any rules made in this behalf under this Act, it shall be deemed to be an arrear, and the authority to which such duty is payable may, in lieu thereof, recover any sum, not exceeding double the amount of the duty unpaid, which such authority may in its discretion think it reasonable to require.

(*2*) An arrear of duty, or any sum recoverable in lieu thereof under this section, shall be recoverable as an arrear of land-revenue and shall be recoverable in addition to, and not in substitution for, any other penalty incurred under this Act.

5. *Issue from manufactory.*

(*1*) No person shall issue any tyres out of any manufactory except in accordance with the provisions of rules made under section 8 regulating such issue, or, until such rules are made, in accordance with the general or special orders of the Central Government.

(*2*) Whoever contravenes any such rule or order shall be punishable with fine which may extend to one thousand rupees or to a sum double the amount of the duty on any tyres issued in contravention of such rule or order, whichever is greater.

6. *Application of the provisions of Act VIII of 1878 to the duty on tyres.*

The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duty imposed by sub-section (*1*) of section 3.

7. *Power of Central Government to prohibit import.*

The Central Government may, by notification in the Official Gazette, prohibit absolutely, or with such exceptions as it thinks fit, the bringing of tyres into British India from the territory of any specified Indian State.

8. *Power to make rules.*

(*1*) The Central Government may, by notification in the Official Gazette, make rules—

(*a*) imposing on owners of manufactories the duty of furnishing returns and keeping records and books, and prescribing the form of such returns, records and books and the particulars to be contained therein, and the manner in which the same are to be verified :

(*b*) regulating the issue of tyres out of manufactories ;

(*c*) providing for the assessment and collection of the duty, the issue of notices requiring payment, the authority to whom the duty shall be payable and the recovery of arrears;

(*d*) authorising and providing for the inspection of manufactories ; and

(*e*) generally for carrying into effect the provisions of this Act.

(*2*) Such rules may provide that any breach thereof shall be punishable with fine which may extend to five hundred rupees :

Provided that the breach of any rule made under clause (*b*) of sub-section (*1*) shall be punishable with the punishment provided for an offence against section 5.

ACT No. XI of 1941.

THE EXCESS PROFITS TAX (AMENDMENT) ACT, 1941.

Received the assent of the Governor General on the 31th March, 1941, and is published in the Gazette of India, *Part IV, dated 5th April, 1941.*

An Act further to amend the Excess Profits Tax Act, 1940.

Whereas it is expedient further to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing :

It is hereby enacted as follows :—

1. *Short title.*

This Act may be called the Excess Profits Tax (Amendment) Act, 1941.

2. *Amendment of section 2, Act XV of 1940.*

In section 2 of the Excess Profits Tax Act, 1940 (hereinafter referred to as the said Act), after clause (*16*) the following clause shall be inserted, namely :—

(*16-A*) "ordinary share capital" has the meaning assigned to that expression in sub-section (*8*) of section 9 ;"

3. *Amendment of section 4, Act XV of 1940.*

Section 4 of the said Act shall be re-numbered as sub-section (*1*) of that section, and to the section as so re-numbered the following sub-section shall be added, namely :—

"(*2*) Where a chargeable accounting period falls partly before and partly after the end of March, 1941, the foregoing provisions of this section shall apply as if so much of that chargeable accounting period as falls before, and so much of that chargeable accounting period as falls after, the said end of March were each separate chargeable accounting period, as if the excess of profits of that separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period ; and any apportionment required to be made by this sub-section shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period."

4. *Amendment of section 7, Act XV of 1940.*

To section 7 of the said Act the following provisoes shall be added, namely :—

"Provided that a deficiency of profits occurring in a chargeable

accounting period beginning on or after the 1st day of April, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period beginning on or after the said 1st day of April, and a deficiency of profits occurring in a chargeable accounting period ending on or before the 31st day of March, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period ending on or before the said 31st day of March; and where owing to an insufficiency of profits for chargeable accounting periods ending on or before the said 31st day of March, or, as the case may be, beginning on or after the said 1st day of April, the whole or any part of the deficiency is applied otherwise than as aforesaid,—

(*a*) the application shall be treated as provisional only; and

(*b*) if it thereafter appears that there is no longer such an insufficiency as aforesaid, such adjustment shall be made as the Central Board of Revenue may by written order direct:

Provided further that where a chargeable accounting period falls partly before and partly after the end of March, 1941, the provisions of the preceding proviso shall apply as if so much of the chargeable accounting period as falls before, and so much of the chargeable accounting period as falls after, the said end of March, were each a separate chargeable accounting period, and as if the deficiency of profits of that separate chargeable accounting period were an apportioned part of the deficiency of profits occurring in the whole period; and any apportionment required to be made by this proviso shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period."

5. *Amendment of section* 17, *Act XV of* 1940.

In sub-section (*1*) of section 17 of the said Act,—

(*a*) in the first proviso, for the words "first proviso" the words "second proviso" shall be substituted;

(*b*) in the second proviso, for the word "modifications" the following words shall be substituted, namely:—

"refusal to make modifications or against any modifications".

6. *Amendment of rule* 1, *First Schedule, Act XV of* 1940.

In the first proviso to rule 1 of the First Schedule to the said Act, after the words "Provided that any sums" the brackets and words "(other than any interest paid by a firm to a partner of the firm)" shall be inserted and shall be deemed always to have been inserted.

ACT No. XII of 1941

THE DELHI RESTRICTION OF USES OF LAND ACT, 1941

Received the assent of the Governor General on the 8th April, 1941 and is published in the Gazettee of India, *Part IV, dated 12th April* 1941.

An Act to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes.

Whereas it is expedient to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes;

It is hereby enacted as follows:—

1. *Short title, extent and commencement.*

(*1*) This Act may be called the Delhi Restriction of Uses of Land Act, 1941.

(*2*) It extends to the Province of Delhi

(*3*) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. *Definitions.*

In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "agriculture" includes horticulture and the planting and upkeep of orchards;

(*2*) "building" has the same meaning as in clause (*2*) of section 3 of the Punjab Municipal Act, 1911;

(*3*) "Chief Commissioner" means the Chief Commissioner of Delhi;

(*4*) "Deputy Commissioner" means the Deputy Commissioner of Delhi and includes any authority, not being an officer employed by the Delhi Improvement Trust, appointed by the Chief Commissioner, by notification in the official Gazette, to

perform all or any of the functions of the Deputy Commissioner under this Act;

(5) "place of worship" includes an *imambara, dargah, karbala* or *takya*;

(6) "prescribed" means prescribed by rules made under this Act;

(7) "road" means a metalled road maintained by the Central Government or by a local authority; and

(8) the expression "to erect or re-erect" in relation to any building has the same meaning as in clause (5) of section 3 of the Punjab Municipal Act, 1911.

3. *Declaration of controlled area.*

(1) The Chief Commissioner may, with the previous sanction of the Central Government, by notification in the official Gazette, declare any land adjacent to and within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(2) Not less than three months before making a declaration under sub-section (1) the Chief Commissioner shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that he proposes, with the previous sanction of the Central Government, to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made, and copies of every such notification or of the substance thereof shall be published by the Deputy Commissioner in such manner as he thinks fit at his office and in every revenue estate of which any part is included within the said boundaries.

(3) Any person interested in any land included within the said boundaries may, at any time before the expiration of thirty days from the last date on which a copy of such notification is published by the Deputy Commissioner, object to the making of the declaration or to the inclusion of his land or any part of it within the said boundaries.

(4) Every objection under sub-section (3) shall be made to the Deputy Commissioner in writing, and the Deputy Commissioner shall give to every person so objecting an opportunity of being heard either in person or by pleader, and shall after all such objections have been heard and after such further enquiry, if any, as he thinks necessary, forward to the Chief Commissioner the record of the proceedings held by him together with a report setting forth his recommendations on the objections.

(5) If before the expiration of the time allowed by sub-section (3) for the filing of objections no objection has been made, the Chief Commissioner may proceed at once to the making of a declaration under sub-section (1). If any such objections have been made, the Chief Commissioner shall consider the record and the report referred to in sub-section (4) and shall hear any parties applying to be heard and may either—

(a) abandon the proposal to make a declaration under sub-section (1), or

(b) make such a declaration in respect of either the whole or a part or parts of the land included within the boundaries specified in the notification under sub-section (2).

(6) For the purposes of sub-section (3) a person shall be deemed to be interested in land if he is a "person interested" as defined in clause (b) of section 3 of the Land Acquisition Act, 1894, for the purposes of that Act or, where the land is land occupied by or for the purposes of a mosque, *imambara, dargah, karbala, takya* or Muslim grave-yard, if he is a Muslim.

(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

4. *Plans of controlled areas to be deposited at certain offices.*

(1) The Deputy Commissioner shall deposit at his office and at the office of the Municipal Committee, New Delhi, and at such other places as he considers necessary, plans showing all lands declared to be controlled areas for the purposes of this Act, and setting forth the nature of the restrictions applicable to the land in any such controlled area.

(2) The plans so deposited shall be available for inspection by the public free of charge at all reasonable times.

5. *Restrictions on building, etc., in a controlled area.*

No person shall erect or re-erect any building, or make or extend any excavation, or lay out any means of access to a road in a controlled area except with the previous

permission of the Deputy Commissioner in writing.

6. *Application for permission to build, etc., and the grant or refusal of such permission.*

(*1*) Every person desiring to obtain the permission referred to in section 5 shall make an application in writing to the Deputy Commissioner in such form and containing such information in respect of the building, excavation or means of access to which the application relates as may be prescribed.

(*2*) On receipt of such application the Deputy Commissioner, after making such enquiry as he considers necessary, shall, by order in writing, either—

(*a*) grant the permission, subject to such conditions, if any, as may be specified in the order; or

(*b*) refuse to grant such permission.

(*3*) When the Deputy Commissioner grants permission subject to conditions under clause (*a*) of sub-section (*2*) or refuses to grant permission under clause (*b*) of sub-section (*2*), the conditions imposed or the grounds of refusal shall be such as are reasonable having regard to the circumstances of each case.

(*4*) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building, not being a dwelling house, if such building is required for purposes subservient to agriculture, nor shall the permission to erect or re-erect any such building be made subject to any conditions other than those which may be necessary to ensure that the building will be used solely for the purposes specified in the application for permission.

(*5*) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building which was in existence on the date on which the declaration under sub-section (*1*) of section 3 was made, nor shall he impose any conditions in respect of such erection or re-erection unless it involves the addition of one or more storeys to the building or the extension of the plinth area of the building by more than one-eighth of the original plinth area, or there is a probability that the building will be used for a purpose other than that for which it was used on the date on which tha said declaration was made.

(*6*) If at the expiration of a period of three months after an application under sub-section (*1*) has been made to the Deputy Commissioner no order in writing has been passed by the Deputy Commissioner permission shall be deemed to have been given without the imposition of any conditions.

(*7*) The Deputy Commissioner shall maintain a register with sufficient particulars of all permissions given by him under this section and the register shall be available for inspection without charge by all persons interested and such persons shall be entitled to take extracts therefrom.

7. *Right of appeal.*

(*1*) Any person aggrieved by an order of the Deputy Commissioner under sub-section (*2*) of section 6 granting permission subject to conditions or refusing permission may within thirty days from the date of such order prefer an appeal to the Chief Commissioner.

(*2*) The order of the Chief Commissioner on appeal shall be final.

8. *Compensation.*

(*1*) No person shall be entitled to claim compension under this or any other Act for any injury, damage or loss caused or alleged to have been caused by an order—

(*a*) refusing permission to make or extend an excavation, or granting such permission but imposing conditions on the grant, or

(*b*) refusing permission to lay out a means of access to a road, or granting such permission but imposing conditions on the grant, or

(*c*) granting permission to erect or re-erect a building but imposing conditions on the grant.

(*2*) When an order has been made refusing permission to erect or re-erect a building any person who has exercised the right of appeal given by sub-section (*1*) of section 7 may, within three months of the date of the order of the Chief Commissioner, make to the Chief Commissioner a claim for compension on the ground that his interest in the land concerned is injuriously affected by the said order:

Provided that no claim for compensation may be made under this sub-section in respect of any land situated in a controlled area adjoining a road which has been constructed after the commencement of this Act or which was not at the commencement of this Act a road within the meaning of clause (*4*) of section 2.

(*3*) On receipt of a claim under sub-section (*2*) the Chief Commissioner shall either proceed to acquire the land concerned under the Land Acquisition Act, 1894, or transfer the claim for disposal to an officer exercising the powers of a Collector under the said Act:

(To be continued)

IMPERIAL ACTS

(*Concluded from page 32*)

Provided that in case the Chief Commissioner decides to acquire the land, the claimant shall be entitled to be repaid by the acquiring authority the amount of expense which he may have properly incurred in connection with the preparation and submission of his claim for compensation under this section, and in default of agreement such amount shall be determined by the authority deciding the value of the land in the proceedings under the Land Acquisition Act, 1894.

(*4*) Nothing in this section shall be deemed to preclude the settlement of a claim by mutual agreement.

9. *Compulsory acquisition.*

If the Chief Commissioner decides to acquire the land under the Land Acquisition Act, 1894, then, notwithstanding anything contained in that Act,—

(*i*) proceedings under section 5-A of that Act shall not be required;

(*ii*) the notification under s. 6 of that Act shall be published within six months from the date of institution of the claim, failing which the claim shall be transferred for disposal to an officer exercising the powers of a Collector under that Act;

(*iii*) the market value of the land shall be assessed as though no declaration under section 3 (*1*) had been made in respect of the area in which it is situated and no restrictions upon its use and development had been imposed, any compensation already paid to the claimant or to any of his predecessors in interest for injurious affection being deducted from the market value as so assessed.

10. *Amount of compensation how determined.*

(*1*) When a claim is transferred for disposal under section 8 or section 9 to an officer exercising the powers of a Collector under the Land Acquisition Act, 1894, such officer shall make an award determining the amount of compensation, if any, payable to the claimant.

(*2*) The amount of compensation awarded under sub-section (*1*) shall in no case exceed—

(*a*) the amount that would have been payable if the hand had been acquired under section 9, or

(*b*) the difference between the market value of the land in its existing condition having regard to the restrictions actually imposed upon its use and development by the order refusing permission to erect or re-erect a building thereon, and its market value immediately before the publication under sub-section (*2*) of section 3 of the notification in pursuance of which the area in which it is situated was declared to be a controlled area,

and no compensation shall be awarded under sub-section (*1*)—

(*i*) unless the claimant satisfies the officer making the award that proposals for the development of the land which at the date of the application under sub-section (*1*) of section 6 are immediately practicable, or would have been so, if this Act had not been passed, are prevented or injuriously affected by the restrictions imposed under this Act, or

(*ii*) if and in so far as the land is subject to substantially similar restrictions in force under some other enactment which were so in force at the date when the restrictions were imposed under this Act, or

(*iii*) if compensation in respect of the same restrictions in force under this Act or of substantially simi-

lar restrictions in force under some other enactment has already been paid in respect of the land to the claimant or to any predecessor in interest of the claimant.

(3) The provisions of Parts III, IV, V and VIII of the Land Acquisition Act, 1894, shall so far as may be apply to an award made under sub section (1) as though it were an award made under that Act.

11. *Saving for other enactments.*

Nothing in this Act shall affect the power of any authority to acquire land or to impose restrictions upon the use and development of land under any other enactment for the time being in force.

12. *Prohibition of use of any land as a brick-field, etc., without a licence.*

(1) No land within a controlled area shall be used for the purposes of a charcoal-kiln, pottery-kiln or lime-kiln and no land either within or outside a controlled area shall be used for the purposes of a brick-field or brick-kiln except under, and in accordance with the conditions of, a licence from the Chief Commissioner which shall be renewable annually.

(2) The chief Commissioner may charge such fees for the grant and renewal of such licences and may impose such conditions in respect thereof as may be prescribed.

(3) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by the refusal of a licence under sub-section (1).

13. *Offences and Penalties.*

(1) Any person who—

(a) erects or re-erects any building or makes or extends any excavation or lays out any means of access to a road in contravention of the provisions of section 5 or in contravention of any conditions imposed by an order under section 6 or section 7, or

(b) uses any land in contravention of the provisions of sub-section (1) of section 12,

shall be punishable with fine which may extend to five hundred rupees and, in the case of a continuing contravention, with a further fine which may extend to fifty rupees for every day after the date of the first conviction during which he is proved to have persisted in the contravention.

(2) Without prejudice to the provisions of sub-section (1), the Deputy Commissioner may order any person who has committed a breach of the provisions of the said sub-section to restore to its original state or to bring into conformity with the conditions which have been violated, as the case may be, any building or land in respect of which a contravention such as is described in the said sub-section has been committed, and if such person fails to do so within three months of the order may himself take such measures as may appear to him to be necessary to give effect to the order, and the cost of such measures shall be recoverable from such person as an arrear of land revenue.

14. *Trial of offences.*

No Court inferior to that of a Magistrate of the first class shall try any offence punishable under this Act.

15. *Protection of persons acting under this Act.*

No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

16. *Savings.*

Nothing in this Act shall apply to—

(a) the erection or re-erection of buildings upon land included in the inhabited site of any village as defined in the revenue records;

(b) the erection or re-erection of a place of worship or a tomb or cenotaph or of a wall enclosing a graveyard place of worship, cenotaph or *samadhi* on land which is at the time a notification under sub-section (2) of section 3 is published by the Chief Commissioner occupied by or for the purposes of such place of worship, tomb, *samadhi*, cenotaph or graveyard;

(c) excavations (including wells) made in the ordinary course of agricultural operations;

(d) the construction of an unmetalled road intended to give access to land solely for agricultural purposes.

17. *Power to make rules.*

(1) The Chief Commissioner may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely :—

(a) the form in which applications under sub-section (1) of section 6 shall be

made and the information to be furnished in such applications ;

(*b*). the regulation of the laying out of means of access to roads ;

(*c*) the fees to be charged for the grant and renewal of licences under section 12 and the conditions governing such licences.

(*3*). All rules made under this section shall be subject to the conditions of previous publication, which publication shall be made in the official Gazette and in at least two newspapers printed in a language other than English ; and the date to be specified under clause (*3*) of section 23 of the General Clauses Act, 1897, shall not be less than two months from the date on which the draft of the proposed rules was published.

ACT No. XIII of 1941

THE INSURANCE (AMENDENT) ACT, 1941.

Received the assent of the Governor General on the 8th April, 1941, and is published in the Gazette of India *Part IV, dated 12th April* 1941.

An Act further to amend the Insurance Act, 1938.

Whereas it is expedient further to amend the Insurance Act, 1938, the for purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. *Short title.*

This Act may be called the Insurance (Amendment) Act, 1941.

2 *Amendment of section 2 Act IV of* 1938.

In section 2 of the Insurance Act, 1938 (hereinafter referred to as the said Act),—

(*a*) in clause (5), for the words "an insurer" the words "an insurer or a provident society as defined in Part III", and for the words "the insurer" the words "such insurer or provident society" shall be substituted ;

(*b*) in clause (9), for the words "to which the provisions of Part III apply" the words "as defined in Part III" shall be substituted.

3. *Amendment of section 3, Act IV of* 1938.

In section 3 of the said Act,—

(*a*) in the proviso to sub-section (1), for the words, brackets and figures "the expiry of one month from the commencement of the Insurance (Amendment) Act, 1940" the words "such date as may be fixed in this behalf by the Central Government by notification in the official Gazette" shall be substituted;

(*b*) in clause (g) of sub section (2), for the word "one" the word "five" shall be substituted ;

(*c*) in sub-section (*4*), to clause (*d*) the word "or" shall be added, and after clause (*d*) the following clause and words shall be added, namely :—

"(*e*) if, in the case of an insurer specified in sub-clause (*c*) of clause (*9*) of section 2, the standing contract referred to in that sub-clause is cancelled or is suspended and continues to be suspended for a period of six months,

and the Superintendent of Insurance may cancel the registration of an insurer if the insurer has failed to have the registration renewed " ;

(*d*) in sub-section (5), after the words, brakets, letter and figure "clause (*a*) of sub-section (4)" the words, brackets, letter and figure "clause (*e*) of sub-section (4), or because the insurer has failed to have the registration renewed" shall be inserted ;

"(*e*) in sub-section (*5C*), after the words brackets and figure "sub-section (*4*)" the words, brackets, letter and figure "clause (*e*) of sub-section (*4*), or because the insurer has failed to have his registration renewed" and after the word and figures "section 98" the words, brackets, figures and letter "or has his standing contract restored or has had an application under sub-section (*4*) of section 3-A accepted" shall be inserted.

4. *Insertion of new section 3A in Act IV of* 1938.

After section 3 of the said Act the following section shall be inserted, namely .—

"3A. *Renewal of Registration.*

(*1*) An insurer who has been granted a certificate of registration under section 3 shall have the registration renewed annually for each year after that ending on the 31st day of December, 1941.

(*2*) An application for the renewal of a registration for any year shall be made by the insurer to the

Superintendent of Insurance before the 31st day of December of the preceding year, and shall be accompanied as provided in sub-section (*3*) by evidence of payment of the prescribed fee which shall not exceed one thousand rupees for each class of insurance business, but may vary according to the volume of business done by the insurer in India in each class of of insurance business to which the registration relates.

(*3*) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(*4*) If any insurer fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as an application to the Court under sub-section (*5D*) of section 3 has not been made, accept an application for renewal of the registration on receipt from the insurer of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by him, as the Superintendent of Insurance may require :

Provided that an appeal shall lie to the Central Government from an order passed by the Superintendent of Insurance imposing a penalty on the insurer.

(*5*) The Superintendent of Insurance shall, on fulfilment by the insurer of the requirements of this section, renew the registration and grant him a certificate of renewal of registration."

5 *Amendment of section* 4, *Act IV of* 1938.

In section 4 of the said Act,—

(*a*) in sub-section (*1*), for the words "a provident society to which Part III" the words "a provident society as defined in Part III" shall be substituted ;

(*b*) for sub-section (*2*) the following sub-section shall be substituted, namely :—

"(*2*) Nothing contained in this section shall apply to any policy of the description known as a group policy, where the number of persons covered by the policy is not less than fifty such smaller number as may be approved by the Superintendent of Insurance and a standard form of the policy has has been certified in writing by the Superintendent of Insurance to be a policy of such description."

6. *Amendment of section* 5, *Act IV of* 1938.

In sub-section (*3*) of section 5 of the said Act, for the words "to which Part III applies" the words "as defined in Part III" shall be substituted.

7. *Amendment of section* 7, *Act IV of* 1938.

In sub-section (*9A*) of section 7 of the said Act, after clause (*b*) the following words shall be added, namely :—

"and may charge the normal commission on such sale or on such investment."

8. *Amendment of section* 10 *Act IV of* 1938.

In section 10 of the said Act,—

(*a*) to sub-section (*1*) the following words, brackets and letters shall be added, namely :—

"and where the insurer carries on business of the class specified in clause (*d*) of that sub-section whether alone or in conjunction with business of another class, he shall, unless the Superintendent of Insurance waives this requirement in writing keep a separate account of all receipts and payments in respect of each sub-class of the class specified in clause (*d*) as may be prescribed in this behalf :

Provided that no sub-class of the class of insurance business specified in clause (*d*) of sub-section (*1*) of section 7 shall be prescribed under this sub-section if the insurance business comprised in the sub-class consists of insurance contracts which are terminable by the insurer at intervals not exceeding twelve months and under which if a claim arises, the insurer's liability to pay benefit

ceases within one year of the date on which the claim arose.";

(*b*) in sub-section (*2*), for the words "the excess of receipts over payments in respect of such business" the following words shall be substituted, namely :—

"all receipts due in respect of such business";

(*c*) in sub-section (*3*), the words and figures "save as provided in section 49" shall be omitted, and for the words "other than those of life insurance" the words "other than those of the life insurance business of the insurer" shall be substituted.

9. *Amendment of section* 11, *Act IV of* 1938.

In section 11 of the said Act,—

(*a*) in clause (*c*) of sub-section (*1*),—

(*i*) for the words "in respect of each class of insurance business carried on by him" the words, brackets and figures "in respect of each class or sub-class of insurance business for which he is required under sub-section (*1*) of section 10 to keep a separate account of receipts and payments" shall be substituted ; and

(*ii*) for the words "that class of insurance business" the words "that class or sub-class of insurance business" shall be substituted ;

(*b*) in sub-section (*2*), for the words and figures "to which the Indian Companies Act, 1913, applies" the following shall be substituted, namely :—

",as defined in clause (*2*) of sub-section (*1*) of section 2 of the Indian Companies Act, 1913,".

10. *Amendment of section* 13, *Act IV of* 1938.

To section 13, of the said Act the following sub-section shall be added, namely :—

"(*6*) The provisions of this section relating to life insurance business shall apply also to any such sub-class of insurance business included in the class 'Miscellaneous Insurance' as may be prescribed under sub-section (*1*) of section 10; and the Superintendent of Insurance may authorise such modifications and variations of the regulations contained in Part I of the Fourth and Fifth Schedules and of the requirements of Part II of those Schedules as may be necessary to facilitate their application to any such sub-class of insurance business :

Provided that, if the Superintendent of Insurance is satisfied that the number and amount of the transactions carried out by an insurer in any such sub-class of insurance business is so small as to render periodic investigation and valuation unnecessary, he may exempt that insurer from the operation of this sub-section in respect of that sub-class of insurance business."

11. *Amendment of section* 15, *Act IV of* 1938.

In sub-section (*1*) of section 15 of the said Act,—

"(*a*) for the words "within six months", the words and figures "in the case of the accounts and statements referred to in section 11 within six months and in the case of the abstract and statement referred to in section 13 within nine months" shall be substituted ;

(*b*) the sentence beginning with the words "The Superintendent of Insurance may extend" and ending with the words "by a period not exceeding three months" shall be omitted.

12. *Amendment of section* 16, *Act IV of* 1938.

In sub-section (*2*) of section 16 of the said Act,—

(*a*) to clause (*a*) the words "as at the date of any balance-sheet so furnished" shall be added ;

(*b*) in clause (*b*),—

(*i*) for the words "for each class of insurance business carried on by him, a revenue account" the following words, brackets and figures shall be substituted, namely :

"for each class or sub-class of insurance business for which he is required under sub-section (*1*) of section 10 to keep a separate account of receipts and payments, a revenue account for the period covered by any account so furnished";

(*ii*) for the words "that class of

business" the words "that class or sub-class of insurance business" shall be substituted ;

(*d*) for clause (*c*) the following clause shall be substituted, namely :—

"(c) a separate abstract of the valuation report in respect of all business transacted in India in each class or sub-class of insurance business to which section 13 refers, prepared in the manner required by that section, and".

13. *Amendment of section* 17, *Act IV of* 1938.

In section 17 of the said Act, after the words "and such copies so sent" the words "shall be chargeable with the same fees and" shall be inserted.

14. *Amendment of section* 21, *Act IV of* 1938.

To sub-section (*2*) of section 21 of the said Act the following proviso shall be added, namely :—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of four months from the time when the Superintendent of Insurance made the order or declined to accept the return."

15. *Amendment of section* 22, *Act IV of* 1938.

In section 22 of the said Act, after the word "refers" the following shall be inserted, namely :—

"or an abstract of a valuation report furnished under clause (*c*) of sub-section (*2*) of section 16".

16. *Omission of section* 24, *Act IV of* 1938.

Section 24 of the said Act shall be omitted.

17. *Amendment of section* 26, *Act IV of* 1938.

To section 26 of the said Act the following sentence shall be added, namely :—

"All such particulars shall be authenticated in the manner required by that sub-section for the authentication of the matters therein referred to, and, where the alteration affects the assured rates, advantages, terms and conditions offered in connection with life insurance policies, the actuarial certificate referred to in clause (*f*) of the said sub-section shall accompany the particulars of the alteration."

18. *Amendment of section* 28, *Act IV of* 1938.

In section 28 of the said Act,—

(*a*) for sub-section (*1*) the following sub-sections shall be substituted, namely :—

"(1) Every insurer registered under this Act carrying on the business of life insurance shall every year, within thirty-one days from the beginning of the year, submit to the Superintendent of Insurance a statement showing as at the 31st day of December of the preceding year the assets held invested in accordance with section 27, and all other particulars necessary to establish that the requirements of that section have been complied with, and such statement shall be certified by a principal officer of the insurer.

(2) Every such insurer shall also furnish within fifteen days from the last day of March, June and September, a statement certified as aforesaid showing as at the end of each of the said months the assets held invested in accordance with section 27.

(3) The Superintendent of Insurance may at his discretion require any insurer to whom sub-section (1) applies to submit before the 1st day of August in each or any year a statement of the nature referred to in sub-section (1), certified as required by that sub-section and prepared as at the 30th day of June.

(4) In the case of an insurer having his principal place of business or domicile outside British India, the Superintedent of Insurance may, on application made by the insurer, extend the periods of fifteen and thirty-one days mentioned in the foregoing sub-sections to thirty days and sixty days respectively.";

(*b*) sub-section (*2*) shall be re-numbered as sub-section (*5*).

19. *Amendment of section* 29, *Act IV of* 1938.

Section 29 of the said Act shall be re-numbered as sub-section (*1*) of that section and to the section as so re-numbered the following sub-section shall be added,

namely:—

(2) The provisions of section 86D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of an insurer being a company, if the loan is one granted on the security of a policy on which the insurer bears the risk and the policy was issued to the director on his own life, and the loan is within the surrender value of the policy."

20. *Amendment of section* 33, *Act IV of* 1938.

In section 33 of the said Act,—

(a) in sub-section (1), for the words beginning with "appoint an auditor or actuary or both" and ending with "himself make such investigation" the following shall be substituted, namely:—

"order an investigation of the affairs of the insurer to be made by an auditor or actuary, or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor or may himself make such investigation:

Provided that an auditor or actuary appointed for this purpose by the Superintendent of Insurance shall not be an auditor or actuary in the employ of the insurer.";

(b) to sub-section (2) the following proviso shall be added, namely:—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of three months from the date on which the Superintendent of Insurance intimates to the insurer his intention to take such action,";

(c) for sub-section (3) the following sub-section shall be substituted, namely :—

"(3) The results of any investigation made under this section shall be recorded in writing by the auditor or actuary appointed or by the Superintendent of Insurance, as the case may be, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the investigation is completed a copy of such record, or where both an auditor and an actuary have been appointed, of each such record, shall be furnished by the Superintendent of Insurance to the insurer and to the shareholders or the policy-holders who have sent a requisition for such an investigation."

21. *Amendment of section* 34, *Act IV of* 1938.

In section 34 of the said Act,—

(a) after the words "incidental to such investigation" the words, brackets and figures "including any expenses incurred before the making of an order by the Court under sub-section (2) of section 33" shall be inserted, and shall be deemed always to have been inserted; and

(b) to the section the following words shall be added and shall be deemed always to have been added namely:—

"shall have priority over other debts due from the insurer, and shall be recoverable as an arrear of land-revenue"

22. *Amendment of section* 35, *Act IV of* 1938.

In sub-section (3) of section 35 of the said Act,—

(a) for the words "and certified copies of the following documents shall be furnished to the Central Government and shall" the following words shall be substituted, namely:—

"and certified copies, four in number, of each of the following documents shall be furnished to the Central Government, and other such copies shall";

(b) in the proviso, after the words and figures "sections 11 and 13" the following shall be inserted and shall be deemed always to have been inserted, namely:—

"of this Act or sections 7 and 8 of the Indian Life Assurance Companies Act, 1912".

23. *Amendment of section* 36, *Act IV of* 1938.

To section 36 of the said Act the following proviso shall be added, namely :—

"Provided that—

(a) no part of the deposit made by any party to the amalgamation or transfer shall be returned except where, after effect is given to the arrangement, the whole of the deposit to be made by the insurer

carrying on the amalgamated business or the person to whom the business is transferred is completed,

(*b*) only so much shall be returned as, in no longer required to complete the deposit last mentioned in clause (*a*), and

(*c*) while the deposit last mentioned in clause (*a*) remains uncompleted, no accession, resulting from the arrangment, to the amount alread deposited by the insurer carrying on the amalgamated business or the person to whom the business is transferred shall be appropriated as payment or part payment of any instalment of deposit subsequently due from him under section 7 or section 98."

24. *Amendment of section* 37, *Act IV of* 1938.

In section 37 of the Act,—

(*a*) for the words "where any business of one insurer is transferred to another" the words "where any business of an insurer is transferred" shall be substituted ;

(*b*) for the words "the insurer to whom the business is transferred" the words "the person to whom the business is transferred" shall be substituted ;

(*c*) for the words "furnish to the Central Government" the words "furnish in duplicate to the Central Goverment" shall be substituted :

(*d*) in clause (*b*), for the words "a declaration signed by every insurer concerned" the words "a declaration signed by every party concerned" shall be substituted ;

(*e*) for clause (*c*) the following clause shall be substituted, namely :—

"(*c*) where the amalgamation or transfer has not been made in accordance with a scheme sanctioned by the Court under section 36—

(*i*) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(*ii*) certified copies of any other reports on which the scheme of amalgamation or transfer was founded."

25. *Amendment of section* 38, *Act IV of* 1938.

In sub-section (*2*) of section 38 of the said Act, for the words "together with" the word "and" and for the words "has been delivered" the words "have been delivered" shall be substituted.

26. *Amendment of section* 39, *Act IV of* 1938.

In section 39 of the said Act,—

(*a*) in sub-section (*1*), the words "not being an absolute assignee of the benefits under the policy" shall be omitted :

(*b*) to sub-section (*4*) the following proviso shall be added, namely :—

"Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy."

27. *Amendment of section* 41, *Act IV of* 1938.

In section 41 of the said Act,—

(*a*) in sub-section (*1*),—

(*i*) for the words "effect or renew" the words "take out or renew or continue" shall be substituted, and after the word "renewing" the words "or continuing" shall be inserted ;

(*ii*) the following proviso shall be added :—

"Provided that acceptance by an insurance agent of commission in connection with a policy of life insurance taken out by himself on his own life shall not be deemed to be acceptance of a rebate of premium within the meaning of this sub-section if at the time of such acceptance the insurance agent satisfies the prescribed conditions establishing that he is a *bona fide* insurance agent employed by the insurer.";

(*b*) in sub-section (*2*), for the words "effecting or renewing" the words "taking out or renewing or continuing" shall be substituted.

(To be continued)

IMPERIAL ACTS

(*Continued from page* 40)

28. *Amendment of section* 42, *Act IV of* 1938.

In section 42 of the said Act,—

(*a*) in sub-section (*1*), for the words "one rupee" the words "three rupees" and for the words "making an application under this section" the words "making an application in the prescribed manner" shall be substituted ;

(*b*) in sub-section (*3*), for the words "a fee of one rupee" the following words shall be substituted, namely :—

"the prescribed fee which shall not be more than three rupees, and an additional fee of a prescribed amount not exceeding one rupee by way of penalty if the application for renewal of the licence does not reach the issuing authority before the date on which the licence ceases to remain in force";

(*c*) in sub-section (*4*),—

(*i*) in clause (*c*)—

(*a*) after the word "cheating" the following words shall be inserted, namely :—

"or forgery or an abetment of or attempt to commit any such offence";

(*b*) the following proviso shall be added, namely :—

"Provided that, where at least five years have elapsed since the completion of the sentence imposed on any person in respect of any such offence, the Superintendent of Insurance shall ordinarily declare in respect of such person that his conviction shall cease to operate as a disqualification under this clause;",

(*ii*) in clause (*d*), for the words "against an insurer or an assured" the words "against an insurer or an insured" shall be substituted ;

(*d*) after sub-section (*5*) the following sub-section shall be added, namely :—

"(*6*) The authority which issued any licence under this section may issue a duplicate licence to replace a licence lost, destroyed or mutilated on payment of the prescribed fee which shall not be more than one rupee."

29. *Amendment of section* 43, *Act IV of* 1938.

In sub-section (*1*) of s. 43 of the said Act the words "licensed", in both places where it occurs, shall be omitted.

30. *Amendment of section* 44, *Act IV of* 1938.

In section 44 of the said Act the words and figures "licensed under section 42" shall be omitted.

31. *Amendment of section* 45, *Act IV of* 1938.

In section 45 of the said Act,—

(*a*) for the words "was on a material matter and fraudulently made" the words "was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made" shall be substituted, and after the words "that the statement was false" the words "or that it suppressed facts which it was material to disclose" shall be added ;

(*b*) the following proviso shall be added, namely :

"Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because

the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

32. *Amendment of section 47, Act IV of 1938.*

In sub section (*1*) of section 47 of the said Act, for the words "the insurer shall" the words "the insurer may" shall be substituted.

33. *Amendment of section 48, Act IV of 1938.*

In section 48 of the said Act,—

(*a*) in sub-section (1), for the words beginning with "shall be persons having the prescribed qualifications" and ending with "by the holders of policies of life insurance issued by the company" the following words shall be substituted, namely :—

"shall notwithstanding anything to the contrary in the Articles of Association of the company be elected in the prescribed manner by the holders of policies of life insurance issued by the company ";

(*b*) sub-section (*2*) shall be re-numbered as sub-section (*4*) and the following shall be inserted as sub-sections (*2*) and (*3*), namely :—

"(*2*) Only and all persons holding otherwise than as assignees policies of life insurance issued by the company of such minimum amount and having been in force for such minimum period as may be prescribed shall be eligible for election as directors under sub-section (*1*), and only and all persons holding policies of life insurance issued by the company and having been in force at the time of the election for not less than six months shall be eligible to vote at such elections :

Provided that the assignment of a policy to the persons who took out the policy shall not disqualify that person for being eligible for election as a director under sub-section (*1*).

(*3*) The Central Government may, for such period, or to such extent and subject to such conditions as may be specified by it in this behalf, exempt from the operation of this section—

(*a*) any Mutual Insurance Company as defined in clause (*a*) of sub-section (*1*) of section 95, in respect of which the Superintendent of Insurance certifies that in his opinion owing to the conditions governing membership of the company or to the nature of the insurance contracts undertaken by it the application of the provisions of this sub-section to the company is impracticable, or

(*b*) any company in respect of which the Superintendent of Insurance certifies that in his opinion the company, having taken all reasonable steps to achieve compliance with the provisions of this section, has been unable to obtain the required number of directors with the required qualifications."

34. *Substitution of new section for section 49, Act IV of 1938. Restriction on dividends and bonuses.*

For section 49 of the said Act the following section shall be substituted, namely ;

"49. No insurer, being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2, who carries on the business of life insurance or any other class or sub-class of insurance business to which section 13 applies, shall for the purpose of declaring or paying any dividend to share-holders or any bonus to policy-holders or of making any payment in service of any debentures, utilize directly or indirectly any portion of the life insurance fund or of the fund of such other class or sub-class of insurance business, as the case may be, except a surplus shown in the valuation balance sheet in Form I as set forth in the Fourth Schedule submitted to the Superintendent of Insurance as part of the abstract referred to in section 15 as a result of an actuarial valuation of the assets and liabilities of the insurer ; nor shall he increase such surplus by contributions out of any reserve fund or otherwise unless

such contributions have been brought in as revenue through the revenue account applicable to that class or sub-class of insurance business on or before the date of the valuation aforesaid, except when the reserve fund is made up solely of transfers from similar surpluses disclosed by valuations in respect of which returns have been submitted to the Superintendent of Insurance under section 15 of this Act or to the Central Government under section 11 of the Indian Life Assurance Companies Act, 1912 :

Provided that payments made out of any such surplus in service of any debentures shall not exceed fifty per cent. of such surplus including any payment by way of interest on the debentures, and interest paid on the debentures shall not exceed ten per cent. of any such surplus except when the interest paid on the debentures is offset against the interest credited to the fund or funds concerned in deciding the interest basis adopted in the valuation disclosing the aforesaid surplus."

35. *Amendment of section* 50, *Act IV of* 1938.

To section 50 of the said Act the following words shall be added, namely ;—

"unless these are set forth in the policy".

36. *Amendment of section* 52, *Act IV of* 1938.

Section 52 of the said Act shall be re-numbered as sub-section (*1*) of that section and to the section as so re-numbered the following sub-sections shall be added, namely ;—

"(*2*) On the expiry of the period of three years referred to in sub-section (*1*), or on the insurer's ceasing before such expiry but at any time after the commencement of the Insurance (Amendment) Act, 1941, to carry on business on the dividing principle, the insurer shall forthwith cause an investigation to be made by an actuary, who shall determine the amount accumulated out of the contributions received from the holders of all policies to which the dividing principle applies and the extent of the claims of those policy-holders against the realisable assets of the insurer, and shall, before the expiration of six months from the date on which he is entrusted with the investigation, make recommendations regarding the distribution, whether by cash payments or by the allocation of paid up policies or by a combination of both methods, of such assets as he finds to appertain to such policy-holders ; and the insurer shall, before the expiry of six months from the date on which the actuary makes his recommendations, distribute such assets in accordance with those recommendations.

(*3*) Where at any time prior to the commencement of the Insurance (Amendment) Act, 1941, an insurer has ceased to carry on business on the dividing principle, the insurer shall, before the expiration of two months from the commencement of that Act, report to the Superintendent of Insurance the measures taken or proposed by him for the distribution among holders of policies to which the dividing principle applies of the assets due to them; and the Superintendent of Insurance may either sanction such measures or refuse his sanction, and, if he refuses his sanction or if the insurer does not report to him as required by this sub-section, the provisions of sub-section (*2*) shall apply to the insurer forthwith."

37. *Amendment of section* 53, *Act IV of* 1938.

In section 53 of the said Act,—

(*a*) in sub-section (*1*), for the word "Chapter" the word "Act" shall be substituted ;

(*b*) in sub clause (*ii*) of clause (*b*) of sub-section (*2*), after the words "has continued such failure" the words "or having contravened any provision of this Act has continued such contravention" and after the words "notice of such failure" the words "or contravention" shall be inserted.

38. *Amendment of section 69, Act IV of 1938.*

In section 69 of the said Act,—

(*a*) in sub-section (*1*), for the words "the results of a distribution, amongst policies maturing for payment within certain time-limits, of certain sums" the following words shall be substituted, namely:—

"the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits";

(*b*) after sub-section (*2*) the following sub-section shall be added, namely:—

"(*3*) Where after the commencement of the Insurance (Amendment) Act, 1941, a provident society is to be wound up in pursuance of this section, or where, whether before or after the commencement of that Act, a provident society ceases to carry on business on the dividing principle, the provisions of sub-section (*2*) and sub-section (*3*) of section 52 shall, so far as may be, apply in like manner as they apply to an insurer ceasing to carry on business on the dividing principle."

39. *Amendment of section 70, Act IV of 1938.*

In section 70 of the said Act,—

(*a*) in sub-section (*2*),—

(*i*) in clause (*a*), after the words and figures "Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted;

(*ii*) to the clause (*b*) the following words shall be added, namely:—

"the full address of the registered office of the society, the full address of the principal office of the society in British India, the name of the manager at such office, and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the society";

(*iii*) the word "and" at the end of clause (*c*) shall be omitted and after clause (*d*) the following word and clause shall be added, namely:

"and

(*e*) the prescribed fee for registration being not more than two hundred rupees.";

(*b*) in sub-section (*4*),—

(*i*) in clause (*c*), after the word "requirement" the words "or having contravened any provision" and after the word "failure" in both places where it occurs, the words "or contravention" shall be inserted;

(*ii*) after the proviso the following proviso shall be added, namely:—

"Provided further that the Superintendent of Insurance may, without previous notice and without application to the Court for sanction,—

(*a*) cancel the registration of a provident society which has failed to have its registration renewed, or

(*b*) cancel, on such terms and conditions as he thinks fit, the registration of any provident society which applies to him for such cancellation if he is satisfied that the society has ceased to carry on insurance business and that all its liabilities in respect of insurance policies are either satisfied or otherwise provided for.";

(*c*) after sub section (*4*) the following sub-sections shall be added, namely:—

"(*5*) When a registration is cancelled the provident society shall not, after the cancellation has taken effect, enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by it before such cancellation takes effect shall, subject to the provisions of section 88, con-

tinue as if the cancellation had not taken place.

(6) Where a registration is cancelled under clause (*b*) of sub-section (*4*), or because the society has failed to have its registration renewed, the Superintendent of Insurance may at his discretion revive the registration if the provident society, within six months from the date on which the cancellation took effect, makes the deposits required by section 73 or has had an application under sub-section (*3*) of section 70A accepted, as the case may be, and complies with any directions which may be given to it by the Superintendent of Insurance."

40. *Insertion of new sections 70A and 70B in Act IV of* 1938. After section 70 of the said Act the following sections shall be inserted, namely:—

"70A. *Renewal of registration.*

(*1*) Every provident society registered under this Act, or under the Provident Insurance Societies Act, 1912, shall have its registration renewed annually for each period of twelve months after that ending on the 30th day of June, 1942.

(*2*) An application for the renewal of a registration shall be made by the society to the Superintendent of Insurance before the 30th day of June preceding the period for which renewal is sought, and shall be accompanied as provided in sub-section (*3*) by evidence of payment of the prescribed fee which shall not exceed two hundred rupees but may vary according to the volume of insurance business done by the society.

(*3*) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(*4*) If a provident society fails to apply for renewal of registration before the date specified in sub-section (*2*) the Superintendent of Insurance may, so long as he has taken no action under section 88 to have the society wound up, accept an application for renewal of registration on receipt from the society of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by the society, as he may require.

(*5*) The Superintendent of Insurance shall, on being satisfied that the society has fulfilled the requirements of this section, renew the registration and grant it a certificate of renewal of registration.

70B. *Supplementary information and reports of alteration in particulars furnished with application for registration.*

(*1*) Every provident society registered under section 70 before the commencement of the Insurance (Amendment) Act, 1941, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance such particulars in addition to those already supplied for the purpose of obtaining registration as are required by sub-section (*2*) of section 70 of this Act as amended by the Insurance (Amendment) Act, 1941.

(*2*) Every provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance so far as it has not already done so the documents and information required by clauses (*a*) and (*b*) of sub-section (*2*) of section 70 to accompany an application by a provident society for registration under that section.

(*3*) When any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (*2*) of section 70 to accompany an application by a provident society for registration under that

section, or are to be furnished to the Superintendent of Insurance under this section, the provident society shall furnish forthwith to the Superintendent of Insurance full particulars duly authenticated of such alteration."

41. *Amendment of section 72, Act IV of 1938.*

In section 72 of the said Act, the words "established after the commencement of this Act" shall be omitted.

42. *Amendment of section 74, Act IV of 1938.*

In sub-section (*1*) of section 74 of the said Act,—

(*a*) the words "established after the commencement of this Act" shall be omitted;

(*b*) in clause (*o*), after the words and figures "Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted.

43. *Amendment of section 77, Act IV of 1938.*

In section 77 of the said Act, for the word "shall have an office" the words "shall have in British India a principal office" shall be substituted.

44. *Amendment of section 79, Act IV of 1938.*

In section 79 of the said Act,—

(*a*) for the words "shall keep at its registered office" the words "shall keep at its principal office in British India" shall be substituted;

(*b*) for clauses (*a*) to (*d*) the following clause shall be substituted, namely:—

"(*a*) such registers in such form as may be prescribed;";

(*c*) clauses (*e*), (*f*) and (*g*) shall be re-lettered, respectively, as clauses (*b*), (*c*) and (*d*).

45. *Amendment of section 82 Act IV of 1938.*

In section 82 of the said Act,—

(*a*) in sub-section (*1*), for the words "and the statements referred to" the words "shall be printed and four copies of these and of the statements referred to" and for the words "within three months" the words "within six months" shall be substituted;

(*b*) in sub-section (*3*), before the words "The provisions of section 17" the following shall be inserted, namely:—

"The provisions of sub-section (*2*) of section 15 relating to the copies therein referred to shall apply to the returns referred to in sub-section (*1*) of this sub-section, and ",

and to the sub-section as so amended the following shall be added, namely:—

"and the Superintendent of Insurance may exercise, in respect of returns made by a provident society and in respect of an investigation or valuation to which section 81 refers, the same powers as are exercisable by him under section 21 and section 22, respectively, in the case of an insurer".

46. *Amendment of section 83, Act IV of 1938.*

In section 83 of the said Act,—

(*a*) in sub-section (*1*), for the word "established" the word "registered", for the words "shall cause any new scheme which it proposes to put into operation" the words "shall cause any scheme which it proposes to put into operation for the first time" and for the words "that the scheme is sound" the words "that the rates, advantages, terms and conditions of the scheme are workable and sound" shall be substituted;

(*b*) in sub-section (*3*), for the words "and shall send the report of the actuary" the words, brackets and figures "and shall, before the expiration of six months from the commencement of the Insurance (Amendment) Act, 1941, send the report of the actuary" shall be substituted;

(*c*) in sub-section (*4*), for the words "it is actuarially sound" the words "the rates, advantages, terms and conditions are workable and sound" shall be substituted;

(*d*) for sub-section (*5*) the following sub section shall be substituted, namely:—

"(5) If the rates, advantages, terms and conditions of any scheme are not reported by the actuary to be workable and sound, the Superintendent of Insurance shall give notice to the society prohibiting the scheme, and the society shall

not after its receipt of such notice enter into any new contract of insurance under the scheme, but all rights and liabilities in respect of contracts of insurance entered into by the society before receipt of the notice shall, subject to the provisions of sub-section (*6*), continue as if the notice had not been given.";

(*e*) in sub-section (*6*), for the word "discontinued", in both places where it occurs, the word "prohibited" and for the word "discontinuance" the word "prohibition" shall be substituted.

47. *Amendment of section* 85, *Act IV of* 1938.

In section 85 of the said Act,—

(*a*) in sub-section (*1*) for the words 'invest all surplus assets in such securities" the following words shall be substituted, namely:—

"invest in such securities every increase that takes place in those assets and in that part of those assets which is held in cash as soon as practicable after the increase takes place and in any case within six months of its taking place."

and to the sub-section as so amended the following proviso shall be added, namely:—

"Provided that for the purpose of determining the amount to be invested under this sub section, any deposit made in cash under section 73 shall be taken into account as if such cash were Government securities amounting at the market value of the securities on the date the deposit was made to the total deposited in cash.";

(*b*) after sub-section (*4*) the following sub-section shall be added, namely:—

"(*5*) The provisions of section 86D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of a provident society being a company if the loan is one granted on the security of a policy on which the society bears the risk and the policy was issued to the director on his own life and the loan is within the surrender value of the policy."

48. *Amendment of section* 87, *Act IV of* 1938.

In section 87 of the said Act,—

(*a*) in sub-section (*1*), after the words "the principal office of a provident society" the words "or the principal office in British India of a society having its principal place of business or domicile outside British India" shall be inserted, and to the sub-section as so amended the following words shall be added, namely:—

"or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor";

(*b*) for sub-section (*3*) the following sub-section shall be substituted, namely:—

"(*3*) The results of any such inquiry shall be recorded in writing by the person making the inquiry, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the inquiry is completed, a copy of the record, or of each such record where more than one are made in the course of the same inquiry, shall be sent by the Superintendent of Insurance to the society concerned and shall be open to inspection by any member or policy-holder of the society.";

(*c*) after sub-section (*3*), as so substituted, the following sub-section shall be added, namely:—

"(*4*) All expenses of and incidental to any inquiry made by an auditor or actuary under sub-section (*1*) including any expenses incurred before the date on which the Superintendent of Insurance receives notice of an appeal under clause (*e*) of sub-section (*1*) of section 110 shall be defrayed by the provident society, shall have priority over other debts due from the society and shall be recoverable as an arrear of land-revenue."

49. *Amendment of section* 88, *Act IV of* 1938.

In section 88 of the said Act,—

(*a*) in sub-sections (*1*), (*3*) and (*4*), after the words and figures "Indian Companies Act, 1913", the words and figures "or under the Indian Companies Act, 1882, or under the

Indian Companies Act, 1866, or under any Act repealed thereby" shall be inserted;

(*b*) in sub-sections (*1*) and (*3*), for the words "that Act" the words and figures "the Indian Companies Act, 1913" shall be substituted.

50. *Amendment of section* 90, *Act IV of* 1938.

In section 90 of the said Act,—

(*a*) to sub-section (*1*) the following proviso shall be added, namely:—

"Provided that if the Superintendent of Insurance is not satisfied that the assets of the society are sufficient to meet the costs of liquidation including the remuneration of the liquidator, he may decline to make such appointment, and in such a case the society shall itself appoint a liquidator who shall carry out the liquidation as if the winding up was being done by an order of the Court.";

(*b*) in sub-section (*2*), for the words "so appointed", the words "appointed by the Superintendent of Insurance under sub-section (*1*)" shall be substituted.

51. *Amendment of section* 91, *Act IV of* 1938.

In clause (*d*) of sub-section (*1*) of section 91 of the said Act, after the word "liquidation" the following shall be inserted, namely:—

"including the remuneration of the liquidator and any expenses incurred under clause (*g*) of this sub-section".

52. *Amendmemt of section* 92, *Act IV of* 1938.

To section 92 of the said Act the following sub-section shall be added, namely:—

"(*13*) The costs of the liquidation including the remuneration of the liquidator and any expenses incurred under clause (*g*) of sub-section (1) of section 91 shall, if the liquidator decides that they shall be payable out of the assets of the society, be payable in priority to all other claims."

53. *Amendment of section* 98 *Act IV of* 1938.

In section 98 of the said Act,—

(*a*) in sub-section (*2*), for the words "of twenty-five thousand rupees" the words "of not less than twenty-five thousand rupees", for the words "to twenty-five thousand rupees" the word "to not less than twenty-five thousand rupees;" and for the words "equal to one-third of the gross premium" the words "equal to not less than one-third of the gross premium" shall be substituted, and shall be deemed always to have been substituted;

(*b*) after sub-section (*2*), the following sub-section shall be added, and shall be deemed always to have been added, namely:—

"(*3*) The provisions of sub-section (*7*) of section 7 shall apply in respect of a Mutual Insurance Company and a Co-operative Life Insurance Society as if for the words 'under the foregoing provisions of this section' the words and figures 'under the provisions of section 98' were substituted."

54. *Amendment of section* 100, *Act IV of* 1938,

In the proviso to section 100 of the said Act, the words "balance-sheet, revenue account and" shall be omitted and to the proviso as so amended the following words shall be added, namely:—

"and any member of the company domiciled in that province shall be entitled on application to the company to receive from it a copy of the balance sheet and revenue account".

55. *Amendment of section* 102, *Act IV of* 1938.

In sub-section (*2*) of section 102 of the said Act, for the words "any provident society which makes default in complying with any of the requirements of Part III" the words "any provident society as defined in Part III which makes default in complying with or acts in contravention of any of the requirements of this Act" shall be substituted and after the word "default" in the second, third and fourth places where it occurs, the words "or contravention" shall be inserted.

56. *Amendment of section* 103, *Act IV of* 1938.

In section 103 of the said Act,—

(*a*) In sub-section (*1*), for the word "transacte" the words "carries on" shall be substituted, the words, and figures "section 6" and "section 97" shall be omitted, and for the word "transacted" the words "carried on" shall be substituted;

(*To be continued*)

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WAR RISKS AND THE LAW OF TORT.

Many employers and occupiers of property to-day are deeply concerned with the extent of their liability to their employees and to members of the public who use their shelters and there appears to be a general ignorance of the provisions of the Personal Injuries (Emergency provisions) Act, 1939, on these matters. There also seems to be a great deal of doubt as to the position of an employer or occupier upon whose property a servant or member of the public is injured as a result of enemy or military action. The object of this article is to attempt briefly to analyse the duties imposed upon such persons by the law and to indicate the extent to which they may be liable for injuries sustained.

The Position apart from Special Legislation.

So far as the common law is concerned, the position, assuming there to be no statutory interference, is that an employer owes to his servants three fundamental duties which he must discharge himself. This does not necessarily mean that the employer must himself personally take the necessary precautions, but it does mean that he cannot escape from his liability by delegating the duty to another person (even though he be a fellow servant, for the doctrine of common employment does not here apply), but will be liable unless that duty is properly discharged by someone. These principles have been laid down by the House of Lords, and in the same decision they formulated what those three duties are. They may be conveniently paraphrased as being (*a*) to employ reasonably competent fellow workmen, (*b*) to provide reasonably safe premises and plant, and (*c*) to provide a reasonably safe system of working. The decision referred to is that of *Wilsons and Clyde* v. *English* [1939] A. C. 57. In addition, the employer will always be liable for any personal negligence of which he may be guilty, though for the acts of fellow servants he will be able to plead the defence of common employment, except where the risk of injury from the acts of those servants was no greater than that from the acts of any other member of the public (*Metcalf* v. *L. P. T. B.* (1939), 55 T. L. R. 700). Certain rather limited exceptions to the doctrine of common employment are also to be found in the Employers' Liability Acts. Apart altogether from his negligence or liability for the acts of his agents and other servants an employer is under a statutory duty to pay *compensation* (*not damages*) to a "workman" who has been partially or totally disabled or killed by an accident arising out of and in the course of his employment, under the Workmen's Compensation Acts. The liability of an occupier to persons who come upon the land in his occupation depends upon first principles of tort and can be summarised as follows: If he takes payment in return for allowing them to come on to the land, he is taken to warrant that that land and the buildings upon it are as safe as reasonable care on the part of anyone (including an independent contractor) can make them (*McClenan* v. *Segar* [1917] 2 K. B. 325; *Francis* v. *Cockrell* (1870), L. R 5 Q. B. 501).

The duty to persons who make no payment depends on whether they are invitees or licensees. To the former the duty (though not absolutely clear) is probably to make the premises reasonably safe, and certainly to warn of all dangers of which the occupier either knows or ought to know. To the latter the duty is a more restricted one and is limited to warning of dangers of which the occupier is aware. Of the innumerable decisions on this branch of the law the leading cases are *Indermaur* v. *Dames*, L. R. 1 C. P.; *Addie & Sons* v. *Dumbreck* [1929] A. C. 358; *Hillen* v. *I. C. I Alkali* [1933] 1 K. B. 20455; and *Hall* v. *Brooklands* [1933] 1 K. B. 205. To mere trespassers the duty is confined to not doing anything likely to injure them after the

occupier is aware of their presence (*Liddle* v. *Yorks C. C.* [1934] 2 K. B. 110).

It will be apparent from the above that there was never in any circumstances a liability on an occupier or employer for the results of enemy or military action in itself, but he might (apart from the special legislation to be discussed below) have been liable if by a breach of one of the duties mentioned above he caused or contributed to injury or damage which was also in part due to military action. For instance, if a faultily constructed shelter fell on business visitors as a result of a nearby bomb, or if gas or water escaped into it after bombing *because* it was negligently constructed or worked, there might have been a liability.

In addition to this common law liability, an employer might have found himself liable to pay workmen's compensation to a workman who had been injured by enemy or military action. Whether any particular bombing or war injury would give rise to such a right to compensation depended on whether the workman was more exposed to that risk than other persons, and in so far as he was exposed to an additional risk (because of a glass roof or the urgent or dangerous nature of his work) he could claim under the Acts (*Cooper* v. *N. E.* R. (1915), 32 T. L. R. 131; *Allcock* v. *Rogers* [1918] W. N. 16; *Bird* v. *Keep* (1918), 118 L. T. 633; see Willis, pp. 109—110.

Effect of Personal Injuries, etc., Act, 1939.

Almost all the above considerations and rules are rendered obsolete and of academic interest only so far as injuries due to military action are concerned by the provisions of the Personal Injuries (Emergency Provisions) Act, 1939 (which will be referred to throughout this article as "the Act"). In addition to conferring rights to allowances and pensions for disablement—whether temporary or permanent—and for death, the Act contains provisions in s. 3 designed to bar any claim at common law or under any other Act.

The rights of the injured person or his dependents to a pension or allowance under this Act and the scheme made under it are of importance only to the injured persons themselves, and this article confines itself to considering how far the Act gives relief from liabilities which would otherwise arise.

The Act draws a distinction between a "war injury" and a "war service injury," both of which are defined in s. 8.

War Injuries.

The definition of "war injury" may be roughly paraphrased as "an injury due to military action"; it includes injuries sustained through enemy bombing or as a result of defensive measures taken to deal with such attacks and is wide enough to cover the case of damage caused by a falling aircraft or part of an aircraft. For such injuries s. 3 provides that *no person* shall be liable either at common law or under any enactment or contract and this immunity is expressly extended to liability under the Workmen's Compensation Acts. The result is that so far as injuries caused by military action are concerned, an employer cannot be held liable even though he has himself been guilty of a breach of duty or of contract, and has by so doing contributed to the damage, nor will he be liable under the Workmen's Compensation Acts even though the accident occurred whilst the workman was engaged at work in which he was particularly exposed to danger of this sort.

The apparent hardship to the injured person is offset to a small extent by the fact that he is entitled in most cases to a pension or allowance under the scheme.

Industrial Accidents during Air Raids.

Since it is now clear that there can be no liability to an employee for a "war injury," it only remains in this connection to consider how far, if at all, the liability for other injuries may be affected by the existence of an air raid or similer danger. If an employee remains at his post during an "alert" and whilst so engaged suffers an accident arising out of and in the course of his employment there seems to be no reason why liabiltty under the Workmen's Compensation Acts (or for breach of duty or statutory duty) would not be quite unaffected, and it is considered that he would be entitled to claim just as if no such warning had been received. Where he remains at his work in defiance of instructions (whether because he is told to knock off on the "alert" or because the roof spotters have given the immediate danger signal, and he has orders then to go to shelter), and is then injured, it is a more doubtful point whether he can recover, but it would seem that in such a case his conduct is such that he would be debarred from claiming compensation unless the injury resulted in death or permanent disablement, on the ground that such conduct was serious and wilful misconduct under s. 1 (1) (*b*) of the Workmen's Compensation Act, 1925. If death or serious injury resulted he would come within the proviso to that sub-section and

could claim, provided that he was acting at the time in the course of his employment and the accident arose out of it.

A. R. P. Workers: War Service Injuries.

A "war service injury" is defined by the Act (s. 8) as an injury suffered by a civil defence volunteer which is certified to have arisen out of and in the course of his duty as such volunteer and not out of and in the course of his employment in any other capacity. To understand this definition aright it then becomes necessary to ascertain who is a civil defence volunteer. Here again there is a statutory definition in s. 8; but it is most unhelpful as it merely states that he is any person who is certified to be a member of a "civil defence organisation" by a responsible officer of such an organisation. To discover what is a civil defence organisation, it is necessary to turn to the Scheme made under the Act, for s. 8 again defines it as meaning such organisations established for civil defence purposes as are declared by the Scheme to be civil defence organisations to which this Act applies. The Scheme is now that of 1940 (S. R. & O., 1940, No. 1307) which gives a definition in the First Schedule. The relevant passages in this definition are to be found in paras. 6 and 14, which provide that an organisation maintained for the protection of employees and persons who may be on the premises by an employer who employs normally at least thirty employees will be a civil defence organisation provided that (*a*) it contains normally at least six members: and (*b*) those members have been or are being, trained effectively and equipped to perform between them the duties of "giving first-aid treatment, dealing with the effects of gas and fighting fires." It will be observed that the roof spotter, the warden and shelter marshal are not included.

It is now proposed to deal firstly with the possibility of accidents to employees who are not members of a civil defence organisation as so defined, and secondly with those who are. If a roof-spotter or shelter warden suffers a war injury, any right of action or claim he might otherwise have had will be barred by the earlier provisions of the Act, which have already been discussed. If, however, whilst discharging those duties he sustains an accident which does not arise out of military action, and so is not a war injury as defined in the Act, the view is expressed that his ordinary rights of action and claim will be unaltered. It also follows that, if his duties are recognised by his employers, he will clearly be acting in the course of his employment and therefore entitled to claim under the Workmen's Compensation Acts.

The position with regard to such employees as are members of a civil defence organisation as above defined is different and more complex. Here again there is no doubt but that he will have no rights in respect of a war injury; the difficulty only arises if he suffers an injury which is not a war injury whilst he is performing his civil defence duties.

The Act provides in s. 3 (1) (*b*) (ii) that the employer, *inter alia*, of such a person is not liable for any war service injury he may sustain. It will be recollected that a war service injury is defined as being an injury which arises out of and in the course of his civil defence duties, and not out of and in the course of his employment in any other capacity. Although the construction of this section is not entirely free from doubt, it is almost certain that its effect will be to relieve the employer of all liability for *any injury* which may be sustained by a recognised member of a civil defence organisation whilst he is performing his duties as such. If therefore a fire-fighter on duty falls down the stairs or a member of the first-aid squad injures himself whilst practising bandaging, they will have no claim, notwithstanding that the accident happened during their working hours and at a time when they were authorised by their employers to undertake the task in question.

It remains to point out that the employer will not be relieved from liability for an industrial accident (which is not a war injury) which happens to an employee of his who is a civil defence volunteer if the accident occurs at a time when he is not performing his duties as such volunteer but is merely discharging his ordinary work:—*S. J.*

IMPERIAL ACTS.

(*Concluded from page* 48.)

(*b*) in the proviso to sub section (*2*), for the words "this section" the words, brackets and figures "sub-section (*1*) or sub-section (*2*)" shall be substituted;

(*c*) after sub-section (*2*) the following sub-section shall be added, namely:—

"(*3*) Any provident society or any person acting on behalf of a provident society who carries on any class of insurance business in contravention of any of the provisions of section 70, section 73 or section 83 or does any one or more of the acts constituting the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to one thousand rupees."

57. *Amendment of section* 105, *Act IV of* 1938.

Section 105 of the said Act shall be re-numbered as sub-section (*1*) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(*2*) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

58. *Amendment of section* 106, *Act IV of* 1938.

(*1*) Section 106 of the said Act shall be re-numbered as sub-section (*1*) of that section.

(*2*) In the section as so re-numbered, after the words "If on the application of" the words "the Superintendent of Insurance or" shall be inserted and to the section as so amended the following sub-section shall be added, namely:—

"(*2*) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

59. *Amendment of section* 107, *Act IV of* 1938.

Section 107 of the said Act shall be re-numbered as sub-section (*1*) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(*2*) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

60. *Amendment of section* 110, *Act IV of* 1938.

In section 110 of the said Act, after sub-section (*3*) the following sub-section shall be added, namely:—

"(*4*) No appeal under this section shall be entertained unless it is made before the expiration of four months from the date on which the order appealed against was communicated to the appellant."

61. *Amendment of section* 113, *Act IV of* 1938.

In section 113 of the said Act,—

(*a*) for sub-sections (*1*) and (*2*) the following sub-sections shall be substituted, namely:—

"(*1*) A policy of life insurance under which the whole of the benefits become payable either on the occurrence, or at a fixed interval or fixed intervals after the occurrence, of a contingency which is bound to happen, shall, if all premiums have been paid for at least three consecutive years in the case of a policy issued by an insurer, or five years in the case of a policy issued by a provident society as defined in Part III, acquire a guaranteed surrender value, to which shall be added the surrender value of any subsisting bonus already attached to the policy, and every such policy issued by an insurer shall show the guaranteed surrender value of the policy at the close of each year after the second year of its currency or at the close of each period of three years throughout the currency of the policy:

Provided that the requirements of this sub-section as to the addition of the surrender value of the bonus attaching to a policy at surrender shall be deemed to have been complied with where the method of calculation of the guaranteed surrender value of the policy makes provision for the surrender value of the bonus attaching to the policy:

Provided further that the requirements of this sub-section as to the showing of the guaranteed surrender value on a policy shall be deemed to have been complied with where the insurer shows on the policy the guaranteed surrender value of the policy by means of a formula accepted in this behalf by the Superintendent of Insurance as satisfying the said requirements:

Provided further that the provisions of this sub-section as to the showing of the guaranteed surrender value on a policy shall not take effect until after the expiry of six months from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

(2) Notwithstanding any contract to the contrary, a policy which has acquired a surrender value shall not lapse by reason of the non-payment of further premiums but shall be kept alive to the extent of the paid-up sum insured, and the paid-up sum insured shall for the purposes of this sub-section include in full all subsisting reversionary bonuses that have already attached to the policy, and shall, where the policy is one on which the maximum number of annual premiums payable is fixed and the premiums are of uniform amount, be before the inclusion of such bonuses not less than the amount bearing to the total sum insured by the policy exclusive of bonuses the same proportion as the total period for which premiums have already been paid bears to the maximum period for which premiums were originally payable.

(3) A policy kept alive to the extent of the paid-up sum insured under sub-section (2) shall not be entitled by virtue of that sub-section to participate in any profits declared distributable after the conversion of the policy into a paid-up policy.";

(*b*) sub-section (3) shall be re-numbered as sub-section (4) and in that sub-section as so re-numbered,—

(*i*) for the words "This section shall not apply to" the following shall be substituted, namely :—

"Sub-section (2) and sub section (3) shall not apply";

(*ii*) clause (*a*) shall be omitted ;

(*iii*) for clause (*b*) the following clause shall be substituted, namely :—

"(*a*) where the paid up sum insured by a policy, being a policy issued by insurer, is less than one hundred rupees inclusive of any attached bonus, or takes the form of an annuity of less than twenty five rupees, or where the paid up sum insured by a policy, being a policy issued by a provident society as defined in Part III, is less than fifty rupees inclusive of any attached bonus or takes the form of an annuity of less than twenty-five rupees, or";

(*iv*) clauses (*c*) and (*d*) shall be re-lettered as clauses (*b*) and (*c*), respectively.

62. *Amendment of section* 114, *Act IV of* 1938.

In sub-section (2) of section 114 of the said Act,—

(*a*) for clause (*b*) the following clause shall be substituted, namely :—

"(*b*) the manner in which it shall be determined which of the transactions of an insurer are to be deemed for the purposes of this Act to be insurance business transacted in India or in British India, as the case may be ;";

(*b*) in clause (*g*), after the words "may be" the words "applied for," shall be inserted.

63. *Amendment of section* 116, *Act IV of* 1938.

Section 116 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub section shall be added, namely :—

"(2) This section shall apply in respect of provident societies as defined in Part III as it applies in respect of insurers."

64. *Insertion of new section* 116-A *in Act IV of* 1938.

After section 116 of the said Act the following section shall be inserted, namely :—

"116-A. *Summary of returns to be published.*

The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other

returns under this Act or purporting to be under this Act which have been furnished in pursuance of the provisions of this Act to the Superintendent of Insurance during the year preceding the year of publication, and may append to such summary any note of the Superintendent of Insurance or of the Central Government and any correspondence :

Provided that nothing in this section shall require the publication of the statements referred to in sub-section (*1*) of section 28."

65. *Amendment of section* 117, *Act IV of* 1938.

In section 117 of the said Act, after the words "being a company" the words "or a provident society as defined in Part III being a company" shall be inserted.

66. *Amendment of section* 118, *Act IV of* 1938.

In section 118 of the said Act, after the words "and to such extent" the words "or subject to such conditions or modifications" shall be inserted.

67. *Substitution of new section for section* 119, *Act IV of* 1938.

For section 119 of the said Act the following section shall be substituted, namely :—

"119 *Inspection and supply of copies of published prospectus, etc.*

Any person may on payment of a fee of five rupees inspect the documents filed by an insurer with the Superintendent of Insurance under clause (*f*) of sub-section (*2*) of section 3, and may obtain a copy of any such document or part thereof on payment in advance at the prescribed rate for the making of the copy."

68. *Insertion of new section* 122 *in Act V of* 1938.

After section 121 of the said Act the following section shall be inserted, namely :—

"122. *Amendment of Schedule I, Act IX of* 1908.

In Item No. 86 in the First Schedule to the Indian Limitation Act, 1908,—

(*a*) for the entry in the first column the following shall be substituted namely :—

"(*a*) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.

(*b*) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers";

(*b*) for the entry in the third column, the following shall be substituted, namely :—

"(*a*) The date of the death of the deceased.

(*b*) The date of the occurrence causing the loss."

69. *Amendment of First Schedule, Act IV of* 1938.

In Form A contained in Part II of the First Schedule to the said Act,—

(*a*) in the first column, after the entry "Miscellaneous Insurance Business Account" the brackets and letter "(*m*)" shall be added ;

(*b*) in the fifth column, after the entry "Outstanding Premiums (*g*)" the brackets and letter "(*d*)" shall be added, and

(*c*) after foot-note (*l*) the following shall be added, namely :—

"(*m*) Where the insurer is required to maintain a separate account in respect of any sub-class of miscellaneous insurance business this heading is to be split up accordingly."

70. *Amendment of Third Schedule, Act IV of* 1938.

In the Third Schedule to the said Act,—

(*a*) in regulation 1 contained in Part I, after the words "for every class" the words "or sub-class" shall be inserted ;

(*b*) in regulation 2,—

(*i*) after the words "miscellaneous insurance" the words "exclusive of any sub-class of such business in respect of which the insurer is required to maintain a separate account" shall be inserted ; and

(*ii*) the following sentence shall be added, namely :—

"For a sub-class of miscellaneous insurance in respect of which the insurer is required to maintain a separate account, Form D or Form F as set out in Part II of this Schedule may be used with such modifications as the Superintendent of Insurance may authorise.";

(*c*) in Form D contained in Part II,—

(*i*) in the first column the entry "Commission to insurance agents (less that on Re-insurances)" shall be omitted, and for the entry "1. Allowances and Commission (other

than commission to insurance agents)", the following entry shall be substituted, namely :—

"1. (*a*) Commission to insurance agents (less that on Re-insurances).

(*b*) Allowances and Commission [other than commission included in sub-item (*a*) preceding]";

(*ii*) in the first column, after the entry "5. Auditors' fees" the entry "6. Medical fees" shall be inserted, and the existing entries numbered 6 to 12 shall be re-numbered 7 to 13, respectively ;

(*iii*) all the horizontal lines appearing in the columns and the letters "Rs." against the entries "Interest, Dividends and Rent" and "Less—Income-tax thereon (*d*)" shall be omitted, and horizontal lines under which the totals of the columns are to be inserted shall be added at the foot of each column ;

(*iv*) in note (*a*) the words "In the case of an insurer having his head office in British India" shall be omitted.

71. *Amendment of Fourth Schedule, Act IV of* 1938.

In Part II of the Fourth Schedule to the said Act,—

(*a*) in the opening paragraph beginning with the words "The following tabular statements"—

(*i*) in clause (*d*), for the semi-colon and the word "and" at the end of the clause the following shall be substituted, namely:—

"for the intervaluation period (except that it shall not be necessary to prepare such statement in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business)";

(*ii*) clause (*e*) shall be omitted;

(*b*) in sub-paragraph (*2*) of the paragraph numbered 8, for the words "as at the valuation date" the words "as a result of this valuation" shall be substituted ;

(*c*) in the paragraph numbered 9, between the word "fourth" and the word "sixth" the word "fifth" shall be inserted;

(*d*) for Form G the form contained in the Schedule to this Act shall be substituted;

(*e*) in Form J, for the heading to the first column "Number of premiums paid" the following heading shall be substituted, namely:—

"Number of annual premiums paid up to the valuation date"

and the following note shall be added after the existing note, namely:—

"NOTE.—The reserve value is to be based on the rate of office premium payable by an insured who entered at the age shown and who had, by the valuation date, paid the number of annual premiums shown in the first column."

SCHEDULE.

[*See* section 71 (*d*).]

Form to be substituted for Form G in the Fourth Schedule of the Insurance Act, 1938.

FORM G.

Consolidated Revenue Account of for years commencing and ending

	Business within India. (*a*)	Total.		Business within India. (*a*)	Total.
	Rs.	Rs.		Rs.	Rs.
Claims under Policies (including provision for claims due or intimated), less Re-insurances—			Balance of Life Insurance Fund at the beginning of the period.		
By death. ...			Premiums, less Re-insurances—		
By maturity. ...			(i) First year premiums.		
Annuities, less Re-insurances.			(ii) Renewal premiums.		
			(iii) Single premiums.		

	Business within India. (a)	Total.		Business within India. (a)	Total.
	Rs.	Rs.		Rs.	Rs.
Surrenders (including surrenders of Bonus), less Re-insurances.			Consideration for Annuities granted, less Re-insurances (c).		
Bonuses in cash, less Re-insurances.			Interest, Dividends and Rents Rs.		
Bonuses in Reduction of Premiums, less Re-insurances.			Less—Income-tax thereon (d). Rs.		
Expenses of Management (b) (e).—			Registration fees.		
1. (a) Commission to insurance agents (less that on Re-insurances).			Other Income (to be specified).		
(b) Allowances and Commission [other than commission included in sub-item (a) preceding].			Loss transferred to Profit and Loss Account		
2. Salaries, etc. [other than to agents and those contained in sub-item 1 (b) preceding].			Transferred from Appropriation Account.		
3. Travelling expenses. ...					
4. Directors' fees. ...					
5. Auditors' fees. ...					
6. Medical fees. ...					
7. Law charges. ...					
8. Advertisements. ...					
9. Printing and Stationery ...					
10. Other expenses of management (accounts to be specified).					
11. Other payments (accounts to be specified).					
12. Rent for offices belonging to and occupied by the insurer.					
13. Rents of other offices occupied by the insurer.					
Bad debts. ...					
United Kingdom, British Indian, Dominion and Foreign Taxes.					
Other Expenditure (to be specified).					
Profit transferred to Profit and Loss Account.					
Balance of Life Insurance Fund at end of the period as shown in the Balance-sheet.					
Rs.			Rs.		

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NOTES.

(a) These columns apply to all business except business the premiums in respect of which are ordinarily paid outside India. If any question arises whether any premiums are ordinarily paid inside or outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.

(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(c) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(d) British Indian, United Kingdom, Foreign and Dominion income-tax on interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(e) In the case of an insurer having his principal place of business outside British India the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

END OF VOLUME 193.